

**Federal Court
Native Title User Group
Adelaide, 9 July 2008**

**Lifting the burden of native title – some
modest proposals for improvement**

Justice Robert French

Introduction

1 It is in the nature of native title litigation under the substantive law that it imposes heavy burdens on the human and financial resources of the principal parties involved. These can be alleviated, only to a limited extent, by process improvements. The procedural changes made to the *Native Title Act 1993* (Cth) (NTA) in 2007 provided some new tools to the National Native Title Tribunal (the Tribunal) and to the parties to assist in a more efficient approach to the resolution of claims. But the claims are proceedings conducted in the Federal Court and their resolution is, to a degree, constrained by the judicial framework. That framework, incorporating as it does, the need to apply the substantive law, requires applicants to prove all elements necessary to make out the continuing existence of native title rights and interests within the meaning of the NTA and their recognition by the common law. They must also deal with sometimes technical questions relating to the identification of other interests, their relationship to native title rights and interests and extinguishment by various categories of past acts.

2 It has been suggested that a more inquisitorial approach to the judicial resolution of claims would be advantageous. There are limits of a constitutional character which would prevent the Court from becoming an investigative agency in relation to the existence of native title rights and interests. However there is an inquiry power available under s 138B of the NTA which can be harnessed to collect and assess evidence and arrive at conclusions capable of being fed into the mediation process and also capable of being received and adopted by the Court. The power to conduct such inquiries resides in the Tribunal. Such inquiries need not

be limited to a single claim (s 138G). They may deal with overlapping claims or regional clusters which are in mediation before the Tribunal (s 138A). These are matters in the hands of the parties and the Tribunal and depend upon a commitment to their use as a means of accelerating claims resolution. It must be acknowledged that any inquiry will involve the deployment of substantial human and financial resources although these can, to some extent, be provided by the Tribunal itself including relevant expert assistance. While an inquiry may be a vehicle for the gathering of oral testimony and expert evidence it must ultimately have regard to the substantive law for the determination of native title rights and interests. It is a tool whose potential is yet to be realised. It cannot be a complete solution to the problems of delay and expense in the resolution of claims. This is true of all process measures.

3 I would like to raise for consideration three suggestions for changes which might assist resolution whether in the litigation process or in the approach to consent determinations. They are fairly modest changes and do not affect what Brennan J might have called “the skeletal structure of native title law”. The first is a change to allow a statement of facts, agreed between the relevant State government and applicants for a native title determination, to be relied upon by the Court in making a consent determination. The second is a change to provide for a presumption in favour of the existence of native title rights and interests if certain conditions are satisfied. The third is the introduction of a provision requiring historical extinguishment to be disregarded over certain classes of land and waters when the applicants and the relevant State or Territory government have agreed that it should.

4 Before going to those suggestions, I will refer to the relevant provisions of the NTA and offer a brief overview of some of the requirements for obtaining a determination of native title under the NTA.

The purpose of the NTA

5 The preamble to the NTA recites the proposition in the decision of the High Court in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 that:

the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands.

It also declares the intentions underlying the enactment of the Act. One of those is rectification of the consequences of past injustices by the special measures contained in the Act. Another is to ensure that Aboriginal people and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire. The preamble has remained unchanged throughout the history of the Act since 1993.

6 The main objects of the Act, set out in s 3, include:

To provide for the recognition and protection of native title.

The overview of the Act in s 4 states that it “recognises and protects native title” and provides that native title cannot be extinguished contrary to the Act.

7 As the Full Court observed in *Northern Territory v Alyawarr* (2005) 145 FCR 442 (at [63]):

The preamble declares the moral foundation upon which the NT Act rests. It makes explicit the legislative intention to recognise, support and protect native title. That moral foundation and that intention stand despite the inclusion in the NT Act of substantive provisions, which are adverse to native title rights and interests and provide for their extinguishment, permanent and temporary, for the validation of past acts and for the authorisation of future acts affecting native title.

The normative foundation reflected in the preamble and the stated objects of the NTA indicate its beneficial purpose. There is a sense that the beneficial purpose has been frustrated by the extraordinary length of time and resource burdens that the process of establishing recognition, whether by negotiation or litigation, impose.

