SUBMISSION ON COMMONWEALTH GOVERNMENT OUTLINE OF PROPOSED LEGISLATION ON NATIVE TITLE BY AUSTRALIAN MINING & PETROLEUM LAW ASSOCIATION LTD*

Dated 30 September 1993

1. INTRODUCTION

1.1 Australian Mining & Petroleum Law Association Limited ("AMPLA") is a company limited by guarantee which was incorporated in 1982. The predecessor to AMPLA was an unincorporated association formed in 1977.

1.2 The current membership of AMPLA is approximately 700. This membership is relatively diverse as it comprises lawyers in private practice, government, mining and petroleum and other related companies, other professionals employed by the mining industry, accountants, academics and land councils.

1.3 The primary objective of AMPLA is to promote knowledge and understanding of the law related to the mining and petroleum industries in Australia. This objective is implemented by holding an annual conference (which is usually attended by approximately 300 delegates) and by an expanding publication programme.

1.4 In the 16 years of its existence, AMPLA has grown to become the pre-eminent legal body involved in the mining and petroleum industries in Australia.

1.5 AMPLA also makes regular submissions on government legislation (State and federal). However, it should be noted that AMPLA does not operate as a lobby group for the mining and petroleum industries in making those submissions.

1.6 This submission is made in respect of the Outline of the Proposed Legislation on Native Title released by the Commonwealth Government on 2 September 1993 ("Outline"). The Outline represents the Commonwealth government's proposed legislative response to the High Court's historic decision handed down on 3 June 1992 in *Mabo v. Queensland (No. 2) (1992)* 175 C.L.R. 1 (*"Mabo (No. 2)"*).

1.7 AMPLA is of the view that the Outline is a valuable step forward in the process of eliminating the uncertainty created by *Mabo (No. 2)*. First, it provides a regime for validating titles. It correctly takes as its premise that all titles run the risk of invalidity because of the *Mabo* decisions — not merely those issued since the *Racial Discrimination Act* 1975. Second, the proposed legislation affirms the principle of Crown ownership of minerals on behalf of all Australians. Third, the role of the Federal Court as part of the new Native Title Tribunal system may give the business community confidence that appropriate judicial procedures will be followed in deciding whether native title exists and whether compensation is payable for extinguishment or impairment of native title.

1.8 AMPLA believes, however, that the Outline contains some proposals which are not workable in practice, and some which, while constituting a

significant step forward in the resolution of the uncertainties created by *Mabo (No. 2)* are unfairly prejudicial to the mining sector and not justified by the High Court's decision. There are other matters which, perhaps because of the Outline's summary nature, do not appear to make clear the nature of the Commonwealth proposals. AMPLA hopes that its views on these matters will be welcomed and duly considered in the preparation of formal legislation.

2. LEGISLATIVE OUTLINE

2.1 AMPLA notes that a centrepiece of the Outline is that all existing grants of interest in land — not merely those issued since 31 October 1975 — will be validated. As the Wik claim shows, validation of all titles has become necessary in the wake of *Mabo (No. 2)*. Two reasons are given. First, because of allegations that titles have been invalidly granted by reason of failure to accord to the holders of native title (as subsequently recognised) the same rights in relation to compensation and procedural fairness as other equivalent title holders. Second, because of breach of fiduciary duty alleged to be owed by governments to holders of native title. The Outline proposes that the Commonwealth legislation itself will validate past Commonwealth grants; State and Territory legislation will be required to validate past grants by the States and Territories and will have effect notwithstanding the *Racial Discrimination Act* but only if certain principles are followed. No State or Territory legislation currently meets these requirements.

2.2 The status of a validated grant should be carefully noted. As the law stands after *Mabo (No. 2)*, a valid mining lease granting exclusive possession will have permanently extinguished native title; an authority to prospect may have done so. If a lease or authority was invalidly granted it will not have this effect, and any pre-existing native title will survive the grant.

