Land, Rights, Laws: Issues of Native Title

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title

Editor: Jessica Weir **Volume 2**

April 2002 **Issues paper no. 14**

Abstract

Since the Native Title Act 1993 *(Cth) amendments, the National Native Title Tribunal continues to perform its core functions, however native title applications are now periodically subject to judicial management from beginning to end by the Federal Court of Australia. This paper provides an overview of this transfer of an entire area of developing law and legal practice from a new and specialised tribunal to the Federal Court and identifies some of the areas in which the tension between the two entities is being experienced. Phillips contends that for some commentators the impact of this shift in native title practice from an administrative body to a legal body must be read in the context of the political imperatives which drove the amendments of the Native Title Act and the rhetorically declared impulse to deliver "bucketloads of extinguishment".*

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"LIKE SOMETHING OUT OF KAFKA":[1] THE RELATIONSHIP BETWEEN THE ROLES OF THE NATIONAL NATIVE TITLE TRIBUNAL AND THE FEDERAL COURT IN THE DEVELOPMENT OF NATIVE TITLE PRACTICE

Susan Phillips

One of the aspirations that the *Native Title Act 1993* (Cth) (NTA) was designed to fulfil was to assist parties to reach agreement about native title rather than requiring proof through contested proceedings in the courts. In the interests of "workable, certain, land management"[2] "a process designed to be as informal, quick and economical as possible"[3] was set out in the NTA.[4] Indigenous peoples did not lose their common law rights by the codification of a process to provide recognition of native title.[5] Persons claiming that their traditional connection to land survives are entitled to commence legal proceedings seeking recognition of native title. However, it was contemplated that by commencing a claim with the National Native Title Tribunal (NNTT or Tribunal), litigation with all its costs and uncertain outcomes is, in principle, avoidable.[6]

Prior to the amendment of the NTA the jurisdiction of the Federal Court was only invoked in a limited number of circumstances. If the relevant Tribunal member or President deemed that further mediation of a matter was futile then the claim could be referred to the Federal Court for contested proceedings.[7] If the parties reached agreement about the existence of native title then the matter would be referred to the Court for consent orders in the terms agreed.[8] Leave could be sought for an application to be accepted by the Court to review the determination.[9] Otherwise issues such as:

- whether the application should be accepted;
- whether an application should be dismissed;
- who could be a party;
- whether or not mediation should occur;
- reference of the matter to the Court;
- whether or not to accept objection to expedited procedure; and,
- whether or not to accept applications in relation to proposed future acts;

were all handled by the Tribunal. The Aboriginal and Torres Strait Islander Social Justice Commissioner commented in his Native Title Report for June 1994, "In light of these determinative and decision-making powers the contentious question arises as to whether the Tribunal as an administrative body is exercising judicial powers."[10]

The decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission*[11] had a significant impact on this scheme highlighting the fact that the Tribunal could not itself determine whether or not native title existed. A constitutionally sound working relationship between the NNTT and the Federal Court had to be developed. Amendment of the NTA to respond to this difficulty had been agreed to in principle[12] before the whole-scale revision visited upon the NTA in the July 1998 amendments which followed the *Wik* decision.[13]

AMENDMENT OF THE *NATIVE TITLE ACT*

Shifting roles from the NNTT to the Federal Court

The July 1998 amendments to the NTA wrought a number of fundamental changes to the role of the NNTT most particularly in the allocation of functions between the Tribunal and the Federal Court. The amendments effected an immediate transition of all the matters lodged with the Tribunal into proceedings before the Federal Court.[14] Additional tasks were also vested in the Tribunal, in particular administration of the registration test by the NNTT Registrar and the development and registration of Indigenous Land Use Agreements (ILUAs). The Tribunal retained its role as a 'native title mediation service' including assistance to parties involved in negotiations about future acts. It also retained its arbitration function for parties unable to reach agreement about such proposed developments.