Core provisions relating to determinations and consent determinations

8 Applications for determinations of native title are made to the Federal Court under s 13. When it comes to making determinations of native title, s 94A of the NTA imposes the following requirement:

An order in which the Federal Court makes a determination of native title must set out details of the matters mentioned in section 225 (which defines *determination of native title*).

9 Section 225 is in the following terms:

A *determination of native title* is a determination whether or not native title exists in relation to a particular area (the *determination area*) of land or waters and, if it does exist, a determination of:

- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the nature and extent of any other interests in relation to the determination area; and
- (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
- (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

10 This must be read with the definition of native title in s 223, which provides:

- (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
 - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
 - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
 - (c) the rights and interests are recognised by the common law of Australia.
- (2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.
- (3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression *native title* or *native title rights and interests*.

Note: Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a valid future act.

- (3A) Subsection (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights

for native title claimants).

- (4) To avoid any doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):
 - (a) in a pastoral lease granted before 1 January 1994; or
 - (b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.

The section, by that definition, governs what applicants for native title determinations must establish in order to obtain a determination.

11 Where the parties to a native title determination application reach agreement they may apply to the Court for a consent order. The power of the Court and the process is set out in s 87 of the Act which provides:

- (1) If, at any stage of proceedings after the end of the period specified in the notice given under section 66:
 - (a) agreement is reached between the parties on the terms of an order of the Federal Court in relation to:
 - (i) the proceedings; or
 - (ii) a part of the proceedings; or
 - (iii) a matter arising out of the proceedings; and
 - (b) the terms of the agreement, in writing signed by or on behalf of the parties, are filed with the Court; and
 - (c) the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court; and

The Court may, if it appears to it to be appropriate to do so, act in accordance with whichever of subsection (2) or (3) is relevant in the particular case.

- (2) If the agreement is on the terms of an order of the Court in relation to the proceedings, the Court may make an order in, or consistent with, those terms without holding a hearing or, if a hearing has started, without completing the hearing.

Note: If the application involves making a determination of native title, the Court's order would need to comply with section 94A (which deals with the requirements of native title determination orders).

- (3) If the agreement relates to a part of the proceedings or a matter arising out of the proceedings, the Court may in its order give effect to the terms of the agreement without, if it has not already done so, dealing at the hearing with the part of the proceedings or the matter arising out of the proceedings, as the

case may be, to which the agreement relates.

Section 87A makes like provision for consent determinations for part of an area the subject of an application.

Requirements for a determination

12 It is not necessary to revisit here the entire development of the law of native title through the cases. It is sufficient to focus upon the requirements of s 223 and 225. The High Court held in *Yorta Yorta v State of Victoria* (2002) 214 CLR 422 that the statutory definition in s 223 is central. A determination under the NTA was said to be "... a creation of that Act, not the common law". This was a key decision and has been criticised as changing the conception of the NTA from that of a vehicle for development of the common law to a kind of statutory fossil bed for the common law.

13 The NTA requires that the native title rights and interests have the following characteristics:

1. They must be communal, group or individual rights and interests of Aboriginal and Torres Strait Islanders.
2. They must be rights and interests "in relation to land or waters".
3. They must be possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders.
4. The relevant people, by their law and customs, must have a connection with the land or waters.
5. The native title rights and interests must be recognised by the common law of Australia.

Each of these is a mandatory requirement for a determination of native title.

14 Determination of the existence of traditional laws and customs requires more than a determination of behaviour patterns. They must derive from some norms or a normative

system. Because there is a requirement that the rights and interests be recognised at common law, the relevant normative system must have had “a continuous existence and vitality since sovereignty”. A breach or interregnum in its existence causes the rights or interest derived from it to cease beyond revival. It is on this point in particular that great difficulty can arise. These requirements impose the burden of determining continuity of existence of their native title rights and interests upon the applicants at least by inference or extrapolation from various kinds of evidence. In the *Sampi* case, which I heard, that evidence included:

1. Oral evidence from the members of the native title claim group about their traditions and customs and the longevity of those traditions and customs.
2. Anthropological evidence.
3. Linguistic evidence.
4. Archaeological evidence.
5. Historical evidence.

