

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

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The High Court Mabo decision in 1992 and the passing of the Commonwealth Native Title Act in 1993 (NTA) mark a fundamental shift in the recognition of indigenous rights in Australia. The NTA, like the High Court decision on which it is based, transforms the way in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation, however, raises a number of crucial issues of concern to native title claimants and to other interested parties. Many of these will have to be decided in the courts. Nevertheless, information about and discussion of the issues are important for those needing to address the matters raised by the claim process. This series of papers address the shift from notions of statutory land rights to the rights of indigenous peoples that pre-existed colonisation and exist within the broad spectrum of their human rights. Within these rights, land is an essential component.

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*This paper is a new departure for the Issues Papers Series in that it provides all the detail necessary for claimants to lodge an application using the minimalist approach if they wish. However, the paper also goes on to discuss some of the consequences of the National Native Title Tribunal's current practice of commencing the right to negotiate procedures on lodgement of a native title claim. The current position is subject to government amendments to the NTA, such as have been brought forward in the Native Title Amendment Bill 1995. Accordingly, this paper is also presented to the general audience of Issues Papers readers as background on the significance of one aspect of the proposed amendments. Mr Irving's views on the effects of the Bill were the subject of vigorous debate with Commonwealth Government officials at the Skills Workshop in September 1995. Some aspects of debate on these issues are recounted in the workshop report, *The Skills of Native Title Practice*, recently published by AIATSIS, at pp. 137- 149. With the calling of an election, the Amendment Bill has lapsed but may be revived by the new government.*

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THE REQUIREMENTS TO BE MET BY CLAIMANTS IN APPLICATIONS FOR A DETERMINATION OF NATIVE TITLE **George Irving**

Introduction

Since the introduction of the *Native Title Act 1993* (NTA), there has been considerable debate among both legal practitioners and anthropologists as to how much information is required to support a claimant application for a determination of native title. The debate has been fuelled by two equally valid but competing concerns: firstly, the need to lodge applications quickly, in response to proposed developments; and, secondly, the need to adequately prepare for a court hearing of the application or to demonstrate the existence of a prima facie case to a Presidential Member of the National Native Title Tribunal (NNTT), in the event that the Registrar of the NNTT is of the opinion that the application is frivolous or vexatious or that prima facie the claim cannot be made out.

Whilst the focus of this debate has been on 'minimalist' versus 'maximalist' applications, the foregoing concerns suggest that the approach taken in a particular case will depend on the circumstances which give rise to the lodging of the application. In places where there are no development pressures, the need to lodge an application quickly will not arise and native title holders will have time to fully prepare their case for court. Where there are development pressures, however, applications are more likely to be based on the amount of information which can be collected in the time available. For example; where the tribunal has issued a non-claimant application notice, under s.66 of the NTA, common law native title holders have only two months in which to prepare and lodge a claimant application. Their failure to do so may result in a determination that native title does not exist over the area covered by the application.¹ Similarly, where a government issues a future act notice under s.29 of the NTA, common law native title holders will lose their right to negotiate unless they become 'registered native title claimants' within two months of the date of the notice.²

Whether such time limits are just and equitable depends on whether, as a matter of practice, they allow sufficient time for common law native title holders to fully and adequately prepare an application. As is pointed out in the *Review of Native Title Representative Bodies*, preparing an application requires 'a complex set of highly specialist activities which generate a substantial workload'.³ It requires, among other things:

- a careful investigation to ascertain all possible claimants;
- meetings between those people and their representatives to explain the provisions of the NTA, the procedures of the Tribunal, the effect of prior extinguishing events and the requirements for proving native title;
- mediation of any disputes over individual and group rights; and
- field and archival research (anthropological and historical) to document the content of the native title.⁴

To arbitrarily require all this to be done within two months, regardless of the circumstances of the claimants, is unrealistic. To require it to be done in even less time in order to subject the application to an acceptance test process before conferring upon common law native title holders the rights of a 'registered native title claimant' invites accusations of injustice.⁵ In these circumstances, native title holders have no alternative but to submit minimalist applications and then, if necessary, resort to second order litigation to gain sufficient time to prepare their case for court. This paper discusses

what information should be provided in a minimalist application given the requirements of the NTA, the requirements of the regulations and the nature of the Registrar's discretion.