2.3 Validating legislation will affect only those interests in land which were invalidly granted. Newly validated mining leases are to be treated under the Commonwealth proposals in the same way as new grants; that is, native title will be suspended until the expiry of the mining lease (including any renewals or re-grants). In other words, there will still be a distinction drawn between leases validly granted in the first place and those validated by the new legislation. An issue which the Outline does not address is whether mining companies are to be granted immunity from prosecution for carrying on unlawful mining activities under an invalidly granted tenement, or from actions in trespass (or negligence) brought by native title holders whose interest was not extinguished by an invalid mining tenement. This should be dealt with by clarifying that validation in the legislation is retrospective to the date of the grant. Similarly, as the Queensland government has recently noted, it is not clear whether the "revival" of native title will create rehabilitation obligations on the expiry of a mining lease which are more onerous than those which already apply as a result of the operation of the *Racial Discrimination Act*. In AMPLA's view this issue should be covered by the Commonwealth legislation.

2.4 It is not clear from the Outline whether the proposed legislation relating to the revival of native title will extend to land subject to existing valid mining leases. It would seem that "revival" will not apply in this case (see clause 7 of the Outline). The legislation should make this clear. A contrary

proposal may face constitutional difficulties. At present, in relation to existing mining leases issued by a State, the State is the landlord and the mining company is the tenant; at least in relation to leases over Crown land. The State therefore holds the reversion of the lease and on the expiry of the lease becomes the full beneficial owner of the land. The High Court said as much in *Mabo (No. 2)*. It appears that the Commonwealth legislation will qualify the title which the State Government will obtain on expiry of the lease and burden it with revived native title. This would appear to be an acquisition from the State by the Commonwealth, which, under s. 51(xxxi) of the Commonwealth Constitution, must be on "just terms".

2.5 The validation of freehold interests in land, and of leasehold interests in land issued for residential, pastoral and tourist purposes, will permanently extinguish native title rights which are inconsistent with the interests granted. However, the validation of a mining lease will not extinguish native title because under the legislative proposals, native title is to exist concurrently, subject to the mining lease, and will "revive" on its expiry including any renewals.

2.6 The High Court held in *Mabo (No. 2)* that leases granting exclusive possession extinguish native title. It did not differentiate between mining leases and other forms of lease. AMPLA believes that the Commonwealth proposals go well beyond the High Court's finding on extinguishment of native title. It is difficult to understand the rationale for the distinction between the mining and other sectors in this regard — particularly given the considerable importance of mining in Australia's export performance. The Queensland government's recent critique of the Outline suggests that some forms of mining lease, such as those which permit mining activity which will permanently alter the incidents of native title (for example, open-cut mining), should permanently extinguish native title with no statutory revival. AMPLA notes that this proposition accords with both common sense and *Mabo (No. 2)*, and does not justify the discrimination against mining inherent in the proposition that mining leases will not extinguish native title permanently. In AMPLA's view, consistent with *Mabo (No. 2)*, mining leases should permanently extinguish native title so as to remove the uncertainty that continuing native title creates for the tenement holder.

2.7 AMPLA has considered whether the principle of "freehold equivalence" referred to in clause 30 of the Outline may have unintended consequences. All future grants of interests in land by the Crown — whether freehold, leasehold or otherwise — may be made over land in which native title has been determined to exist only if the grant could be made over freehold land. This would appear to have the following effects:

2.7.1 *Future Grants of Freehold* — It would seem that State or Territory governments will be able to make future grants of freehold over land subject to native title only if the native title is surrendered to the Crown in right of the State or Territory, or if the State or Territory compulsorily acquires native title, paying just terms compensation where required under relevant State or Territory compulsory land acquisition legislation. The State or Territory would then be free to make a grant of freehold.

2.7.2 *Future Grants of Leasehold* — It would seem that a State or Territory government will only be able to grant a lease over land the subject of native title in the following ways:

2.7.2.1 by surrender or compulsory acquisition of native title (as in 2.7.1 above), which will leave the State or Territory in a position to grant a lease of any description; or

2.7.2.2 by using the special legislative provisions relating to mining, forestry, etc, which grant to a State or Territory the power to grant valid leases over land already the subject of freehold.