In simple form the scheme of the amended NTA, as it affected the respective functions of the Tribunal and the Federal Court, now follows this path:

- matters are now commenced by application to the Federal Court;[15]
- non-claimant applications are no longer dismissed if a claimant application is lodged in response but continue as proceedings in their own right though generally scheduled together with the relevant claimant application;[16]
- if the matter is defective it can be struck out by the Court;[17]
- if the matter is a claimant application, the application is sent to the NNTT Registrar for application of the registration test;[18]

- the matter is notified to the public and people with an interest in the claim area by the Tribunal;[19]
- after the end of the notification period (three months) the matter is again listed before the Court for settlement of the party list;[20]
- unless it orders otherwise the Court then refers the matter to mediation by the Tribunal;[21]
- the Court can request a report from the Tribunal about the progress of the mediation;[22]
- the Court may at any time determine a question of fact or law referred to it by the NNTT or adopt any agreement on facts between the parties during mediation;[23]
- if the parties reach agreement the matter is remitted to the Court for orders reflecting the agreement without a hearing;[24] and,
- if mediation does not result in settlement of the matter by agreement or the NNTT or Court considers that further mediation is unnecessary or unlikely to resolve any of the issues raised by the claim the matter reverts to the Court for decision.[25]

Of the NNTT functions commented upon by the Social Justice Commissioner in 1994 the following tasks are now the province of the Court not the Tribunal:

- whether an application should be dismissed;
- whether an application can be amended;
- who can be a party; and,
- whether or not mediation should occur.

Additional functions for the NNTT

The registration test The Registrar of the NNTT is now responsible for administration of the registration test. The amendments required that almost all native title claims which existed at the time when the amendments came into force (30 September 1998) had to be submitted to the test.[26] The test must be applied to all new applications.[27] Passing the registration test ensures a claim is entered (or, if a pre-amendment claim, remains) on the Register of Native Title Claims entitling the applicants to exercise a range of procedural rights, including most importantly the right to negotiate in relation to the grant of certain future acts in the area of the claim.

Development and registration of Indigenous Land Use Agreements The second new function for the NNTT involved assisting parties to reach agreements, which are registrable, governing land use and future acts in an area – ILUAs.[28] ILUAs offer another kind of outcome of mediation as voluntary agreements which are contractually binding on the parties entering them. ILUAs can take a number of different forms and deal with almost any issue affecting land use including the doing of future acts, the exercise of access for traditional purposes, management of national parks and other public services, and others. They can even involve recognition or surrender of native title. The parties can seek to have the agreement entered on a Register maintained by the NNTT Registrar. The Registrar will notify the public about the lodgment. Objection to registration can be filed and that also can be dealt with by mediation.

Practical challenges to the Federal Court in its new role

Extra case load The most immediate impact of the amendments to the NTA on the Federal Court was the transfer of almost 800 matters from the Tribunal, translated overnight into current proceedings before the Court.[29] On the date of transfer, 30 September 1998, the claims were scattered through each procedural phase.[30] The transitional provisions[31] were relatively indiscriminate in effect and so matters became proceedings without regard to the stage they had reached under the Tribunal's processes. Even applications which were being considered for rejection by the Tribunal became fully fledged proceedings in Court despite defects of form which, had they been applications to the Court de novo, may never have passed the Registry.[32]

Provisional docket judge and substantive allocation

To deal with the additional matters the Court nominated a judge per registry as the provisional docket judge with directions hearings listed before them en bloc commencing, in New South Wales, in March 1999. Differences in judicial management between the Registries appeared. In Queensland and Western Australia the provisional docket judges heard and determined various interlocutory proceedings arising in the applications. In NSW, where issues within the case arose for decision, the matters were given substantive allocation to the judge who would ultimately determine the claim.[33] Substantive allocation removed the matter from provisional judicial consideration and increased the pressure on the applicants to be ready to submit to a more robust 'hands on' style of judicial case management often at a time when, for reasons set out below, the capacity of the applicants to respond meaningfully to the new forum was at its lowest.

Notification

Due to the lack of uniformity about where matters were procedurally, in an administrative sense the challenge for each judge was to ascertain what the Court *could* do in each matter. Take, for example, a matter which had not yet been notified by the Tribunal, and the parties, other than the state Minister and possibly the native title representative body (NTRB)[34] had not yet joined. This meant that directions affecting the future conduct of the proceedings could not be made until the relevant procedural steps had been given time to occur and the parties were before the Court.[35] The length of time required for the state to provide the Tribunal with the necessary information about interest holders in the area of the application in order to notify the claim varies according to the size and complexity of the area of the claim and interests held within the area. Once the Tribunal has a list of persons to be notified it can commence the notification process allowing three months within which certain categories of persons, with an interest which may be affected by a determination in the proceedings, can notify the Court in writing that they wish to be parties.[36] In relation to un-notified matters which had been transferred, determining how long to adjourn a matter, in order to allow notification to be completed, was almost impossible to do with any accuracy.

