Chapter 2

The Native Title Environment

Introduction

2.1 The decision by the High Court in *Mabo v the State Queensland [No.2]* 175 CLR 1 held for the first time that Indigenous Australians have native title rights in relation to land recognised by the common law. The judgment challenged Australia's legal and parliamentary systems to provide a framework to respect and protect those rights, while at the same time providing the necessary certainty to enable economic activity and development to proceed.

2.2 The *Native Title Act 1993* (the Act) commenced on 1 January 1994. The legislation provides a legal framework for the recognition of native title. It also established the National Native Title Tribunal (NNTT). As the NNTT observed in its submission its first ten years of operation have seen an evolution in practices and functions:

> In a relatively new legal environment it is not surprising that over the life of the tribunal the law has been subject to dramatic changes as legislation is implemented and then amended, and as judicial precedents are established.[1]

2.3 Soon after the commencement of the Act, certain developments (such as the *Brandy* case[2]) necessitated amendments to the Act. In addition, the High Court in its decision in *The Wik Peoples v The State of Queensland and Ors* (1996) 187 CLR 1 found that the grant of a pastoral lease does not necessarily extinguish native title.

2.4 Further, some held the view that the Act had not delivered real outcomes. As the then Attorney-General indicated in his second reading speech to the Native Title Amendment Bill 1998:

> After almost four years of operation and over 600 claims lodged under the Act, there had been only one determination of native title on mainland Australia.[3]

2.5 Various bodies had been particularly critical of the complex and time consuming native title process. Legislative amendments seeking to clarify the Act and respond to the other concerns were made with the passage of the *Native Title Amendment Act 1998.* The Act received Royal Assent on 27 July 1998.

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1 Submission No 22, p 43.

2 *Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245.*

3 *House of Representatives Hansard*, 4 September 1997, p 7886.

2.6 The role of the Tribunal was substantially altered by the 1998 amendments which transferred certain functions to the Federal Court while enhancing others performed by the Tribunal. The 1998 amendments also gave the Tribunal an arbitration and mediation role in the *future act* process. (See paragraphs 2.29 – 2.38 for further discussion).

The Tribunal and the Registrar

2.7 The NNTT identifies its main role as being:

> to assist people to resolve native title issues. This is done through agreement-making.[4]

2.8 The Tribunal (the President, deputy presidents and other members) mediates native title determination applications, as well as compensation applications.

2.9 The position of Native Title Registrar is established under part 5 of the Act. The Registrar's statutory responsibilities include the establishment and maintenance of the:

- Register of Native Title Claims (subsection 185(2));
- National Native Title Register (subsection 192(2));
- Register of Indigenous Land Use Agreements (subsection 199A(2)).

2.10 The Registrar (or his delegates) also applies the registration test under sections 190A to 190C, and assists the President of the Tribunal in the management of the administrative affairs of the Tribunal (sections 96 and 129).

2.11 There are two distinct facets of activity within the Tribunal. The President commented in evidence that "many clients or stakeholders appear to perceive the tribunal as a single entity performing a range of functions under the act"[5]. In its submission this view was given further consideration:

> for example, many seem to consider that it is the Tribunal which applies the registration test to native title claimant applications and also mediates in relation to those applications when, in accordance with the Act, it is the Registrar (or his delegates) who apply the registration rest and members (or presidential consultants) who mediate.[6]

2.12 The President's view was supported by other evidence received by the Committee during the inquiry.[7]

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4 Submission No 22, p1.

5 *Committee Hansard*, 27 March 2003, p 1.

6 Submission No 22, p 3.

7 See for example Northern Territory Cattlemen's Association Inc Submission No 6, and New South Wales Farmers' Association Submission No 20.

The Tribunal's mediation and agreement making role

2.13 The National Native Title Tribunal's roles include:

- Mediation of native title claims, compensation applications, consent determinations and a number of other agreements provided for under the Act;
- Assistance in the negotiation of Indigenous Land Use Agreements;
- Arbitration on objections to the use of the expedited procedure in proposed developments; and
- Facilitation of agreements on a wide range of matters under the Act.