Minimum requirements for acceptance by the Registrar

To ensure acceptance by the Registrar, an application must comply with the provisions of s.62 of the NTA. That section requires a claimant application to contain the following:

- all information known to the applicant about interests in relation to any of the land or waters concerned that are held by persons other than as native title holders;
- a description of the area over which the native title is claimed; and
- the name and address of the person who is to be taken to be the claimant.

Section 63(1) provides that the Registrar *must* accept an application which complies with the requirements of s.62, unless of the opinion that the application is frivolous or vexatious or that *prima facie* the claim cannot be made out. This has been described as 'a low level negative screening test [which] favours the acceptance of applications'.⁶ The Tribunal, in the *Waanyi Directions Ruling*, held that, in order to form an opinion, under s.63(1), the Registrar may conduct current and historical land tenure searches and may even 'seek some advice on the plausibility, from an anthropological perspective of the native title rights and interests claimed'.⁷ However, apart from the sworn evidence, in the accompanying affidavit, of the applicants' belief that native title has not been extinguished,⁸ s.62 does not impose 'any requirement upon the applicants to lodge with the application evidence in support of the existence of native title or evidence of the absence of extinguishing events'.⁹

The application must be in the form prescribed by the regulations and contain such information, in relation to the matters sought to be determined, as is prescribed by the regulations.¹⁰ The matters to be determined in a claimant application are set out in s.225 of the NTA. They are:

- whether native title exists;
- who holds it;
- whether the native title rights and interests confer possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others; and
- the nature and extent of any other interest in relation to the land or waters that may affect the native title rights and interests.

Regulations that require information unrelated to the matters to be determined would be in excess of the authority conferred by s.61(2) and therefore invalid.

Viewed from the above perspective, the following comments are offered on the requirements (as shown in italics) of Form 1 in the Regulations:

Form 1

A1 *The name and address of the person applying for a determination.* Although the procedural directions of the Tribunal provide that the applicant must be a natural person, the Federal Court recently refused to exclude the possibility of a body corporate making an application on behalf of a claimant group.¹¹

A2 *The address of the applicant.* There is no reason why this cannot be care of the applicant's representative. Since applicants are entitled to be informed of their legal rights prior to making a decision which might affect them, this is the safest approach.

A3 *The nameof the person who is to be the registered native title claimant.* Ascertaining the legitimate native title claimants for an area is a complex, difficult and time-consuming task. It requires numerous community meetings and, more often than not, mediation between different family groups who may not immediately appreciate how their particular rights and interests can be accommodated in the one claim. For the reasons discussed under A5 below, it is recommended that the following wording be adopted in this part of the application: 'The names of the persons who are to be the registered native title claimants are: A, B and C, on behalf of all other Aboriginal people who enjoy native title rights and interests in the area of the claim'.

A4 *The name and address of the applicant's representative.*

A5 *A description of any other native title holders.* This requirement, whilst exceeding the demands of s.62, does fall within the ambit of s.225 as a matter to be determined. Section 61(3) also provides that, where an application is made by a person claiming to hold native title with others, the application must 'describe or otherwise identify those others'. Since it is 'not necessary to name those others or to say how many there are',¹² the Tribunal's guide on how to complete an application suggests that this requirement can be fulfilled by naming the 'people' on whose behalf the application is made; for example, 'the Meriam people'.¹³ This of course would assist the Registrar in assessing the plausibility of the application from the perspective of any anthropological writings about such 'people'.

However, as we have seen in South Australia, there is an enormous risk that serious conflict will occur if Aboriginal people feel they have been left out of a claim over an area in which they believe they have rights and interests. Naming a group or a 'people', when there has not been a thorough investigation of the matter because of time constraints, increases that risk. A safer alternative is to state that 'the claimants make this application on their own behalf; on behalf of their respective family groups; and on behalf of all other Aboriginal people and groups who under their laws and customs are connected to the claim area'. This leaves it open for other Aboriginal people and groups, who have not been consulted because of time constraints, to join in the claim after it has been lodged and accepted.

A6 *A description of the area covered by the application.* This requirement falls squarely within the ambit of s.62 and is answered by providing a written description of the location and boundaries of the claim area.

