

Prima Facie Native Title

Peter C. Grundy

The Mabo Decisions

Native title, only recently recognised in Australia, has emerged from a trying process. The High Court delivered its first Mabo judgement on 8 December 1988, some six and a half years after the action was commenced by Eddie Mabo and James Rice representing family groups of the Murray Islands. They sought a declaration that, among other things, native title was held to the island land that they occupied.

In Mabo 1 the High Court considered the validity of the *Queensland Coast Islands Declaratory Act 1985* which, declaring that the islands were Crown land subject to the applicable legislation, could have extinguished the basis of the claim by the Murray Islanders. The High Court concluded that the Queensland Act was incompatible with the Federal Racial Discrimination Act. By virtue of section 109 of the Constitution, Commonwealth law prevails; in 1988 Queensland therefore failed in its attempt to quash this native title claim and it continued before the High Court.

On 3 June 1992, a decade after the issuing of the Murray Islanders' writ, the High Court delivered the judgement now known as Mabo 2. In Mabo 2 the High Court held that Australian common law recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.

The Commonwealth's Legislative Response

The Native Title Bill was developed as part of the Commonwealth response to Mabo 2; it emerged from an extensive round of consultations. With the passing of the bill, the Australian Parliament concluded a strenuous task. During Senate consideration, a total of 149 amendments was moved, of which 119 were agreed to. The Senate took 51 hours and 49 minutes to deal with the bill, the longest such consideration in Australian history.

The *Native Title Act 1993* responded to a range of issues about native title in Australia. It answered questions concerning the appropriate legislative response to Mabo 2, the ways in which native title could be acknowledged and the significant matter of reconciliation. However, there were certain things that the Act did not do and many that it could not. Crucially, because it provided a somewhat incomplete definition of native title at s.223(1) and (2), the Act did not articulate for Aboriginal people what their native title rights are. It did, however, prescribe a mechanism (including mediation through the National Native Title Tribunal) for determining where native title persists.

Under the Act the National Native Title Tribunal (NNTT) began operating in January 1994. Five months later the Parliamentary Joint Committee on Native Title, appointed under the Act¹, commenced its task of monitoring the Act's implementation.

The Parliamentary Committee has since tabled two reports. The first, in October 1994, discussed issues that arose during its initial round of public consultations. The second report, tabled in March 1995, examined the NNTT President's first annual report;² the Committee concentrated on the process by which native title applications are accepted by the Tribunal, an issue that was also raised in its first report.

Applications for Native Title

The acceptance process for native title applications has been the subject of considerable comment, not only in the Committee's reports. For instance, in the January 1995 issue of *The Australian Law Journal* Peter Butt dealt in part with answering a central question about applications: 'What must an applicant do to make out a "prima facie" claim to native title?' He noted that the NNTT Registrar makes decisions concerning the acceptance of native title applications:

Under s.62 of the Act, an application for a determination as to the existence of native title is lodged with the registrar of the National Native Title Tribunal. Where the applicant is claiming native title, the application must be accompanied by specified information, including a sworn affidavit that the applicant believes that native title has not been extinguished: s.62(1). If the requirements of s.62 are met, the registrar must accept the application, unless the registrar considers (a) that the application is frivolous or vexatious; or (b) that

¹ s.204.

² Tabled in the Parliament, 15 November 1994.

"prima facie the claim cannot be made out". If the registrar considers that the application ought not to be accepted on these grounds (a) or (b), then the registrar must refer the application to a presidential member of the Tribunal: s.63(2). If the presidential member is of the same opinion, then he or she must give the applicant "reasonable opportunity to satisfy the presidential member that the application is not frivolous or vexatious, or that a prima facie claim can be made out": s.63(3).³

If the presidential member disagrees with the Registrar, the Registrar is directed to accept the application.⁴ In essence, then, the Registrar either accepts an application or, under the direction of a presidential member, does not accept an application. The Act does not refer to the Tribunal *rejecting* applications although, of course, that is what ultimate refusal to accept amounts to; and the term 'reject' has been employed widely.