2.14 The Tribunal's mediation and agreement making role is conducted under the direction of the Federal Court of Australia.

2.15 In its submission the NNTT explained:

> The purpose of mediation is to assist parties reach agreement on all or some issues specified in s.86A (1) of the Act, such as whether native title exists and, if it does exist, who holds native title, what constitutes the native title rights and interests, whether there are any other (non-native title) interests in the claimed area and, if so, the relationships they have with the native title rights and interests. [8]

2.16 The Tribunal also mediates compensation applications and may also provide assistance to those wishing to negotiate Indigenous Land Use Agreements (ILUAs), (see paragraphs 2.54-2.57). Its future act work is governed by Part 2 Divisions 3 of the Act.

2.17 Native title claimants lodge their applications with the Federal Court who in turn may refer the claim to the Tribunal for mediation. In its submission the NNTT set out the ensuing process:

> If the parties agree on some or all of those matters, they will set out their agreement in the form of a proposed order of the Federal Court. It is then for the Court to decide whether it can, or will, make an order consistent with the terms of the agreement reached between the parties.[9]

2.18 Further, it indicates that prior to the 1998 amendments, claimant applications were lodged with the Tribunal rather than the Federal Court. The Court was not involved in any referral process nor did it supervise the mediation program.[10]

2.19 The Committee was advised by the NNTT that at 30 June 2000, 214 applications had been referred by the Federal Court to the Tribunal for mediation. By 31 October 2002 that number had increased to 314. At this date, there were 259 active

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8 Submission No. 22, p 39.

9 Submission No 22, p 39.

10 Submission No. 22, p 40.

claimant applications awaiting possible referral by the Federal Court to the Tribunal for mediation. [11]

2.20 Prior to the 1998 amendments, non-claimant applications were allowed under the Act. The NNTT submission also explains the nature of so called "non-claimant" applications:

> Non-claimant applications are usually made for the purpose of obtaining a determination that native title does not exist or to enable a future act to occur without the need for negotiation with people who may hold native title in relation to an area. People who wish to be recognised as native title holders for the area subject to a non-claimant application can respond by filing a native title claim within the relevant period. Unless a claimant application is filed in response, the non-claimant applicant can proceed with future acts without going through the future act process set out in the Act.[12]

2.21 Whether an application is a native title claimant application or a non-claimant application the Registrar is required to notify the claim to the public and interested parties (see paragraphs 2.50 – 2.51), prior to the matter proceeding to mediation. The Tribunal notes that at 31 October 2002, there were 31 non-claimant applications in the system, which is less than five per cent of total active claimant applications. [13]

2.22 In addition to the work conducted by the Tribunal in the mediation of claims, it also has a role in facilitating certain agreements. These agreements may involve non-native title matters as the NNTT submission indicates:

> s.86F of the Act allows the Tribunal to facilitate agreements to settle applications that do not necessarily result in a determination of native title. Parties to court proceedings may request the Tribunal to provide assistance in negotiating an agreement relating to:
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> - withdrawing or amending an application;
> - varying parties to the proceedings; and
> - doing anything else in relation to an application.[14]

2.23 This form of agreement was added by the 1998 amendments and is illustrated by an agreement between the ACT Government and ACT native title claim groups. The agreement provided that the claimants withdraw their claim in exchange for benefits including involvement in the management of the Namadji National Park.[15]

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11 Submission No. 22, p 55.

12 Submission No 22, p 69.

13 Submission No. 22, p 70.

14 Submission No 22, p 40.

15 Available on Chief Minister's Department's website at http://www.cmd.act.gov.au/community/indigenous/ATSIagreement.html

2.24 The Tribunal also mediates on consent determinations. The NNTT submission notes that such mediation can be necessary when an agreement has been reached,

> but there are technical or logistical difficulties preventing the formal signing of the agreement. A consent determination may also be made when one of the claimants refuses to sign, even though the claim group as a whole has reached agreement.[16]

The Tribunal observes that this type of consent determination is made "where the parties (and particularly the native title party) are legally represented and have given their consent to the determination."[17].