Mediation

Complicating this restraint on pro-active judicial case management is the imperative that all matters after notification be referred to the Tribunal for mediation unless there is an order otherwise.[37] At the time of transition, many 'old' NTA applications had already been referred for mediation and the parties were either fully engaged in mediation or the mediation was on hold for reasons particular to that application. For example, the applicants may have been engaged in exercising their right to negotiate with a grantee and state parties; and therefore were unavailable or unable to focus on participation in mediation of the claim as a whole. An intra-Indigenous dispute about who was entitled to be part of the group in a number of cases was being separately mediated by either the Tribunal or the NTRB, putting mediation of the entire claim on hold until the internal difficulty was settled.

In some matters where the Court perceives that mediation by the Tribunal has not been effective, the Court can order mediation by a registrar or a case management conference to help settle a matter which is causing delay.[38] Such mediation and/or case management conferences can be co-existent with the matter's mediation by the Tribunal.

The ramifications of these dual and in some cases treble streams of institutional activity challenges the classic purpose of and model of judicial case management and, in most cases, put preparation of the case for hearing seemingly indefinitely on hold. Indeed, the object of the amended NTA remains to help parties reach agreement rather than to litigate.[39] Where agreement is reached the matter may never be litigated, meaning timetables for the provision of evidence and other such directions ordinarily made in litigation may never be required. At the time of transition for most applications, directions for hearing were the last steps

in the process which could or would be taken. This meant the judges' role in relation to most of the 800 matters was largely an administrative rather than a judicial one, concerned with moving the application into its next procedure. Those procedures were mostly the purview of the Tribunal not the Court.

In many cases after the transition of the claims to the Court, applicants sought postponement of notification of the application, or referral to mediation, or other directions, in order to allow time in which to amend the application so that it could pass the registration test and remain on the Register of Native Title Claims. The provisional docket judges and the judges to whom the matters were substantively allocated had to become informed about the stage reached by each matter and consider what steps the Court could take to 'move the matter along'. In an uncertain procedural environment it was difficult for the Court to determine how much time ought reasonably be allowed to applicants as well as bearing in mind what was tolerable within the goal of timely disposition of native title cases.[40]

The three year timeframe

The Court adopted a goal of three years as the timeframe within which native title cases should be disposed.[41] This is regarded as a significant adjustment of the normal goal of eighteen months for other matters.[42] The decision that, in relation to 'old' Act applications, the time frame would commence from 30 September 1998 without regard to the stage reached by the matter has been an enduring cause of concern to practitioners.[43] As mentioned above, until a matter has completed notification, been sent to mediation then referred back to the Court it will not be known what issues are contested, what matters require evidence to be prepared, filed and served, who are the parties to the contested issues, and the like. In this sense timing an 'old' Act application from the transition date disregards relevant considerations about when, in fact, a contested matter commences. Until the issues which are contested between the parties are referred back to the Court, orders about the preparation of evidence and other orthodox judicial case management steps cannot be taken. To assess progress in the matters according to a criterion which is not relevant to the matter itself but mostly only to the Court, makes a doubtful contribution to perceptions of appropriate disposition of native title matters.

It must be born in mind that future act procedures and non-claimant applications as well as compulsory acquisition procedures allow non-Indigenous parties to acquire new interests or change uses without native title causing undue delay. The claims themselves do not create a prejudice to any interests with which they at best co-exist. Timely disposition of the claims involves allowing enough time for the claims to traverse the process set out for them, responding to every opportunity those processes present participating in litigation only as a last resort. Apart from consideration of the statutory scheme by which the claimants are bound the other significant issue about whether or not a claim is litigated is one of resources.[44]

Staying on the Register

After the amendments, the primary focus of applicants and the NTRBs was not the Court proceedings but the application of the registration test to existing claims.[45] Passing the test was a necessary step for a matter to remain registered. If the claim failed the test it was removed from the Register although it would remain valid as proceedings before the Court. The significance of remaining on the Register of Native Title Claims was the important procedural rights such as the right to negotiate, which were secured by applicants. However it was not possible for applications to pass the test in the form in which they were filed. Much more detailed information was required in all fundamental aspects of the claim covering:

- where is the area being claimed, s.190B(2) (identify the land and waters),
- who are the people claiming it, s.190B(3) (identify the persons in the group),
- why is native title being claimed, s.190B(4) (identify the rights and interests),

- what are the factual bases of the native title that is being claimed s.190B(5), and
- how are they going to be proven s.190B(6) & (7) (identify the prima facie case).