A map showing the geographical boundaries of that area. Whilst this appears to be a logical and legitimate extension of the previous requirement, the Tribunal's procedural directions have been phrased in such a way that claimants may think they have to purchase expensive cadastral maps and undertake a current land tenure search so they can colour code the maps to show any freehold and leasehold properties in the claim area.¹⁴ This is beyond *the Waanyi Directions Ruling*.

The description must include the indigenous name of the area and sites within the area. In *NT v Lane*, the Federal Court held that the requirement to provide a description of the area was fulfilled 'even though indigenous names... were not included in the application'.¹⁵

A7 *A description of all information known to the applicant about interests in relation to any of the land or waters concerned that are held by persons other than as a native title body corporate.* This requirement deals with non-indigenous interests in the land, such as freehold and leasehold interests, and arises as a direct result of s.62. The requirement, however, is

limited by the words of that section. Applicants are only required to provide information which is *known to them*. In *NT v Lane*, O'Loughlin J held that this requirement 'has to be read, at its highest, as meaning the information that is known to the claimants at the time of the lodgment of their application'.¹⁶ Applicants are not required by s.62 to find out whether any such interests exist. Thus, if the applicants know there is a pastoral lease or a mining lease in the area of their claim, they are required to state this in their application. If they know who holds the leases, they are required to state that too. If they do not know whether any such interests exist, they are required to state that they do not know.

A8 *Details of, and documents relating to, all searches carried out by the applicant to ascertain such interests.* As previously indicated, applicants are not required by the NTA to undertake any searches at all. However, if they do, they are required to provide details about those searches, along with all relevant documents, to the Registrar. If no searches have been undertaken, this should be stated.

A9 *Details of the native title rights and interests possessed under traditional laws and customs observed by the applicants.* Section 62 does not require this information to be given. Section 225 requires only that a determination state whether native title, if it exists, confers possession, occupation, use and enjoyment of the land or waters to the exclusion of all others. Accordingly, this requirement would be answered by stating that 'the native title rights and interests possessed under laws and customs acknowledged and observed by the applicants and other persons with whom they claim to hold native title are the possession, occupation, use and enjoyment of the land and waters to the exclusion of all others'. As pointed out by the Aboriginal and Torres Strait Islander Social Justice Commissioner, '[t]his was the description of native title rights and interest used in *Mabo* (No. 2) and I can see no reason why the regulations should require more detail'.¹⁷

In cases where it is not possible to claim exclusive possession, because of the acceptance criteria of the Tribunal, this should be stated. For example, in the case of a pastoral lease containing a reservation in favour of Aboriginal people, the suggested wording might be qualified by adding: 'However, pursuant to the Tribunal's Guidelines for Acceptance of Applications over Freehold and Leasehold Land, the applicants and other persons with whom they claim to hold native title, claim only those of their native title rights and interests as are consistent with any implied or express reservations for Aboriginal use and/or benefit contained in the pastoral lease or arising out of the laws of the State and the Commonwealth. The applicants reserve their right to seek leave to amend in the event of those guidelines being found to be too narrow in their scope'.

In cases where the claim is over reserves which are not in favour of Aboriginal people, such as recreation or conservation reserves, the suggested wording could be qualified by adding: 'However, the applicants and other persons with whom they claim to hold native title claim only those native title rights and interests as are consistent with the continued enjoyment of native title, having regard to the purpose of the reservations and the ways in which the reserved areas have been used or occupied'.¹⁸

Information about any physical connection that exists between the applicants or their ancestors and the claimed area. As previously indicated, the Tribunal has ruled that s.62 does not require claimants to lodge with the application any evidence in support of the existence of native title.¹⁹ Thus it is not necessary to provide any information in excess of a general proposition about the facts which give rise to the cause of action, such as: 'The

applicants and other persons with whom they claim to hold native title over the area covered by the application continue to follow their laws and customs and maintain their connection with the claimed area that those laws and customs require and which their ancestors followed before the acquisition of sovereignty over the area by the British Crown'.²⁰