The Parliamentary Committee's second report noted⁵ that the provision of the Native Title Act for *prima facie* assessment was not part of the original bill; it was adopted in one of the 119 amendments agreed to by the Parliament. It remains an open question whether the drafters of the amendment intended the new section to entail a difference in the threshold test as applied by the Registrar and presidential members. Nevertheless, Justice Robert French, President of the Tribunal, has outlined the difference in approach between the Registrar's *prima facie* test and that of the presidential member as required by s.63(3)(a) of the Act:

There is a semantic difference between the requirement imposed on the applicant at this point and the criterion under s.63(1)(b) upon which the Registrar must refer the application. Whereas before the Registrar the applicant merely had to survive the possibility that prima facie the claim could not be made out, now a positive case must be shown that a prima facie claim can be made out.⁶

In the *Australian Property Law Journal* of November 1994, John Hockley⁷ described as 'unsatisfactory' the current arrangement for a negative *prima facie* test applied by the Registrar, and a positive *prima facie* test applied by the presidential member. Dr Hockley considered that tension could result from the different tests and suggested a more rigorous screening test or provisions requiring the Tribunal to conduct an inquiry in all cases.

³ 'The Conveyancer', *The Australian Law Journal*, Vol 69, No 1, January 1995, p.10.

⁴ s.63(4).

⁵ Parliamentary Joint Committee on Native Title, *The National Native Title Tribunal Annual Report 1993-1994*, paragraph 3.4, p.6; also noted in J. Hockley, 'Native Title Act 1993 (Cth): "Fine Tuning" Needed', *Australian Property Law Journal*, Vol 2, No 3, November 1994.

⁶ French J, 'Reasons for Ruling in Relation to Criteria for Acceptance of a Native Title Determination Application', unpublished, 15 September 1994, p.25.

⁷ Hockley, *op. cit.*, p.247.

The Prima Facie Test

The Parliamentary Committee has followed this issue closely. It has been advised of concerns about the operation of s.63 of the Act; in particular, the fact that applications have been subjected to *prima facie* examination.

Although at s.63 the Act prescribes *prima facie* tests, the Tribunal President has promulgated a procedure (6.3) which states that an applicant is not required to establish a *prima facie* case in order to have an application accepted. In a submission to the Committee, the Hon. Peter Dowding, solicitor for the Ngarluma and Injibarndi people in regard to their native title application, referred to the Tribunal's procedure 6.3. Mr Dowding has claimed that, although the Tribunal is not required to make a decision on *prima facie* grounds, in the claim with which he is associated the Tribunal took that approach. That is, according to Mr Dowding the onus was put on the applicants to show why their application should be accepted. He concluded that this situation involved issues that should have been resolved after the application had been accepted.⁸ The Ngarluma and Injibarndi application (WN94/6) was subsequently accepted by the Tribunal Registrar on 20 December 1994.

In the overview to his first annual report, Tribunal President Justice Robert French notes the Registrar's role in assessing applications and advises:

There is, at this point, a role for the Registrar and the Tribunal in screening out hopeless applications.⁹

It is certainly the case that the Act¹⁰ provides for an assessment of the application on *prima facie* grounds at the acceptance phase. And as Mr Dowding has pointed out, according to the Tribunal's procedure 6.3, an applicant is not required to establish a *prima facie* case in order to have an application accepted. Presumably the Tribunal intends procedure 6.3, to relate to the 'negative' *prima facie* test applied by the Registrar. As was indicated in the Parliamentary Committee's first report,¹¹ there is no inherent contradiction in the Tribunal:

- having the power or responsibility to make a *prima facie* assessment pursuant to the Act, and
- having the option to accept an application even if a *prima facie* case has not been established.

⁸ Submission No.6, DCH Legal Group to Parliamentary Joint Committee on Native Title, 5 December 1994, Parliament House, Canberra, p.4.

⁹ *National Native Title Tribunal Annual Report 1993/94*, AGPS, p.1.

¹⁰ s.63(1)(b).

¹¹ Parliamentary Joint Committee on Native Title, *Consultations During August 1994*, paragraph 3.20, p.11.

Indeed, the Act¹² even allows for the fact that an application could reach the ‘inquiry’ stage before it was dismissed on *prima facie* grounds, although this strains the logic of *prima facie*.