This would appear to affect all future grants of leases, whether for residential, commercial, pastoral, tourism, forestry, or mining purposes.

2.7.3 *Future Grants of Lesser Interests (licences, permits, etc)* — On the principle of freehold equivalence these can presumably be issued only over native title land where they could be issued over freehold. AMPLA notes that this could have serious implications not only for the mining but also for the forestry industry.

2.7.4 *Each Native Title is Sui Generis* — The principle of freehold equivalence seems to run counter to the High Court's carefully chosen words in both *Mabo (No. 2)* and *Mabo (No. 1).* In *Mabo (No. 2)* the majority of the court made it clear that what constitutes native title will vary from case to case; it might approximate freehold, as the court found it did in the Murray Islands; it might approximate a usufruct; or it might be no more than a right to cross land, akin to an easement of way or licence to traverse. In *Mabo (No. 1)* the court was at pains to point out that the holder of native title should be treated under the law in no worse a fashion than the holder of some other *equivalent* title.

Despite the High Court's statements in *Mabo (No. 2)* that their findings were not intended to be read as having application only in relation to the Murray Islands but were intended to apply generally to the Australian mainland, it is clear that the native title found to subsist on the Murray Islands will not be of universal application in Australia. The principle that a grant can be made by the Crown over land subject to native title only if it could be made over freehold land is unnecessarily restrictive where the "native title" involved amounts only to a right of passage. This is particularly the case where the proposed Crown grant would not interfere with or extinguish that "native title".

2.7.5 *Western Australia* — Under s. 29(2) of the *Mining Act* 1978 (W.A.), owners of freehold agricultural land have an effective right of veto over whether a mining tenement may be granted in respect of their land. Pastoral leaseholders do not. It is not clear from the Outline whether the principle of freehold equivalence will extend to give a right of absolute veto to native title holders in Western Australia. If it did, this would be of concern to AMPLA, the mining industry and the nation generally, given the massive importance to the Australian economy of mining in Western Australia.

2.7.6 The Queensland government has recently noted that there is no adequate mechanism in the Outline for facilitating grants of interest in land where native title has been *claimed* or where *it might exist* but is not yet *established.* Even if a regime could be devised for

expeditious determination as to whether a prima facie case exists, the sheer volume of such cases would render the Commonwealth proposals unworkable. The Queensland government has proposed that in these cases, the application for a grant of an interest in land should be allowed to proceed without negotiation with the native title claimants or putative native title holders. Any interest in land issued would be valid, and if native title was subsequently proved, the native title holders would be entitled to compensation. AMPLA agrees with this suggestion, provided that the mining companies who may have to pay the compensation know what its limits are. If there is uncertainty about exposure to compensation mining companies will not be interested in taking a grant and working the land.

2.8 AMPLA notes that under the Outline, holders of native title (where determined), or *registered claimants (where native title has not been determined)*, are to have a "right to negotiate" in relation to any grant of an interest in land subject to native title or a claim for native title. If no agreement between the proposed grantee and native title holders or native title claimants is reached within a period currently expressed to vary between three and five months, the matter is to be referred to the Commonwealth's new National Native Title Tribunal for a decision whether the grant should be made. In determining whether the grant should be made and what conditions if any should apply, this non-judicial Tribunal will be required to take into account the normal grounds of objection which any freeholder is able to put before a State body such as a Mining Warden's Court. The Tribunal must also take into account the effect of the grant on the preservation and protection of native title and the way of life, culture and tradition of the native title holders; their wishes; the preservation of sacred sites; the freedom of access by native title holders to the land; the preservation of the environment; economic and other significances to Australia and the State concerned; and the public interest. The government proposing to issue the grant will be able to override the Tribunal's determination in the "State or national interest". If the Tribunal that makes the determination is not recognised by the Commonwealth, then the override power will reside with the Commonwealth government.