- A10 *Any details or information provided that the applicants request the Registrar to keep confidential from the public ... and the reasons for that request.* It is unlikely that this provision would have any relevance in the absence of any information of a secret or sacred nature.
- A11 *An outline of the type of evidence the applicants will produce in support of the claim.* It has been held that this provision 'does not require a description of the contents of such evidence that will be produced, but rather a listing of its categories'.²¹ This would be answered by stating: 'The type of evidence which the applicants will produce, if necessary, to support the claim will be oral evidence from Aboriginal people, anthropological documents and historical documents'.
- A12 *The name of the representative Aboriginal/Torres Strait Islander body or bodies (if any) for the area covered by the claim.* Clearly, there is no requirement in s.62 to provide this information and it is not relevant to the matters to be determined. Thus, it is open to applicants who do not know the name of the representative body to simply state that they do not know.
- A13 *Any other relevant information.* Applicants would be well advised to resist the temptation to provide any other information that goes to the foundation of their case. It is not required by the NTA and, in the absence of any order to do so, it is neither necessary nor helpful to provide one's opponents with the details of one's case.

It will be seen that the 'minimalist' approach limits the amount of information to be collected to that which identifies the area under claim, the applicants and the claimants. Questions about the claimants' cause of action, their connection to the land and their rights and interests therein are answered with general propositions, taken from the law relating to native title. They state the facts which give rise to the right of action and which would ultimately need to be proved in the Federal Court if the action is to be successful. This is the usual way in which actions in law are commenced.

The accompanying affidavit

Section 62 also requires a claimant application to be accompanied by sworn evidence, in the form of an affidavit, of the applicant's belief that:

- native title has not been extinguished in relation to any part of the area;
- none of the area is covered by an entry in the National Native Title Register; and
- all of the statements made in the application are true.

Such belief is not required to be substantiated by the applicants. As was pointed out recently by Justice O'Loughlin in the Federal Court, 'The subsection could have easily required them to state the sources and the grounds for their beliefs but it did not and I see no reason to expand the ambit of the legislation by reading into the subsection words that are not there'.²² Thus, the applicant need not undertake any searches into the historical or current tenure of the claimed area to justify the belief that native title has not been extinguished. Similarly, the applicant's belief as to whether the area claimed is covered by an entry in the National Native Title Register, and the truth of all the

statements made in the application, may be based on what is known to the applicant at the time the affidavit is sworn.

The Registrar's discretion

Given the approach suggested above, it is unlikely that the Registrar would refuse to accept an application unless, as a result of inquiries undertaken at her request, it appeared that native title had been lost²³ or extinguished.²⁴

As a matter of practice, however, an application would not go to the Registrar for a decision until the applicant had been given an opportunity to respond to such issues. For each application, a case manager is appointed by the Registrar to prepare a submission on whether the application should be accepted.²⁵ In the course of preparing that submission, the case manager may, at the direction of the Registrar, commission land tenure searches and make enquires of the applicant.²⁶ Since an application can be amended at any time prior to the decision of the Registrar,²⁷ this procedure provides scope for reducing the native title rights claimed or withdrawing from the application any areas which have been the subject of prior inconsistent grants, thus ensuring acceptance of the application.

In some cases, of course, applicants may choose, as a matter of principle, not to withdraw a contentious area from their claim. Providing there is another non-contentious area in the claim, the application should be accepted by the Registrar. This is because the Registrar is not required to consider difficult legal questions, such as

... whether the potential extinguishment of a piece of the claimed area vitiates an entire application or whether something akin to a 'blue pencil rule' could be used then, or at some later stage, to expunge reference to the offending piece of land. These are questions to be considered by the Court if the matter is not resolved in the Tribunal.²⁸

In any event, an unfavourable decision by the Registrar may be reviewed in the Federal Court and the applicants may seek orders restraining the Registrar from referring the application to the Presidential Member and/or compelling her to accept it.²⁹ In this way, the immediate need to demonstrate to a Presidential Member that a prima facie case can be made out may be postponed, allowing further time for preparation.