The Parliamentary Committee’s second report concluded that the Tribunal has been acting consistently with its powers pursuant to the Act in subjecting applications to *prima facie* assessment. Importantly, the fact that the Tribunal can accept an application where a *prima facie* case has not been made out does not entail that it should forego the *prima facie* assessment. Nevertheless, three questions are relevant:

- Should the Tribunal exercise as a matter of course its option (pursuant to procedure 6.3) concerning the acceptance of applications that have not established a *prima facie* case?
- Indeed, should the Act be amended to preclude *prima facie* assessment prior to acceptance?
- Or should the Act be amended to allow for the resolution of *prima facie* matters at an early inquiry stage?

The third question relates to an amendment proposal put by Justice French and canvassed by Dr John Hockley; it concerns the post-acceptance phase of the process and is considered later in this article.

In regard to the first two questions, Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Michael Dodson, has endorsed a low threshold test for acceptance of claims.¹³ Mr Dodson referred to the contention of the applicants in the Waanyi claim that no investigation is required on the part of the Registrar and no material, other than that accompanying the application, should be taken into account.¹⁴

Should this approach be adopted and comprehensive *prima facie* assessment discarded, the Tribunal would be unable to screen out what the President describes as ‘hopeless applications’.¹⁵ And there would be two consequent disadvantages in such an approach. First, it could add to the mediation workload of the Tribunal without prospect of advantage to native title applicants: the validity of ‘hopeless’ applications would not be expected to improve during mediation. Second, it would deny applicants some potentially useful pre-acceptance advice. These are major considerations against the notion that the Act should be amended to preclude *prima facie* assessment prior to acceptance.

¹² s.148.

¹³ Submission No.8, M.Dodson to Parliamentary Joint Committee on Native Title, 20 December 1994, Parliament House, Canberra, p.2.

¹⁴ French J, op. Cit., 15 September 1994, p.12.

¹⁵ *NNTT Annual Report*, op. cit., p.1.

In reference to the pre-acceptance process, Mr Dodson has drawn attention to the Tribunal's guidelines concerning leaseholds. The Committee's first report noted¹⁶ that if a pastoral lease does not contain a 'reservation' in favour of Aboriginal people, then the Registrar will not usually accept the application but refer it to a presidential member. The wording of the guidelines is that such applications 'will *not ordinarily* be accepted by the Registrar' (emphasis added). Mr Dodson has advised that:

The legal uncertainty as to the extent that pastoral leases extinguish native title even beyond the reservations leads me to query why the Registrar of the Tribunal is rejecting applications on this ground while this uncertainty persists.¹⁷

Although it is not the Registrar who 'rejects' applications, Commissioner Dodson's remarks are important. Given the significance of the pastoral lease issue and the fact that the matter may receive some clarification in the near future from the Wik claim before the Federal Court, it is useful for the Tribunal (where possible) to employ the option provided in the guidelines. This is the case because, depending on the terms of the claim, *elements* of native title may be able to be mediated despite the issuing of a valid leasehold. Although the Act provides that presidential members may decline to accept applications where native title can be demonstrated to have been extinguished, the Tribunal can maintain a flexible approach in other cases. Unless there is irrefutable evidence of extinguishment, applications should be accepted even if in many cases the mediation process would be significantly constrained until at least such time as the Federal Court has dealt with the Wik case. Pursuant to s.148 any such applications that reached the 'inquiry' stage would be subject to the *prima facie* test following the Federal Court's judgement in the Wik case.

While Justice French confirmed¹⁸ that to 24 November 1994 no application had been rejected by the Tribunal on the grounds of extinguishment by virtue of any past or present pastoral lease, on 14 February 1995 he issued his *Reasons for Ruling on Acceptance of a Native Title Determination Application* for the Waanyi claim. He found¹⁹ that under common law principles native title was extinguished by pastoral leases granted in 1883 and 1905; Justice French accordingly directed the Registrar not to accept the Waanyi application.

Points of Law

Concern about *prima facie* examination of applications has tended to concentrate on the fact that points of law are assessed. Mr Greg McIntyre, a barrister practising law in the field of

¹⁶ Parliamentary Joint Committee on Native Title, *Consultations During August 1994*, paragraph 3.40, p.16.

¹⁷ Submission No.8, op. cit., p.4.