AMPLA comments as follows:

2.8.1 Experience with similar "national interest" provisions in the *Aboriginal Land Rights (Northern Territory) Act* 1976 shows that despite the existence of those provisions, no new major resource development has proceeded in the Northern Territory since that legislation came into effect.

2.8.2 The economic significance of a development to a local community is not a matter which the Tribunal should take into account.

2.8.3 AMPLA notes that the Commonwealth proposals have come under attack from Aboriginal groups for not giving sufficient "teeth" to native title holders to veto mining or other development activity. AMPLA notes that the government's June Green Paper proposed that native title holders would have an absolute veto over development on sacred sites. AMPLA would not oppose this in principle, but the nature of Aboriginal culture is such that proving the genuineness of a claim that a particular development would affect a sacred

site is very difficult. The mining industry has, rightly or wrongly, been sceptical in the past of the fact that sacred sites are apt to be claimed or to arise once areas of geological significance are discovered. In *Mabo (No. 2)* Moynihan J. of the Supreme Court of Queensland, who was deputed by the High Court to hear evidence in that case, found much of the testimony before him to be unreliable and self-serving — a fact which the High Court did not mention. AMPLA urges that the "right to negotiate" go no further than as set out in the Outline.

2.8.4 AMPLA also notes that so far as the "right to negotiate" is concerned, registered native title claimants are to be treated almost as if they were registered native title holders. This is of concern, because the process of registering a claim, although nominally judicial, may be delegated to the Registrar of Native Titles (Outline clauses 94ff.), and is in any event clearly less rigorous than the process of proving the existence of native title. This would lead to numerous ambit claims over the same land. If the mining company's compensation obligations were capped some of the uncertainty would be removed and the negotiation process would be less of an impediment to the commencement of work on the land.

2.8.5 A decision by the non-judicial arm of the Tribunal will be reviewable by the Federal Court on a question of law; but the Tribunal will determine its own procedures and will not be bound by the rules of evidence. This invites the introduction of hearsay evidence, (another aspect of the Mabo decision which Moynihan J. found unsatisfactory).

2.8.6 The judicial arm of the Tribunal must operate with the assistance of a mediator/assessor, who is to be, where possible, an Aboriginal or Torres Strait Islander; this raises further questions as to the impartiality of the Tribunal. It is suggested that mediators/assessors be suitably qualified and experienced and may include Aborigines and Torres Strait Islanders.

2.8.7 The National Native Title Claims Register which will be established ought to enable parties dealing with land to ascertain whether native title exists or is claimed over a particular parcel of land. However, the Outline states at clause 95 that there will be no "sunset" clause for the making of new claims — which appears to rob the idea of a Claims Register of much of its utility. AMPLA's view is that real benefit could be derived from a Native Titles Claim Register if it could be relied upon to identify, in Torrens title fashion, whether native title existed or was claimed over any given parcel of land. AMPLA agrees with the Queensland government's proposal that a "sunset" period of 12 or 15 years should be established, so that there is ultimate certainty in dealing with land over which native title exists or might exist.

2.8.8 Once a claim is made, those persons holding an interest in the land in question and in adjoining land, and the public, are to be notified of the claim; but it is not clear whether anyone but a rival native title claimant has the standing to object to the determination whether the native title claimed exists (Outline clause 99). In AMPLA's

view any person with a reasonably identifiable interest should be entitled to object, to lead evidence and to be represented.

2.8.9 Governments and parties with interests in land may apply to the Tribunal for a determination whether native title exists. However, it does not appear that explorers or miners may do so unless they have interests in the land or perhaps are applicants for interests in the land (Outline clause 101). In AMPLA's view an exploration or mining company should be able to make such an application and make an application for amendment of the Register (Outline clause 106) upon production of evidence that it is intending to apply for an interest in the land.