In addition claimant groups had to demonstrate the process by which the applicant was authorised to bring the claim and to deal with matters arising in the application.[46]

Therefore in order to bring a matter into a form in which it might pass the test, the application had to be substantially amended – requiring the leave of the Court. In the course of considering a claim for the purposes of the registration test the Registrar must have regard to any information supplied by the Crown that is relevant to the conditions set out in the test.[47] In practice this has meant that many applicants provide a draft amended application to the Crown for assessment according to the criteria about which it would otherwise make comments to the Registrar. If the applicants and the Crown settle any matters which would otherwise have attracted adverse comments, then leave to amend in those terms can be sought. After leave to amend is granted the application is forwarded to the Registrar to apply the test. Following the test, in the ordinary course, the matter is then notified. If, as an 'old' Act claim, the application had already been notified then the parties only are notified by the Registrar about the outcome of the test.

Following the introduction of the registration test a significant area of interaction between the Court and the Tribunal occurred. Applicants, disappointed when their application failed the test and, in some instances, the Crown party, have begun applying to the Federal Court for review of the Registrar's decision.[48] As it did with *Lane* and *Waanyi* this judicial review of the conduct of the Registrar and his delegates has contributed significantly to the way in which the registration test is carried out and the way in which the Registrar and his delegates exercise their powers under the amended NTA.

The retrospective application of the test to existing applications took an enormous toll on the resources of the Crown,[49] the Tribunal, the NTRBs and applicants. The focus on helping claims remain on the Register rather than preparing the matter for hearing was seen by most applicants and NTRBs as an appropriate priority given the goal of settling rather than litigating claims. However, particularly since substantive allocation of the bulk of cases, there has been vocal judicial criticism of applicants and NTRBs for not preparing matters for hearing.

Another example serves to illustrate the challenge of native title proceedings to the ordinary functions of the Court in relation to applications brought before it, and the necessity for mediation processes to help the parties define the issues. That is the position of native title applicants properly understood as respondents to the proceedings of others.

The applicants as respondents

When a non-claimant application is filed or the government issues a s.29 notice indicating that it proposes to do a future act in an area where native title has not been extinguished by the grant of an inconsistent interest, native title claimants have only three months within which to file a claim. In the case of a response to a s.29 notice the application filed must pass the registration test in order for the applicant to exercise a right to negotiate about the terms upon which they will agree to the grant of the interest sought by a third grantee party. Where a claim is filed in response to a non-claimant application, passing the registration test is not essential. The claim will remain valid as an application even if it fails the test. In any event the two matters will be dealt with in the same proceedings.[50]

In NSW and the Australian Capital Territory since the commencement of the NTA on 1 January 1994, 163 non-claimant applications have been filed, and 146 claimant applications.[51] A significant number of the claimant applications were responses to non-claimant application or s.29 notices. Cast as applicants the claimants bear the onus of prosecuting the proceedings, yet they have been required to reply to the proceedings of others in order to be able to speak for their country. An opportunity perhaps offered for the

first time. They either respond within the three month time limit or lose the opportunity. In either instance the native title applicants will bear the procedural burden as well as the evidentiary burden.

What this means is that native title applicants are more truly in the position of respondents to the proceedings of other parties. In these circumstances it is rarely the case that their application was filed after a suitable period of time spent in planning, preparation and consultation with those whose interests are represented in the claim. Their application had to be prepared within three months giving very limited opportunity to identify and consult all the people who may hold native title rights and interests in the claim area. Inevitably disputes occur about the identity of the people who are members of the claimant group.[52]

The other conundrum facing applicants is that information which is essential to their application, in order to identify precisely what land within a claim area is claimable, lies exclusively with the Crown. In order for an application to be valid it must not include land where native title has been extinguished.[53] Creating a sufficiently accurate description of the area to specifically exclude parts where native title may have been extinguished is technical and reliant upon information which is not in the public domain. It has often been the case that the Crown itself cannot tell without substantial research whether or not a particular area has ever been subject to an extinguishing interest.