Part B: Demonstrating A Prima Facie Case to a Presidential Member

If the application is referred, the Presidential Member must decide, within 21 days,³⁰ whether he agrees with the decision of the Registrar or otherwise direct the Registrar to accept the application.³¹ If he agrees with the opinion of the Registrar, that prima facie the claim cannot be made out, the Presidential Member must write to the applicants inviting them to make submissions, within a reasonable time,³² to demonstrate that a prima facie case can be made out.³³ This does not require the applicants to actually produce evidence of each of the elements necessary to establish native title but rather to demonstrate that such evidence exists or can be obtained.³⁴ As was pointed out by French J, in the *Waanyi Directions Ruling*:

This may be done in a variety of ways. The applicant might refer, in summary, to the content and nature of anthropological or historical material which exists or to the content of oral evidence which it is expected could be adduced from members of the propounded community of native title holders.³⁵

The preferred approach to this issue would be an affidavit from an anthropologist, based on a review of the anthropological and historical literature relevant to the area under claim as well as

interviews with members of the claimant group, which demonstrates that evidence exists or can be obtained to show the elements necessary to establish native title.

A further issue to be addressed by the applicants for the purpose of demonstrating that a prima facie case can be made out is “the effect of the known land tenure history on the continuance of native title”.³⁶ In this regard it is not necessary for the applicant to adduce experience to show that native title has not been extinguished by the prior grant of an interest.³⁷ Rather, in determining the issue, the Presidential Member would have regard to such evidence of tenure history as is before the Tribunal and, in so doing, would take into account the submissions of the applicants on the effect of that history. The Procedures of the Tribunal, as revised on 8 September 1995, provide that the Tribunal “will not consider submissions on the acceptance question from parties other than the applicants, either before or after the referral of an application to a Presidential Member”.³⁸

Section 169 of the NTA grants a statutory right of appeal from a decision of a Presidential Member not to accept the application. The appeal may be on a question of fact or law and must be commenced in the Federal Court within 28 days of the decision. The Federal Court must hear and determine the appeal and may make such orders as it thinks appropriate, including:

- an order affirming or setting aside the decision of the Presidential Member;
- an order remitting the case to be heard again, either with or without the hearing of further evidence, in accordance with the directions of the Court.

Interim orders may be sought from the Court preventing other parties from acting against the interests of the applicants until such time as the appeal is heard.³⁹

Part C: Becoming a Registered Native Title Claimant

A “registered native title claimant” was initially defined by the Tribunal as: “A native title holder with a claim accepted and placed and placed on the Register of Native Title Claims”.⁴⁰ The President of the Tribunal took the view that a provision in s.190 of the NTA which requires registration upon the lodgement of a claim was a “drafting anomaly”,⁴¹ since it appeared to be inconsistent with section 66(1) which requires the Registrar, if an application is accepted, to record the “details of the application”, rather than the details of its acceptance, in the Register of Native Title Claims.

However, Part 7 of the NTA, which establishes the “Register of Native Title Claims”, makes it clear that a person becomes a registered native title claimant as a result of lodging a claim with the Registrar. Section 184 of the NTA provides that a reference in that Part of the NTA to a “claim”, is a reference to “an assertion contained in an application given to the Registrar that a person or persons hold native title in relation to a specified area of land or waters”. Section 190 provides that the Registrar must record the details of any claims, contained in an application given to her, in the Register of Native Title Claims “as soon as practicable after becoming aware of them”. Section 186(1) provides that for each claim an entry must be made in the Register showing, *inter alia*, “the name and address for service of the person who is taken to be the claimant” and a note, immediately below s.186(1) states that this person “is the registered native title claimant”.

The President's view of s.190 prevailed, notwithstanding a later decision to the contrary by the Deputy President of the Tribunal.⁴² Indeed it was only after O'Loughlin J, in the Federal Court, held that “the simple act of lodging a claim gives to the claimant recognition as a ‘Registered Native Title Claimant’”,⁴³ that the Tribunal's Procedures were altered to provide for registration upon lodgement.⁴⁴

The real issue underlying the question of whether claimants become “registered native title claimants” upon the lodgement of an application or upon its acceptance by the Registrar is the so-called “balance of interests” that finds expression in two of the “main objects of the Act”, namely:

- to provide for the recognition and protection of native title, and
- to establish ways in which future dealings affecting native title may proceed....⁴⁵

One way of ensuring that future dealings can proceed is to make the protection of native title conditional upon the formal recognition of its possible existence within a very short period of time.