2.8.10 Because the grant of both an exploration tenement and a mining tenement over land subject to native title may be subject to these "negotiations" and Tribunal determinations, there is a real possibility of a double veto. If a project proceeds through the negotiation process and is ultimately approved at the exploration stage, either by the native title holders or the Tribunal, and a worthwhile deposit is then found, the mining company must run the gamut of negotiation and possible Tribunal veto again when an application for a production tenement is made at a time when the mining company will be at a significant negotiating disadvantage. This two-step approach will, in AMPLA's view, serve as a significant disincentive to mining exploration and development in Australia, and may accelerate moves offshore by Australian mining companies.

AMPLA suggests that the Commonwealth should reconsider the scope of the Category 1 past grants and include exploration and mining tenements, thus extinguishing native title over land covered by them. Alternatively, introduce a regime which caps the compensation payable by the mining company to realistic levels at both the exploration and mining stages. This would enable the mining company to make a rational business decision about whether to pursue the activity after receipt of a grant, or look elsewhere. AMPLA is aware that the Commonwealth had, in a previous proposal, suggested that compensation obligations be capped. In addition to a cap on compensation, a one-step process is required to assure access. This means negotiation prior to the exploration stage only.

2.8.11 AMPLA welcomes the statement in the Outline that the legislation will confirm that reservations of minerals and forests to the Crown in State and Territory legislation are valid, notwithstanding the existence of any native titles.

2.9 Compensation on "just terms" will be payable to native title holders for any loss or impairment of their native title caused by validation or by future grants of interests over land subject to native title. Compensation will be payable by the State or Territory involved, but the Commonwealth may decide to contribute to the cost.

2.9.1 AMPLA agrees with the Queensland government criticism that "just terms" compensation will not necessarily equate with the existing compensation regimes of the States and Territories. As the High

Court painstakingly explained in *Mabo (No. 1)*, it would be discriminatory to deny native title holders the same rights of compensation for loss of their title as are enjoyed by the holders of the other equivalent forms of title. "Just terms" compensation may be more or less than the compensation generally available under State or Territory law. In AMPLA's view, compensation for loss of native title should be calculated (as in the Victorian legislation) on the same basis as for loss of other equivalent forms of title due to compulsory acquisition. If there is no equivalent form then "just terms" compensation should be payable.

2.9.2 AMPLA notes that the previous Commonwealth proposal for a "cap" on compensation has been removed. If this means that "just terms" compensation is now to be "open-ended", particularly in relation to the "special attachment" to the land which Aborigines have, AMPLA urges a return to the "cap" concept. Note also the comments in paragraph 2.8.10.

2.10 The Queensland government has recently criticised certain aspects of the Commonwealth proposal as unworkable and unrealistic. AMPLA broadly agrees with the Queensland government's criticisms. In particular:

2.10.1 The Queensland government has described as "unworkable" the requirement that a mining company must negotiate with native title holders and claimants before the issue of exploration tenements. The situation is particularly unworkable where an exploration area applied for might involve several different native titles. AMPLA agrees with the Queensland government that this requirement would significantly inhibit exploration — as has been shown to be the case in the Northern Territory, where mining companies must negotiate with Aboriginal title holders prior to exploration. AMPLA agrees with the Queensland suggestions that the grant of exploration (as opposed to production) tenements should not require prior negotiation with native title holders, given that exploration activities will neither extinguish nor, in most cases, adversely affect the enjoyment of native title. However, if this proposal is adopted in lieu of that suggested by AMPLA in paragraph 2.8.10, mining companies will not proceed with exploration if, upon a discovery of a workable deposit, there is an open-ended compensation liability as the price for obtaining exploration rights. This proposal will only work if compensation caps are introduced.

2.10.2 The Queensland government has also criticised the negotiation process in relation to the 4,000 mining tenements issued in Australia annually as unrealistic and likely to involve lengthy delays. AMPLA agrees; the problem lies in both the blanket application of the principle of freehold equivalence, and the conferring of a right of negotiation not only on those who have established native title but also on those who have made a claim to native title. A more workable regime would be to confer a right to negotiate only on those native title holders whose "substantial" native title would be significantly impaired by the grant of the mining lease applied for.