15 If by accident of history and the pressure of colonisation there has been dispersal of a society and an interruption of its observance of traditional law and custom, then the most sincere attempts at the reconstruction of that society and the revival of its law and custom seem to be of no avail.

16 The “connection” requirement in s 223(1)(b) is somewhat elusive. The Full Court in *Alyawarr* endeavoured to come to grips with what it described as “opaque drafting” which picked up a term used in the judgment of Brennan J in *Mabo (No 2)* and put it into a statutory setting. In the event the Court said (at [88]):

... “connection” is descriptive of the relationship to the land and waters which is, in effect, declared or asserted by the acknowledgment of laws and observance of customs which concern the land and waters in various ways. To observe laws and acknowledge customs which tell the stories of the land and define the rules for its protection and use in ways spiritual and material is to keep the relevant connection to the land. There is inescapably an element of continuity involved with derives from the necessary character of the relevant laws and customs as “traditional”. The acknowledgment and observance, and thereby the connection, is not transient but continuing.

The Court noted that the term “connection” involved continuing assertion by the group of its traditional relationship to the country defined by its laws and customs. This could be manifested by physical presence or in other ways including the maintenance of stories and allocation of responsibilities and rights in relation to it. It was not a qualification or limitation on the range of rights and interests which can be native title rights and interests for the purposes of the NTA.

17 Section 225 mandates a determination of “who the persons, or each group of persons, holding the common or group rights comprising the native title are”. As the Full Court said in *Alyawarr* (at [78]):

That requires consideration of whether the persons said to be native title holders are members of a society or community which has existed from sovereignty to the present time as a group, united by its acknowledgement of the laws and customs under which native title rights and interests claimed are said to be possessed.

18 Identification of the relevant group and its precise composition has also given rise to questions of some nicety the subject of extensive evidence and debate. Are the native title holders to be identified as a society which has subsisted since the time of sovereignty? Are they part of a larger, cultural bloc? Are they to be defined by reference to estate groups specified as distinct native title holding groups limited to interests in particular areas? Is the putative native title claim group an impermissible hybrid of distinct groups which should be separately identified as such?

19 The determination must also specify the nature and extent of other interests and the relationship between them and the native title rights and interests. In remote areas this may not pose much of a problem. In areas where there has been a degree of dealing with the land and waters, it may require extensive research.

Consent determinations

20 Before the Court can make a consent determination under s 87 of the NTA it must be satisfied that the order proposed is “within the power of the Court” and “appropriate”. The same requirements apply to a consent determination under s 87A where a part of the area under claim is involved.

21 Those statutory terms “within power” and “appropriate” reflect a principle of general application whenever the Court is asked to make orders pursuant to an agreement between parties to litigation before it. The Court cannot make orders by agreement which it would have no power to make in the absence of agreement. This does not mean that parties who have come to an agreed result must prove their case to the Court. They may have agreed that all the facts exist which support the orders which are sought. But if, for example, the parties to a native title determination application had agreed to a determination of native title rights and interests which were not interests in relation to land or waters, then the Court could not make a determination of such rights or interests. The Court could not make a determination which did not conform with s 225. That is because s 94A requires that it set out details of the matters prescribed in s 225.

22 The Court must also be satisfied that the proposed determination is “appropriate”. This is an evaluative term and so has a somewhat elastic application. Where a determination of native title is made that determination binds not only the parties but is good against the whole world. Words like “to the exclusion of all others” do not apply to exclude only those who are parties to the proceedings. So evidence of the existence of a proper basis for a determination may be required to reassure the judge that the agreement is rooted in reality.

23 In deciding whether a proposed determination is appropriate the Court will not lightly second guess the agreement that the parties have reached. That is particularly so given that the NTA accords a high priority to negotiated resolutions. This has been recognised by judges of the Court in a number of cases.

24 The cases do not require that anthropological or other expert reports be put before the Court on each occasion although on many, if not most occasions such material has been submitted. It may be however, that a detailed statement of agreed facts, based upon materials contained in such reports or from other relevant sources would suffice. While there may be some variance in what individual judges may require to support a consent determination, there is no rule that the judge must always be provided with volumes of anthropological material. It may be, for example, that a State government has accepted oral accounts from some key members of the native title holders group and, having regard to its own archival materials, is satisfied that it can agree to the determination.