2.25 The Tribunal's 2001-2002 annual report states that when the Court makes a consent determination, it publishes its reasons for the determination and terms of each order made by the court. These become a "valuable source of information for those who are negotiating agreements about native title determination applications elsewhere in Australia."[18].

2.26 The Tribunal has noted an increase in the number of consent determinations made in recent years. During the 2001-2002 financial year, the Tribunal registered 14 determinations of native title, 12 of which were made by consent of the parties, or which were unopposed.[19] In the previous year, the Tribunal registered 18 determinations of native title, 13 of which were made by consent of the parties.[20]

2.27 In addition to the agreements already referred to, the Tribunal advised the Committee that it can also mediate other kinds of agreements. These include:

- framework agreements that provided the foundation for future agreements in relation to specific matters;
- process agreements that set out how the parties will relate to each other; and
- agreements about statutory access rights.[21]

2.28 The Committee observes that the Tribunal mediates in a widely variable environment. The indigenous cultural sensitivities present in one area will not necessarily be the same in other areas. Equally, there are a range of different mining and pastoralist issues in each region, as well as different land tenure issues in each State and Territory.

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16 Submission No 22, p 94.

17 Submission No 22, p 94.

18 NNTT, Annual Report 2001-2002, p 6.

19 NNTT, Annual Report 2001-2002, p 4.

20 NNTT, Annual Report 2000-2001, p 5.

21 Submission No 22, p 41.

Future Acts

2.29 The NNTT, in its submission, defines future acts as:

> various legislative and other acts that take place on or after nominated dates and, among other things, 'affect' native title, that is, they extinguish native title rights and interests or are otherwise wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title rights and interests.[22]

2.30 Native title claimants or holders have the right to negotiate in relation to a future act if they have an application for native title that has passed the registration test (see paragraphs 2.43 to 2.49), or one that has been determined and granted. The right to negotiate is not a veto right but "claimants can negotiate about some proposed developments over land and sea waters"[23]. The Tribunal notes that the right to negotiate process:

> is only one aspect of a wider future act process there are many other future act processes that take place under relevant state and territory legislation, and the Tribunal has no role in respect of these processes.[24]

2.31 The NNTT's submission indicates that the future act process provides that:

> when a state or territory government publishes a future act notice … over an area where there is no registered claimant application … potential native title applicants have three months from the date specified in the notice within which to file a claimant application.[25]

2.32 If the application is registered then the right to negotiate applies and:

> the government, the developer and the registered native title parties must negotiate 'in good faith' about the effect of the proposed development on the registered native title rights and interests of the claimants. The parties can ask the Tribunal to mediate during the negotiations. If the negotiations do not result in an agreement the parties (no sooner than six months after the notification date) can ask the Tribunal to decide whether or not the future act should go ahead, or on what conditions it should go ahead.[26]

2.33 During 2001-2002, 25 mediations in relation to a future act negotiation were completed with a final agreement. [27]

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22 Submission No 22, p 79.

23 Available at NNTT's website at http://www.nntt.gov.au/publications/1021860536-5025.html

24 Submission No 22, p 80.

25 Submission No 22, p 33.

26 Available at NNTT's website at http://www.nntt.gov.au/publications/10218605325.html

27 NNTT, Submission No 22, p 276.

2.34 Future act applications may also be fast tracked or expedited under section 33 of the Act. The expedited procedure applies to acts:

> that have minimal impact on native title, such as some exploration or prospecting licenses. If the expedited procedure is used, the future act can be done without negotiations with the registered native title parties[28]

2.35 The NNTT submission notes that section 237 of the Act sets out the conditions under which the expedited procedure can apply.

> In order to attract the expedited procedure it is necessary to come to a view that the act is not likely to:
>
> - interfere directly with the carrying on of the community or social activities of the holders of native title in relation to the land or waters concerned; and
> - interfere with areas or sites of particular significance to the native title holders; and
> - involve major disturbance to any of the land or waters concerned.[29]

2.36 Registered native title parties have four months to object to the use of the expedited procedure. If an objection is lodged, the Tribunal must then hold an inquiry to determine whether the act attracts the expedited procedure. If the objection is successful the Act requires that comprehensive negotiations must take place in "good faith" before any development can proceed.