These kinds of considerations mean that the application filed at the Court is unlike any other proceedings. It does not fit within the classic paradigm of legal proceedings nor does it establish the parameters within which the Court can perform its fact finding role.[54] Each detail of an application filed may go through many changes as an outcome of mediation before a fact finding task arises. This kind of indeterminacy is another cause of frustration to the bench when considering what can actually be done with an application.

In practice many applicants have had little choice other than to withdraw their claim having 'spoken' for their country at a time when a new interest in it was created. Withdrawal may be safer in terms of protecting their native title rather than going on to attempt, in a resource starved environment, all that is necessary to 'prove' that their native title survives. The theory of the NTA is predicated upon the survival of native title. It must be remembered that if native title is recognised it is because it has survived. Those who succeed in demonstrating that survival will, during the process, in fact *have* native title that simply lacks formal legal recognition. The entire system that has been described is the structure created to recognise something that already exists.

More than half of the total number of applications filed in NSW have been withdrawn not determined. Withdrawal of the proceedings does not of itself create any conclusions about whether or not native title survives in that area. Should further non-claimants be filed or s.29 notices issued, other claims in response may properly be filed. Withdrawal of the proceedings called forth by the need to respond to a non-claimant or s.29 notice may allow the claimant group a better opportunity to prepare a claim which is the outcome of consultation with all those who should be involved. The challenge for applicants in this position is that their ability to attract the kind of funding and support a claim requires is reduced when they do not have a claim 'on the books'.

CHALLENGE TO THE SYSTEM

Indeterminacy of the structure, the law and the facts

The challenge to the two institutions, with responsibility for the management and determination of native title, is for the powers of each to be exercised consistently with the other in order to provide proper and impartial delivery of services to the community adapting to a newly recognised co-existent interest. One of the dilemmas in the melding of this partnership is the difficulty of delineating the powers of each – in simple terms where does one institution end and the other begin.

As has been set out above there are many instances along the procedural path in which an application will be passed from one institution to the other and then back. There will be many instances when the applications are involved in simultaneous proceedings both within each forum and in each institution simultaneously. The capacity of each institution to work with the other and to understand the demands and constraints of their respective functions is critical in order that the parties are assisted to comprehend what is required of them, what their rights are, what their options are. Too often in this maze, made more complex by the transitional provisions and the retrospective registration test, the last people consulted about the progress of the application has been the applicants themselves.

When searching for clear guidelines to distinguish the powers of the two in order to most effectively utilise each institution for its most suitable purpose, one finds only more indeterminacy. In *Brandy v Human Rights and Equal Opportunity Commission*[55] the High Court found that judicial powers are not amenable to exhaustive definition. The attributes were summarised as the power to make decisions about contested rights according to legal principles determined by reference to relevant facts. The Court found one of the features distinguishing non judicial from judicial decision making is that non-judicial decision making may be dictated by policy or an administrative discretion. Judicial decision making determines existing rights according to law and judicial decisions are enforceable.[56]

In the co-operation and interaction of the Tribunal and the Federal Court called for by the scheme of the amended NTA, dealing in an area which has been highly politicised and targeted with emotional and often inaccurate information by politicians and political parties, industry and the media, it may be difficult for the parties to see where policy and discretion end and findings of fact begin.

The functions and powers of the Tribunal are very much an outcome of the Tribunal creating processes to perform its functions within a scheme which quite quickly was found to be unconstitutional. The most enduring description of the Tribunal's function as a mediation service in theory means the process and outcome are in the hands of the parties.

There are many dilemmas for the legal system posed by native title claimant applications. Each one of them challenges assumptions such as those explored in *Brandy* which underpin our institutional structures. Some of these dilemmas are not solved by the structure created by the statute. Others of them are generated by the meanings which inure in two completely different systems – traditional Indigenous law maintained via oral and ceremonial transmission being recognised by another tradition reliant upon written (and ceremonial) transmission. Challenging each step by the two institutions is the difficulty of defining, with precision, what rights and interests are being asserted and protected, the category of people who may legitimately be involved,[57] what can be settled and what contested, how to bind the settlement to the land and other issues. Under the amended NTA the parties may have elements of choice about the forum in which they resolve these issues.