25 Whatever process is used the material before the Court must be capable of supporting the determination sought. If, for example, anthropological material or a statement of agreed facts were placed before the Court which were inconsistent with the definition of the native title holders group in the proposed consent order, the Court could quite properly require the parties to clarify the apparent inconsistency or amend the proposed determination.

26 In conclusion, on this topic, there might be some utility in a provision of the Act authorising the Court, in a case where a consent determination is offered, to act upon a statement of facts agreed between at least the applicants and the State. This is on the assumption that all respondents consent to the proposed determination.

27 It would not be necessary in that event that all respondents sign up to the agreed statement of facts. There will be cases in which the relevant anthropological material has been produced as part of the State's requirement to be satisfied that the necessary elements to support a determination of native title exist. However, where these elements can be distilled into an agreed statement of facts and placed before the Court, the Court's task will be made easier. The basis for its assessment that the determination is appropriate should be clearer. The alternative requires the Court to peruse the anthropological material itself and discern the elements from often very substantial texts.

Lifting the burden – a presumption

28 It may be possible to lighten some of the burden of making a case for a determination, whether in litigation or mediation, by a change to the law so that some elements of the burden of proof are lifted from applicants.

29 A presumption may be applied in a variety of ways in favour of native title applicants. It could be applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time. A fact sufficient to engage such a presumption might be that the native title claim group acknowledges laws and observes customs which members of the group reasonably believe to be, or to have been, traditional laws and customs acknowledged and observed by their ancestors. And if by those laws and customs the people have a connection with the land or waters today, in the sense explained earlier, then a continuity of that connection, since

sovereignty, might also be presumed. Such a presumption would enable the parties, if it were not to be challenged, to disregard a substantial interruption in continuity of acknowledgment and observance of traditional laws and customs. Were it desired, the provision could expressly authorise disregard of substantial interruptions in acknowledgment and observance of traditional law and custom unless and until proof of such interruption was established.

30 A presumption can be challenged by a respondent party including the relevant State or Territory. And if there were concerns on the part of States about expanding the scope of compensation claims in respect of historical extinguishment, it may be that the presumption might not be applied to such cases. It would be important that any presumption be robust enough to withstand the mere introduction of evidence to the contrary. Some presumptions are little more than platforms for inferences and collapse upon the introduction of evidence to the contrary whatever its probative value. A presumption subject to proof to the contrary is to be preferred.

31 The form of a provision containing a presumption could be along the following lines:

- (1) This section applies to an application for a native title determination brought under section 61 of the Act where the following circumstances exist:
 - (a) the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;
 - (b) members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;
 - (c) the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application;
 - (d) the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.
- (2) Where this section applies to an application it shall be presumed in the absence of proof to the contrary:

- (a) that the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty;
- (b) that the native title claim group has a connection with the land or waters by those traditional laws and customs;
- (c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established.

32 I enter the disclaimer that this is rough drafting. It is offered as a basis for discussion of the use of presumptions in this area.

Agreement to disregard extinguishment

33 The second suggestion, by way of modest amendment to the NTA, would allow extinguishment to be disregarded where an agreement was entered into between the States and the applicants that it should be disregarded. Such agreements might be limited to Crown land or reserves of various kinds. The model for such a provision may be found in ss 47 to 47B. By way of example, arcane argument over long dead town sites might be avoided by resort to such agreements. Presumably some form of registration or formal public record of the agreement would have to be maintained. Native title so agreed would also be subject to existing interests. If, for example, the vesting of a reserve was taken to have extinguished native title an agreement of the kind proposed could require that extinguishing effect to be disregarded while either applying the non-extinguishment principle under the NTA or providing in the agreement itself for the relationship between native title rights and interests and the exercise of powers in relation to the reserve.

Conclusion

34 The preceding suggestions are modest and are offered as a basis for discussion. They will not lift the entire burden of bringing native title determination applications. In combination with process improvements, they may contribute to some further mitigation of the burden of these proceedings.