The requirement for such formal recognition is justified by its proponents on the basis that mining companies and governments should not have to waste time and money negotiating with Aboriginal people who do not in fact enjoy native title over the relevant area. Unfortunately, this is transmuted into a different argument: mining companies and governments should not have to waste time and money negotiating with Aboriginal people who are unable to demonstrate, in the time allowed, the possible existence of a legal interest in the land by preparing and lodging an application which is not formally deficient, frivolous or vexatious, or on the face of it, unable to succeed.

The force of this argument has moved the Commonwealth Government to propose amending the NTA to reverse the decision of the Federal Court in *NT v Lane*. Under the proposed amendments, claimant applications “will have to pass a registration test and be registered before the claimants will have the right to negotiate”.⁴⁶ The proposed amendments will:

make it clear that the Registrar will not be obliged to register a claim solely on the basis of the material contained in it; she or he will be able to seek further information, including land tenure history searches and submissions from other parties, before forming an opinion whether or not prima facie a claim cannot be made out.⁴⁷

Although these are matters outside the control of the claimants, common law native title holders who are unable to prepare and lodge their application and pass the registration test within two months from the date of a s.29 notice will be denied their right to negotiate.⁴⁸

In addition to making submissions to the Native Title Registrar on the question of registration, parties opposed to a claim will be able to bring a strike out application in the Federal Court, which, if successful, will result in a registered claim being de-registered.⁴⁹ This, in effect, creates the civil law equivalent of “double jeopardy” for applicants, since they may, at the discretion of opposing parties, be required to argue issues of fact that are substantially the same, first in an administrative forum and then in a judicial forum. In this regard it is worth bearing in mind the duty, which the House of Lords held is incumbent upon courts and tribunals to:

conduct their proceedings so as to command the respect and confidence of the public. For this purpose it is absolutely necessary that issues of fact that are substantially the same should, whenever practicable, be tried by the same tribunal at the same time.⁵⁰

Registration confers upon common law native title holders the right to negotiate the terms under which a future act, such as the grant of a mining lease, might be done.⁵¹ This is significant because it provides native title holders with the opportunity not only to share in the economic benefits that come from the exploitation of their country, but also to ensure that such exploitation does not occur in ways or at places that are unacceptable under their laws. However a right to negotiate is empty and meaningless if restrictive time constraints prevent native title holders from ever enjoying it.