2.37 The future act regime was significantly changed by the 1998 amendments. The NNTT submission notes that while the Tribunal's mediation function remained unchanged:

> the Act was amended to require all parties to negotiate in good faith with a view to reaching an agreement in relation to the doing of a future act that does not attract the expedited procedure. Prior to the 1998 amendments only the government party was required to negotiate in good faith.[30]

2.38 In addition, the Act now provides that a future act will only attract the expedited procedure if it 'is not likely to' rather than 'does not' interfere directly with the physical aspects of community life.

2.39 A major impetus for the 1998 amendments was the High Court's judgement on *The Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1 (see paragraph 2.71 for further discussion).

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28 Available at website http://www.gov.au/publications/1021860536_5025.html

29 Submission No 22, p 87.

30 Submission No 22, p 82.

2.40 The 1998 amendments sought to clarify this judgment by removing the right to negotiate in relation to claims over pastoral leases, and clarifying that where native title is extinguished, it is extinguished permanently.

Native Title Registrar roles and functions

2.41 The Native Title Registrar's roles and functions include:

- maintenance of the Register of Native Title Claims, the National Native Title Register and the Register of ILUAs;
- registration testing of all native title applications;
- assistance in the preparation of native title applications; and
- notification to the public, governments and organisations of native title applications and ILUAs.

National Native Title Register

2.42 In its submission, the NNTT explained the function of the Native Title Register.

> The National Native Title Register contains details about determinations of, or in relation to, native title. The determination may be that native title does not exist or that native title exists in some areas but not in others.
>
> The High Court, Federal Court or recognised body making the determination must send details of the determination to the Registrar …[who then enters] the details of [the] determination …
>
> The provisions relating to the National Native Title Register existed prior to the 1998 amendments. However, there was no specific requirement that the Registrar include details relating to whether or not native title was in fact determined to exist [31].

2.43 The Registrar is responsible for the registration test which is an administrative test. The registration test was a key feature of the 1998 amendments. The NNTT explained the impact of the amendments.

> All claimant applications made on or after 30 September 1998 are subject to the registration test as are most claimant applications made before the registration test came into effect. In addition, claimant applications must be re-tested if they are amended in the Federal Court.[32]

2.44 The registration test's criteria are set out in sections 190B and 190C of the Act. The NNTT indicates that in order for claimant applications to be registered, they must properly identify the boundaries of the claim, clearly define the claimant group

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31 Submission No 22, pp 59-60.

32 Submission No 22, p 29.

and ensure that the applicants are authorised by the claimant group, ensure that areas claimed have not been areas where native title has been extinguished, and that there is a factual basis for the claimed native title.[33]

2.45 The NNTT indicates that under the current provisions, it is not possible for members of the same claimant group to have two or more claims for the same area. While these so called overlapping claims still exist, the registration test operates to ensure that such claims are between different groups[34]. However, this was not the situation before the 1998 amendments.

2.46 Under the pre 1998 regime the Registrar was required to apply "an acceptance test". The threshold criteria of that test were designed to screen "applications based on an assessment of whether they were frivolous or vexatious or whether the application could be made out prima facie."[35]. One result of this test was the registration of numerous overlapping claims leading to concern and criticism of the process. Further, as the NNTT indicate "As a consequence of number of court decisions the acceptance test was revealed to be inadequate"[36].

2.47 The registration test has evolved over the years since its implementation. The NNTT notes that "initially there were no legal precedents for the application of the registration test and no experience in terms of the standard of evidence necessary to meet the requirements of the test."[37]. Three applications for review of registration test decisions have since been filed in the Federal Court which resulted in the Registrar amending the registration test procedures.[38]

2.48 Court decisions have also had an impact on the application of the registration test. The NNTT explains the impact of the High Court's decision in *Western Australia v Ward and others* (2002) 191 ALR 1 in its submission:

> [the case] clarified issues such as where native title is (or is not) extinguished, and described native title as a bundle of rights. … As a result of the [subsequent] consultation processes, the Registrar made minor amendments to the procedures.[39]

2.49 As of 31 October 2002, the Tribunal had made 788 registration test decisions. There were 74 applications awaiting a decision. In excess of half of the 788 decisions

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33 Submission No 22, p 29.