The detail of native title applications and the responses to them follow no template. Each set of information provided will be imprecise and capable of many different interpretations. Dealing with the processes via

which native title can be recognised is fraught with flexible meaning and open-ended interpretation. The structures within which these tasks are performed have to be adaptive to the needs of the parties and the tasks in order for the goals of the legislation to be fulfilled. This need is outside the classic perception of the role of a court although increasingly that kind of procedural flexibility is being acknowledged from within and outside the institution.[58]

Conclusion

The shift from tribunal based case management to judicial case management has had an impact on the levels of formality with which issues are dealt, the remoteness of the procedural steps from the claimants and other parties and has emphasised the notional opposition of parties on which a litigious model is predicated. Difficulties are being caused because the Court is, in a practical sense, required to play an administrative not a judicial role, leading to considerable judicial frustration. The shift of management is also problematic for the aims of the legislation. Vesting the managerial role within the jurisdiction of the Court imports the structural hazard of parallel procedures adding to the difficulty and expense of reaching the goal of settling the matters by agreement.

The Tribunal's role as a 'mediation service' continues. Gradually these successes are being brought to and acknowledged by the Court:

> The mediation was successful and the parties have reached an agreement which recognises that native title exists in relation to the determination area and that the Meriam people are the common law holders of that title. They have prepared a document which sets out the terms of their agreement. The document is signed by the legal representatives of the parties and was filed with the Court on 12 June 2001. The parties have applied to the Court for an order in accordance with the terms set out in the agreement and that is the matter before the Court here on Dauar Island today…..[5]
>
> Since the first historic determination, there have been 21 determinations of native title by this Court, 15 of which have been reached by consent, the majority of these in the Torres Strait. These numbers suggest that governments and other parties are increasingly cognisant of the benefits of negotiated settlements of native title claims, which otherwise have the potential to be lengthy, costly and divisive. [11][59]

In *Mark Anderson on behalf of the Spinifex People v State of Western Australia* Black CJ observed:

> I wish to congratulate the Spinifex People, the State of Western Australia and the Shire of Laverton for resolving this application by agreement between them. Discussions leading to consent determinations about the existence and workings of native title will often involve very difficult questions for the parties to consider and yet agreement, if it can be reached, is highly desirable.
>
> The courts have always encouraged parties to settle their claims amicably and have often congratulated them when they have done so. I am following a long tradition of common law judges in congratulating the parties to this application; but I would add that it is especially desirable that there be agreed resolutions of applications for the determination of native title cases. These cases involve matters of great importance and great sensitivity to many people. If not resolved by agreement they can be lengthy and very costly to all concerned. They can also cause distress. If an appropriate outcome can be arrived at by

> agreement, and it is an outcome that represents goodwill and understanding on all sides, that is something to be applauded. [60]

Increased experience on the part of each of the institutions and practitioners will contribute to better utilisation of each forum. That experience may encourage the participants to feel more confidence in the processes and more patience with the time it takes to reach an outcome. Due to the complexity of the interactions called for between the Court and the Tribunal the question which was posed in *Brandy* may arise in the future unless the working relationship which develops between them makes clear which task is being performed, by whom and under which power. Whilst clearly institutional flexibility is called for, the constitutional lines must remain in focus and not become blurred even where there is duplication of some functions. The Court itself may need to adapt criteria developed through its experience of 'ordinary' litigation to the exigencies of native title processes. If litigation is the least desirable outcome for the management and resolution of native title then it begs the question of why the matters are subjected to judicial management before a judicial role properly arises.

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[1] Remark in exasperation by Wilcox J during a directions hearing in a native title matter shortly after amendment of the NTA took effect. The response followed explanation by the author of the impact of the NTA transitional provisions on current native title applications and the relationship between the procedures of the NNTT and the Federal Court – all of these being reasons why there were no orders the Court could relevantly make in that matter to prepare it for hearing.

[2] Second Reading Speech, Native Title Bill 1993, Paul Keating, Prime Minister, Tuesday 16 November 1993, Hansard p2878.

[3] *Mabo, the High Court decision on Native Title*, Discussion Paper, Commonwealth Ministerial Committee on Mabo, AGPS, Canberra, 1993, p34.

[4] s.109(1) NTA requires the Tribunal to carry out its functions "in a fair, just, economical, informal and prompt way".

[5] *Mason v Tritton* (1994) 34 NSWLR 572, *WA v Commonwealth* (1995) 183 CLR 373, *Yanner v Eaton* (1999) 166 ALR 258.