2.10.3 There are particular problems in according the right of negotiation on those who have merely made a claim to native title. A situation

of special difficulty could arise where land is subject to rival registered native title claims — a mining company would be required to negotiate with all claimants, which would lessen the chance of an agreed outcome. AMPLA proposes that this situation should be handled in the same way as for grants of non-mining interests over land where the existence of native title is unknown or uncertain (see paragraph 2.7.6 above) — the mining title should be granted without negotiation, and if native title is subsequently proven, compensation for its loss or impairment would be payable within a known or capped compensation environment.

2.10.4 The Queensland critique points out that the criteria (set out in clause 78(b) of the Outline) for State or Territory bodies to be recognised as capable of exercising Tribunal functions include "consultation on appointments". AMPLA agrees that this will render it practically impossible for States or Territories to use existing courts. No State or Territory on constitutional grounds, should permit Commonwealth interference in its judicial appointments. AMPLA also agrees that providing for direct appeal from a State or Territory court to the Full Federal Court, represents an "unwarranted intrusion into the judicial administration" of the States and Territories.

2.11 A further feature of the Commonwealth proposals which seems unworkable is the concept of making a tenement grant by the non-judicial Tribunal before the court determines whether native title exists (see clause 65 of the Outline). In AMPLA's view, it is unrealistic to expect work to be commenced on land the subject of a tenement grant following payment of an amount of compensation into a trust account pending determination of native title and final compensation by the court. The attributes of native title, as eventually found by the court, might require the payment of more compensation. The court is not bound by any time limits. AMPLA proposes that this area of uncertainty be removed by providing caps on compensation.

2.12 AMPLA also notes that the Commonwealth proposals do not appear to have found favour with Aboriginal interests. They have argued strongly for a right of veto — particularly in relation to sacred sites. They have also claimed that the provisions in the legislation enabling a State body to fulfil the functions of the National Title Tribunal are objectionable because, to quote Mr Michael Mansell, "some of the raving politicians at State level will create havoc with native title owners by being allowed under the Federal Government's proposal to set up a Tribunal with their own people operating those Tribunals in a way which will deal very harshly with native title claimants". In AMPLA's view, the provisions of the Commonwealth legislation requiring State bodies exercising the Tribunal's functions to meet Commonwealth criteria for fairness to native title holders should reassure Aboriginal interests. Constitutional questions apart, the proposal for State bodies to carry out the functions of the Tribunal seems both practical and equitable.

3. SUMMARY

The following is a summary of AMPLA's principal concerns in relation to the Outline and some suggested solutions.

3.1 **Concurrent Native Title**

Non-extinguishment of native title during the term of a resource tenement creates uncertainty about the rights of the holders of native title during that term and thereafter. For example, recognition of concurrent rights might include access rights to the lease area which, if abused, could result in unwarranted disruption of mining and petroleum activities.

3.1.1 *Suggested Solutions*

Extend the Category 1 past grants to include mining and petroleum tenements and extinguish native title over the land covered by them.

If this approach is not accepted, State and Territory governments could nevertheless amend their general resource legislation to provide tenement grantees with exclusive occupation rights. Under the Outline this would mean native title rights could not be exercised for the period of the lease and any extension or renewal of it.

3.2 **The Two-step Negotiation Requirement**

The two-step approach, which has the consequence of requiring negotiation or a determination both before an exploration tenement is granted, and again after a discovery is made and before an exploitation lease can be granted, places resource companies in an inequitable negotiating position.

Resource companies are unlikely to expend exploration dollars without knowing the total amount of their native title compensation liability if they proceed to mining.

3.2.1 *Suggested Solutions*

Extinguish native title over land covered by exploration and mining tenements.

Alternatively, cap the compensation payable by resource companies at both the exploration and mining stages. This would enable the companies to make rational business decisions about whether to pursue the activity after receipt of a grant, or look elsewhere. To date, the Commonwealth has rejected this approach.