¹⁸ Submission No.9, Justice French to Parliamentary Joint Committee on Native Title, 11 January 1995, p.6.

¹⁹ French J, 'Reasons for Ruling on Acceptance of a Native Title Determination Application', unpublished, 14 February 1995, p.70.

native title, advised the Committee of his concern that the Tribunal Registrar formed views on points of law in the screening process, in effect making quite substantial decisions on questions of law.²⁰ It has already been noted that Peter Dowding referred to the same issue in his submission. And Commissioner Dodson stated:

I am anxious that the Registrar has in some instances made quite substantial decisions on questions of law in what is supposed to be a preliminary screening process.²¹

Perhaps such expressions of concern should not single out the Tribunal Registrar. While the Registrar forms opinions on points of law and acts upon them in referring applications to presidential members, it is the Tribunal through its presidential members that confirms such acts or negates them pursuant to s.63 of the Act; in so doing the presidential members also form opinions on points of law. To the extent that such complaints are relevant to the Registrar, Justice French has stated:

There is no doubt that in the process of referral of certain applications to a Presidential Member, the Registrar is making judgements about whether, *prima facie*, the claim can be made out. That is what the Act requires the Registrar to do. If, in the course of making that judgement, the Registrar forms an opinion as to the law relating to the extinguishment of native title, she is only acting in accordance with her duty.²²

Although the Registrar's function is to apply a 'negative' *prima facie* test, under the Act *prima facie* assessment allows for the forming of opinion on points of law by both the Registrar and presidential members. Those who are concerned by the fact that the Tribunal considers points of law in the acceptance process, then, should address their criticisms to the Act. One way in which to rule out assessment of points of law during the acceptance process (by amending the Act) would be to lower the present threshold level for acceptance of applications by removing the Tribunal's power of *prima facie* assessment. As already indicated, however, there are reasons to conclude that that would be undesirable. (Another proposal, put by Justice French on 14 March 1995, would address this problem without lowering the acceptance threshold. That proposal, beyond the scope of this discussion, provides that native title applications would be lodged not with the Tribunal, but in the Federal Court.)

In the period under review by the President's first annual report (January to June 1994) there were two applications referred by the Registrar to the President.²³ To date, however, the most significant referral has been the Waanyi application (QN94/9). The application was referred to

²⁰ Parliamentary Joint Committee on Native Title, *Hansard*, 24 November 1994, p.704.

²¹ Submission No.8, *op. cit.*, p.4.

²² Submission No.9, *op. cit.*, p.7.

²³ *NNTT Annual Report*, *op. cit.*, p.9.

the President on 16 August 1994 and on 15 September 1994 Justice French issued his *Reasons for Ruling in Relation to Criteria for Acceptance of a Native Title Determination Application*. There Justice French made two significant points:

- It is not necessary that applicants identify comprehensive evidence of non-extinguishment as a condition of acceptance of their claim.
- On the other hand, evidence of an extinguishing event may be relied upon by the Registrar in deciding that *prima facie* the claim cannot be made out.²⁴

The initial point is significant in two ways. First, it avoids the (in principle) difficulty of being required to prove the *non-occurrence* of an event (extinguishment). Second, and as a consequence, it relieves claimants of one element of onus of proof in the application acceptance phase.

Now, applications to determine whether native title exists can be made other than by persons claiming to hold native title; they are known as non-claimant applications. For example, the Parliamentary Committee was told by the Mount Isa City Council²⁵ of its need to extend the cemetery. As the Council did not know whether native title was considered to prevail over that land, it could submit a non-claimant application to the Tribunal for a determination.

In one non-claimant application (QN94/4 at Edmonton south of Cairns) evidence of an extinguishing event was apparent to the Registrar in referring it to the President. Mr McIntyre, in noting the Aboriginal claimant response to this application, stated²⁶ that the Tribunal determined as a matter of law that there was no claim which could be made over any of that area. Mr McIntyre advised that, as a consequence of the claimant response being rejected, the non-claimant application proceeds as an unopposed non-claimant application with no Aboriginal claimant as a party to the proceedings. Mr McIntyre added²⁷ that taking this decision meant that the claimant response had no standing. He suggested²⁸ that there ought to be some provision for the claimants to be able to continue to put their case as the non-claimant application was being considered.