[6] See *Djaigween v Douglas* (1994) 48 FCR 535, *Wilson v Anderson* [1997] NSWSC 8 (20 January 1999).

[7] s.74 NTA.

[8] s.166, s.167 NTA, see *Buck v NSW Minister for Land and Water Conservation* [1997] FCA 7 April 1997, Lockhart J, the first determination that native title existed following the *Mabo* decision. The orders made by the Court were by consent in the terms settled by the parties in the course of mediation by the Tribunal.

[9] s.167 NTA.

[10] 1994 Aboriginal and Torres Strait Islander Social Justice Commissioner's Report p107.

[11] (1995) 183 CLR 245.

[12] In 1995 amendments to the NTA addressing the consequences of the *Brandy* decision were proposed by the Keating government. Many of these provisions were picked up in the first Native Title Act Amendment Bill introduced into the Federal Parliament by the Howard Government in June 1996 prior to the *Wik* decision. Those provisions were carried forward in the further NTA Amendment Bills debated during 1997 and 1998.

[13] *Wik v Queensland* (1996) 187 CLR 1.

[14] Table A Application, Saving or Transitional Provisions amended NTA.

[15] s.61 amended NTA.

[16] Contrast s.67 NTA and s.67 amended NTA.

[17] s.84C amended NTA.

[18] s.63, s.190A amended NTA.

[19] s.66 amended NTA.

[20] s.84 amended NTA.

[21] s.86B amended NTA.

[22] s.86E amended NTA.

[23] s.86D amended NTA.

[24] s.87 amended NTA.

[25] s.86C amended NTA.

[26] The amended NTA's transitional provisions require that all applications lodged between 27 June 1996 and 30 September 1998 must be submitted to the registration test. Those applications lodged before 27 June 1996 which do not include any freehold or lease hold land (excluding mining leases) or which are not subject to a future act notice do not have to be tested and therefore remain on the Register of Native Title Claims, Notes Table A, Schedule 5, Part 4, note 11 amended NTA.

[27] s.190A amended NTA.

[28] Part 2, Division 3, sub-divisions B, C, D and E amended NTA.

[29] "As at 30 September 1998, all claimant, non-claimant and compensation applications had to be filed at the Court and all 794 existing applications before the NNTT were transferred to the Court…compris[ing] 712 claimant applications, 29 compensation

applications and 53 non-claimant applications…some 58 matters were already before the Court at that date having been previously referred by the NNTT." Figures drawn from the Federal Court *Annual Report 1998-99* at 50 and *Managing Justice, A Review of the federal justice system* Report 89 Australian Law Reform Commission, AGPS 2000, p462.

[30] "When the 1998 amendments took effect, there were 709 applications before the Tribunal in, or awaiting entry to, the mediation process. The applicants had withdrawn another 89 applications, the Tribunal had rejected 19 applications…" *Future Directions In Native Title*, Graeme Neate President, NNTT, 17 March 1999, seminar held by the Centre for Energy and Resources Law, University of Melbourne.

[31] Supra n37.

[32] Matters NG6101/98, NG6015/98 and NG6025/98 *Wellington v NSW Minister for Land & Water Conservation* were dismissed by Gyles J for defects of form. Also in more contested proceedings, *Longbottom v NSW Minister for Land & Water Conservation* [2000] FCA, 23 August 2000 Madgwick J, *Brown v NSW Minister for Land & Water Conservation* [2000] FCA 17 August 2000 Madgwick J, *Ford v NSW Minister for Land & Water Conservation* [2000] FCA 19 December 2000 Lindgren J were also dismissed for defects in the original applications which made them unsustainable as proceedings before the Court.

[33] For a thorough analysis of Federal Court case management and adoption of the Individual Docket System (IDS) see chapters 6 and 7 of the ALRC Report 89 supra n52.

[34] Native Title Representative Bodies are appointed by the Minister for an area to facilitate research and preparation of claims, assist resolution of disagreements among individuals and claim groups, represent groups in native title business. Section 202 NTA, s.203B amended NTA conferred additional functions on the NTRBs and slightly altered the existing ones.

[35] s.66 amended NTA sets out how notification by the NNTT Registrar is to be achieved.

[36] s.84 amended NTA.

[37] s.86B amended NTA.

[38] Under the ordinary Federal Court Rules.

[39] "If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the court and the likely parties to the litigation are saved a great deal in time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers." *Waanyi* supra n2 at 617.