In addition to a cap on compensation, a one-step process is required to assure access. This means negotiation prior to the exploration stage only. One way of achieving this would be to amend State and Territory resource legislation to provide for a combined exploration and production tenement for a longer duration.

3.3 **Open-ended Compensation**

No guidance is given, or limits imposed, for compensation payable by governments or resource companies. This may have the effect of discouraging expenditure on minerals exploration in Australia.

3.3.1 *Suggested Solutions*

Caps on compensation.

3.4 **Grant Before Compensation Determination**

It is unrealistic to expect work to be commenced on land the subject of a tenement grant following payment of an amount of compensation into a trust account pending determination of native title and final compensation by the court. The attributes of native title, as eventually found by the court, might require the payment of more compensation. The court is not bound by any time limits.

3.4.1 *Suggested Solutions*
Caps on compensation.

3.5 **Negotiation Difficulties**
Resource companies and government will be required to negotiate with registered claimants, not registered holders of native title, when seeking a tenement grant for land where native title is yet to be determined. This might encourage numerous ambit claims over the same land, and the expenditure of much time and effort, not to mention shareholders' funds. It is expected there will be a low threshold for the Registrar to accept and register a claimant for native title.

3.5.1 *Suggested Solutions*
As for 3.2 above, extinguishment of native title or caps on compensation. Compensation caps would at least remove some of the uncertainty and enable work to proceed within a known compensation environment.

3.6 **Potential for Delays**
The time for determination by the Tribunal whether a grant can be made, or whether native title exists, or what compensation might by payable, could be years rather than months when the appeal processes are taken into account — and the problem could be particularly severe where there are multiple claimants for native title to the land in question. In addition to appeals by registered claimants to native title, resource companies may, for example, appeal on the basis of an error in law in the calculation of compensation. A satisfactory method must be found to enable work to proceed on the tenement area pending a final determination of these matters.

3.6.1 *Suggested Solutions*
As for 3.2 above, extinguish native title or caps on compensation.

3.7 **The Mediators/Assessors**
These people will have wide powers conferred on them to assist Federal Court judges in native title determinations, acting as mediators in negotiations involving native title holders and claimants and in disputes to which those holders and claimants are parties. They are required, where possible, to be Aboriginal and Torres Strait Islander peoples.

The reality and appearance of impartiality are at the very heart of justice and public respect for the law. The requirement that Mediators/Assessors be Aboriginal and Torres Strait Islander people, where possible, would seem to be contrary to this principle.

Also, mediators should be impartial and persons in whose trust confidences can be placed by the parties in the course of negotiation. Can a Mediator who is an Aboriginal or Torres Strait Islander person properly be expected to have the requisite standard of impartiality for the tasks to be undertaken by him or her?

3.7.1 *Suggested Solutions*
Mediators/Assessors must be suitably experienced and qualified, and may be Aboriginals or Torres Strait Islanders.

3.8 Commonwealth Land Management Control

It is not clear from the Outline whether native title claimants can elect to have their claims determined by either the Commonwealth regime or a State or Territory regime recognised by the Commonwealth.

If this election is available, a consequence is that de facto control of land management matters will almost certainly pass from the States and Territories to the Commonwealth. This is because, given the stated attitude of the States and Territories to (*Mabo No. 2*) and to the Commonwealth solutions, it seems unlikely that, given a choice, native title claimants would move outside the Commonwealth regime.

The mining and petroleum industries have enjoyed a reasonably harmonious relationship with the governments of the States, to whom they pay royalties and fees. The intrusion of Commonwealth land management decisions affecting tenement grants is unlikely to be greeted enthusiastically by State and Territory governments or the resource industry.

3.8.1 *Suggested Solutions*

The States and Territories should ensure their resource legislation meets the Commonwealth standards for recognition.

Native title claimants should be obliged to make their claims in the jurisdiction where the land is situated and the "Tribunal" in that place should be empowered exclusively to deal with them, and with all applications for tenements within their jurisdictions.

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