Commissioner Dodson has also taken an interest in the Edmonton claim. Notably, and like Mr McIntyre, Mr Dodson has expressed the view that the Registrar's decision on this point of law was 'legally questionable'. Both Mr McIntyre and Mr Dodson would have preferred such points of law to have been considered during the mediation process. Mr McIntyre advised the Committee that there is only one remedy to situations where responses to non-claimant applications are not accepted allowing the non-claimant application to proceed unopposed:

²⁴ French J, *op. cit.*, p.30.

²⁵ Parliamentary Joint Committee on Native Title, *Hansard*, 4 August 1994, pp.343, 345.

²⁶ *ibid.*, 24 November 1994, p.702.

²⁷ *ibid.*, p.703.

²⁸ *ibid.*, p.704.

I think the only way to deal with it is to make an application under the Administrative Decisions (Judicial Review) Act to overturn the decision of the Registrar rejecting your application, which is a ludicrous process.²⁹

Justice French has commented on the details of the referral of the Edmonton non-claimant application. He advised³⁰ that the claimant (respondent) application was referred by the Registrar in part on the basis that some of the area under claim had been the subject of freehold grant and that *prima facie* the claim to native title could not succeed over the whole of the area covered by the application. At page 3 of his submission Justice French explains why, pursuant to the Act³¹, an application cannot be accepted in such circumstances. Justice French accordingly wrote to the applicant on 1 September 1994 inviting submissions on the acceptance question within fourteen days. By 27 September no response had been received and the Registrar was directed not to accept the application.

There is, then, clear justification for the Native Title Act³² provision for the Registrar to conduct the pre-acceptance *prima facie* test. Without it, the Tribunal's operations could become burdened by 'hopeless' applications. Where it is clear that a claimant response to a non-claimant application cannot be accepted on *prima facie* examination, the Tribunal President³³ has confirmed that it is open to the Tribunal to hear evidence from unsuccessful claimants if the Tribunal can be assisted in arriving at its decision at the inquiry. That is, while 'standing' may not be granted, in order to be heard during the inquiry process it is not necessary to pursue the course outlined by Mr McIntyre — an application under the *Administrative Decisions (Judicial Review) Act 1977*.

Importantly, while it would be undesirable to lower the present threshold for the acceptance of applications, there remains considerable flexibility in the Tribunal's acceptance process by virtue of:

- the President's procedure 6.3 whereby an applicant is not required to establish a *prima facie* case in order to have an application accepted;
- the President's *Reasons for Ruling in Relation to Criteria...* (p.30) whereby, to have an application accepted, it is not necessary that applicants identify comprehensive evidence of non-extinguishment; and

²⁹ ibid.

³⁰ Submission No.9, op. cit., p.6.

³¹ s.62.

³² s.63.

³³ Submission No.9, op. cit., p.9.

- the President’s submission (No.9, p.9) whereby, for non-claimant applications, it is open to the Tribunal to hear evidence from those whose claimant response has not been accepted on *prima facie* grounds.

Justice French’s Proposed Amendment

Section 139(a) of the *Native Title Act 1993* requires an ‘inquiry’ to be held in relation to applications that achieve agreement pursuant to s.73. This is to establish whether the agreement is within power and appropriate. Although the Tribunal has the power to conduct *prima facie* assessment of applications before they are accepted, and the Act³⁴ allows for *prima facie* assessment at the inquiry stage of an application, would it be desirable to facilitate such assessment *following* acceptance of an application in certain circumstances? The President has proposed an amendment to the *Native Title Act 1993* that would:

enable an inquiry to be held, on a discretionary basis, at any point after acceptance of the application to determine whether there is a *prima facie* case and in that context to allow for important points of law which may affect the negotiation process to be referred to the Federal Court.³⁵

The resolving of points of law early in the native title consideration process has been a continuing issue. As already discussed, the Tribunal’s acceptance process has included the development of opinion on significant points of law, in turn determining whether an application is accepted or referred to a presidential member. Clearly the Registrar acts on the basis of such opinions in processing all applications. In the case of applications that have been referred to a presidential member (such as the Waanyi claim) they were referred on the basis of an opinion about a point of law; in the Waanyi case it concerned the status of the pastoral lease at Lawn Hill. The President’s proposed amendment, then, is not one designed to permit points of law to be taken into account early in the acceptance process — that is already being done.