[40] Beaumont J *Native Title Cases in the Federal Court* paper presented to the NSW Bar Association, November 1998.

[41] Federal Court *Annual Report 1998-99* at 51 and *Managing Justice, A Review of the federal justice system* Report 89 ALRC supra n52, p464.

[42] Native Title Users Group meeting, Federal Court, Sydney Registry 23 February 2001. The ALRC Report 89 supra n52 notes, "The Commission's study of the sampled cases showed the median period for cases from commencement to disposition was seven months, 85% of cases were resolved within 1 year 8 months and 95% of cases were resolved within 2 years 10.5 months." at p449.

[43] Concern raised on a number of occasions at the Sydney Native Title Users Group meetings convened by the NSW provisional docket judge, Beaumont J.

[44] At the time of writing (April 2001), four appeals about native title claims were current before the High Court: *Ward v WA* (the Miriuwung Gajerrong Case), *Yarmirr v NT* (Croker Island), *Yorta Yorta* and *Anderson v Wilson*. Miriuwung Gajerrong took 80 hearing days and cost the parties $5 million just at first instance. In *Yorta Yorta* at first instance there were 101 days of opening addresses and evidence and 12 days of legal submissions. Even one matter such as these can absorb many more times an NTRB's annual budget meant for all matters in its area. Figures from Graeme Neate, President, NNTT *Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal*, Paper delivered at Federal Court of Australia – Native Title Workshop, 15 April 1999.

[45] Supra n49.

[46] s.61 and s.251B amended NTA.

[47] s.190A(3)(c) amended NTA.

[48] *State of Western Australia v Native Title Registrar* [1999] FCA 1594 (16 November 1999), *Strickland v Native Title Registrar* [1999] FCA 1530 (4 November 1999), *State of Western Australia v Strickland* [2000] FCA 652 (18 May 2000), *Risk v National Native Title Tribunal* [2000] FCA 1589 (10 November 2000), *Martin v Native Title Registrar* [2001] FCA 16 (19 January 2001).

[49] A designated State Minister is the nominal respondent to all native title proceedings filed by native title applicants. In NSW the designated Minister is the Minister for Land and Water Conservation.

[50] s.67 amended NTA.

[51] Refer to the old timeline (now Snapshot) maintained by the Tribunal at <www.nntt.gov.au>.

[52] The identity of the members of the group is an issue attracting considerable judicial attention and has been directly or inferentially the subject of the litigation in *Moran v Minister for Land and Water Conservation* [1999] FCA 1637 (25 November 1999) Wilcox J, *Quall v Risk* [2001] FCA 378 (6 April 2001) O'Loughlin J, *Risk v National Native Title Tribunal* [2000] FCA 1589 (10 November 2000) O'Loughlin J. See also comments in the determinations in *Rubibi Community v State of Western Australia* [2001] FCA 607 (29 May 2001) Merkel J, *Ngalakan People v Northern Territory* [2001] FCA 654 (5 June 2001) O'Loughlin J.

[53] s.61A amended NTA.

[54] A helpful analysis of the traditional model and the impact of public law litigation is in Chayes, A "The Role of the Judge in Public Law Litigation" (1976) 89 *Harv L Rev* 1281 at 1282.

[55] Supra n33.
[56] Ibid at 268.
[57] Chayes comments in supra n77 are apposite:

"….if the right to participate in litigation is no longer determined by one's claim to relief at the hands of another party or one's potential liability to satisfy the claim, it becomes hard to draw the line determining those who may participate so as to eliminate anyone who is or might be significantly (a weasel word) affected by the outcome.." at 1290. A contrast between the outcome under the NTA and amended NTA of determining who may be a party is to be found in *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1 and *Woodridge v Minister for Land and Water Conservation* [2001] FCA 419 (11 April 2001) Katz J.
[58] "The Federal Court is managed 'on a loose rein'. Judges fully participate in policy and rule making initiatives and the Court culture is tolerant of management processes adapted to local cultures." ALRC Report 89 supra n52 p398.
[59] *Passi v Queensland* [2001] FCA 697, (14 June 2001), coram Black CJ, at paras 5 and 11 respectively.
[60] [2000] FCA 1717 (28 November 2000) Black CJ at paras 7-8.

ISSN 1326 - 0316
ISBN 0 85575 390 0

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