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- ¹ For a recent discussion of this aspect of the NTA, see *In the Matter of Stjepan Jozic Non-claimant Determination Application*, National Native Title Tribunal, Mr Sean Flood, Member, 23 March 1995.
- ² See ss.29-31 of the NTA.
- ³ *Review of Native Title Representative Bodies* (NTRB Review), ATSIIC, 1995, p. 54.
- ⁴ *ibid.*
- ⁵ Until recently, an applicant did not become a 'registered native title claimant' until an application was accepted by the Registrar. As a result of the decision of O'Loughlin J, in the *Northern Territory of Australia v Patricia Lane and ors.*, (*NT v Lane*) unpublished decision, Federal Court, No. DG6001 of 1994, an applicant becomes a 'registered native title claimant' upon lodging an application with the Tribunal. The Commonwealth Government, however, has made moves to legislate to reverse the decision via the *Native Title Amendment Bill 1995*.
- ⁶ *In the Matter of the Waanyi Peoples Native Title Determination Application* (Waanyi Directions Ruling), NNTT, French J, President, 15 September 1994, p. 24. This description was expressly adopted by O'Loughlin J, in *NT v Lane*, at p. 53.
- ⁷ *Waanyi Directions Ruling*, pp. 23-24. In *NT v Lane*, it was held that, whilst there is no obligation on the Registrar to conduct such inquiries, the need to scrutinise an application suggests a need to investigate (at p. 10), and the Registrar 'is to be encouraged to make expeditious inquiries if it might assist her in the formulation of her opinion' (at p. 52).
- ⁸ See s.62(1)(a)(i)
- ⁹ *Waanyi Directions Ruling*, p. 23.
- ¹⁰ Section 61(2).
- ¹¹ See *NT v Lane*, pp. 35 and 38-39.
- ¹² Section 61(3).
- ¹³ How To Complete a Native Title Determination Application (Form 1), NNTT, issued 9.2.94, p. 5.
- ¹⁴ See *Procedures for Applications for Native Title Determination and Compensation* (Procedures for Applications), NNTT, Original Issue 16 May 1994, Revised Issue 12 September 1994, Procedure 3.1, p. 3. For a concise critique, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, January-June 1994*, April 1995, p. 117.
- ¹⁵ At p. 42.
- ¹⁶ *NT v Lane*, p. 45.
- ¹⁷ *Native Title Report*, p. 24.
- ¹⁸ See *Mabo v The State of Queensland* (No. 2) (*Mabo No. 2*) (1992) 107 ALR 1 per Brennan J, at p. 50).
- ¹⁹ *Waanyi Directions Ruling*, p. 23.
- ²⁰ *Mabo No. 2*, per Brennan J, at p. 43.
- ²¹ *Waanyi Directions Ruling*, p. 22. O'Loughlin J, in *NT v Lane* (at p. 51), expressly agreed with this view.
- ²² *NT v Lane*, p. 40.
- ²³ In seeking advice on the plausibility, from an anthropological perspective, of the native title rights and interests claimed, the Registrar may, for example, reach the conclusion that the claimants were 'physically separated from their traditional land and have lost their connection with it' (see *Mabo No. 2*, per Brennan J, at p. 43). However, as indicated previously, this possibility can be lessened strategically by referring to the claimants as family groups rather than as a 'people'.
- ²⁴ For example, where current and historical tenure searches disclose that the area under claim has been the subject of previous grants of interests, such as freehold or leases granting exclusive possession; see *Mabo No. 2*, per Brennan J, at p. 51.
- ²⁵ Procedures for Applications, 6.1.
- ²⁶ *ibid*
- ²⁷ Procedures for Applications, 4.1.²⁸ *NT v Lane*, pp. 52-53.²⁹ In *NT v Lane*, it was held that the Registrar's decision to accept an application was a decision that is reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) p. 35. Moreover, since the Registrar is an officer of the Commonwealth, the Federal Court, 'in its original jurisdiction, is entitled to review the decision of the Registrar and to grant, in an appropriate case, relief under s.39B of the Judiciary Act', p.37.
- ³⁰ NNTT Procedures, 6.7.
- ³¹ Section 63, sub-sections (3) and (4).
- ³² See NNTT Procedures, 6.7. What is reasonable will depend on the nature of the case but extensions of time may be allowed if requested.
- ³³ Section 63(3)(a)
- ³⁴ *Waanyi Directions Ruling*, pp 27-28.
- ³⁵ *ibid*, p 28.
- ³⁶ *Waanyi Directions Ruling*, p 32.
- ³⁷ *ibid*.
- ³⁸ NNTT Procedures, 6.8.
- ³⁹ Section 170(2).

⁴⁰ See *National Native Title Tribunal: A Guide*, produced by the NNTT, December, 1994, p 21.

⁴¹ *Registration of Native Title Claims Upon Lodgement - Change of Procedures*, NNTT 1 September 1995, p.2.

⁴² *In the Matter of a future act determination by Associated Gold Fields NL and Alkane Exploration NL*, NNTT, Olney J, Deputy President, 6 February 1995, at pp. 8-9.

⁴³ *NT v Lane*, p. 11.

⁴⁴ See *Procedures for Applications of Native Title Determination and Compensation*, National Native Title Tribunal, Second Revised Issue, 8 September 1995, ("NNTT procedures") Procedure 2.8.

⁴⁵ Section 3 of the NTA.

⁴⁶ *Outline of Proposed Amendments to the Native Title Act 1993*, ("Proposed Amendments") Department of the Prime Minister and Cabinet, Attorney-General's Department, September 1994, par 13, at p. 4.

⁴⁷ *ibid*, par 15, p.4.

⁴⁸ *Proposed Amendments*, par. 15, p. 4.

⁴⁹ *ibid*, par 15, p.4.

⁵⁰ *Connelly v D.P.P.* [1964] A. C., 1254, per Lord Devlin, at p. 1353.

⁵¹ Section 31 (1) of the Act.

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