Rather, the President’s suggested amendment addresses his perceived need for *an inquiry* to proceed following acceptance in certain cases where agreement has not been reached between the parties. As the Act stands, an inquiry can only be held if the application is unopposed or the subject of agreement either with or without mediation.³⁶ In theory the benefit of the proposed amendment would be that the Tribunal, by conducting the inquiry early, could identify issues affecting the application and, where necessary, refer them to the Federal Court for determination pursuant to s.145 of the Act. This process could expedite difficult cases.

³⁴ s.148.

³⁵ *NNTT Annual Report*, op. cit., Appendix 9, p.67; see Appendix 5 of second report of the Parliamentary Joint Committee on Native Title, *The National Native Title Tribunal Annual Report 1993-1994*.

³⁶ s.139(a).

Perhaps one virtue in this proposal is that it potentially addresses the various concerns that have been expressed about the fact that the Tribunal Registrar has been acting on opinions about points of law during the process of accepting applications. Were an early inquiry process available, in appropriate cases the Tribunal could exercise the (existing) option of accepting applications although a *prima facie* case was not established confident that an early inquiry could address issues relevant to the *prima facie* test. (In fact, the President's proposal is premised on the postponement of the *prima facie* test until the application has been accepted.) The present concern (albeit questionable) about the Registrar having regard to points of law in the acceptance phase could be alleviated, the parties having such issues clarified through an early inquiry, and the Federal Court would be able to determine matters that might otherwise remain unresolved for a considerable period. Justice French notes in his annual report³⁷ that, for example, a test case on the impact of a pastoral lease with a statutory reservation in the area the subject of the claim, could be considered in this way. Commissioner Dodson has recognised the value of the proposal, confirming in his submission³⁸ that the resolution of questions of law at an early stage would enhance the negotiation process and give greater certainty and credibility to the native title determination procedures.

While there are benefits in the President's proposed amendment to the Act, it is not without difficulty. Perhaps the most significant issue concerns the concept of mediation. Despite being termed a Tribunal, the NNTT is more accurately described by Justice French as a native title dispute resolution service. The Tribunal assists parties to native title claims to resolve those claims by agreement. However, because Justice French's proposed amendment could open the inquiry process at an early stage following acceptance of an application, one of the major benefits of the process envisaged under the Act could be put at risk. That is, the parties would have at least some elements of the claim dealt with in the *public* inquiry process at an early stage rather than in *private* mediation. The Parliamentary Committee's second report advised³⁹ that this could hazard the chances of an agreed outcome. In his submission Commissioner Dodson endorses the private mediation process:

The adoption of interests-based negotiation by the Tribunal which recognises the possible need for confidentiality and is flexible in the consultation options available to parties is, I believe, a balanced method for dealing with claims.⁴⁰

Nevertheless, it is important to record that the President's proposal would not compel the Tribunal to conduct an early inquiry. Rather, the Act could be amended to provide an additional option for processing particular applications. It also should be noted that the proposal would enable inquiries to be held *on a discretionary basis* to determine *prima facie* matters and refer points of law to the Federal Court. Provided that this was the approach taken, and that every attempt was otherwise made to pursue mediation, the President's proposal could be useful

³⁷ *NNTT Annual Report*, op. cit., p.67.

³⁸ Submission No.8, op. cit., p.13.

³⁹ *The National Native Title Tribunal Annual Report 1993-1994*, paragraph 4.5, p.14.

⁴⁰ Submission No.8, op. cit., p.12.

because it would increase the flexibility of the Tribunal's procedures. In some instances applicants may prefer an early inquiry rather than have the application subjected to pre-acceptance examination on points of law.

Summary

This article has explored some wider reasons for supporting the following judgements of the Parliamentary Committee's second report:

- that the Tribunal's acceptance process, including *prima facie* assessment of applications, is consistent with section 63 of the *Native Title Act 1993*; and
- that there are grounds for the Tribunal President's proposed amendment to the Act which would allow for increased flexibility through an early inquiry process for applications.