34 *Committee Hansard*, 27 March 2003, p 8.

35 NNTT Submission No 22, p 29.

36 Submission No 22, p 29.

37 Submission No 22, p 29.

38 These are *Western Australia v Native Title Registrar and others* (1999) 95 FCR 93, *Queensland v Hutchison* (2001) 108 FCR 572 *and Risk v NNTT* [2000] 1589.

39 Submission No 22, p 35.

were made by the 30 June 2000, which was 21 months after the registration test took effect.[40].

Notification

2.50 The next step in the process is notification. The NNTT submission outlines that process.

> Once a claimant application has been assessed against the conditions of the registration test, the Registrar notifies the general public and people with an interest in the area covered by the claim.[41]

2.51 The NNTT further indicates that any person with an interest in the area may then apply to the Federal Court to become a party (or respondent) to the proceedings, entitling them to participate in the mediation and litigation of the application.[42]

2.52 The Registrar also has duties that relate to assisting people to prepare applications and other native title matters. These functions were expanded by the 1998 amendments to the Act. Under the current provisions of the Act, the Registrar:

> may assist people to prepare applications and accompanying material, and may help any parties at any stage in matters related to the native title court proceedings. The assistance may include providing research services and conducting searches of registers or other records of current or former interests in land or waters.[43]

2.53 The NNTT indicates that the Registrar's assistance functions pre the 1998 amendments, were limited to the provision of "assistance to those people preparing claimant, non-claimant and compensation applications"[44].

Indigenous Land Use Agreements

2.54 The 1998 amendments to the Act also defined a process to achieve Indigenous Land Use Agreements (ILUAs). The NNTT describe ILUAs as "voluntary agreements made between people who hold, or claim to hold, native title in an area and people who have, or wish to gain, an interest in that area"[45]. Further, its website offers the following as matters that ILUAs can be negotiated: native title holders agreeing to a future development, clarify how native title rights coexist with the rights of other

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40 NNTT, Submission No 22, p 31.

41 Submission No 22, p 35.

42 Submission No 22, p 35.

43 Submission No 22, p 14.

44 Submission No 22, p 14.

45 NNTT Annual Report 2001-2003, p 47.

people, provide access to an area, or provide for extinguishment of native title, or for compensation.[46]

2.55 Both the Tribunal and the Registrar can discharge functions in relation to ILUAs. The Tribunal can be asked to assist parties negotiating ILUAs, including the provision of mediation. The Registrar's functions include the notification and registration of ILUAs.[47]

2.56 Once an ILUA is registered under the Act, it has the effect as if it were a contract among the parties, and all parties are bound by it.

2.57 Between 30 September 1998 and 31 October 2002, there were 87 ILUA applications lodged - 56 had been registered and five withdrawn. At 31 October 2002, there were 26 ILUAs being processed. [48]

Other factors that influence native title

2.58 The Tribunal is a unique entity in that it is subject to external scrutiny from three separate organisations:

- the Tribunal is accountable to the Federal Court and must provide written reports to the Court setting out the results of each mediation.
- under the current Administrative Arrangements Order, the Commonwealth Attorney-General is the Minister administering the Act.[49] Accordingly, the Tribunal is part of the Attorney General's portfolio and must report to Government through annual reports and Portfolio Budget Statements.
- the Tribunal is required under Part 12 of the Act to be subject to the scrutiny of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund.

2.59 Other external variants which can cause unpredictability in the native title process include variation in state/territory based legislation and the evolving legal climate. Evidence given by the Tribunal noted the varying environment in which native title operates:

> One might be well down the track in a mediation and then a major High Court decision comes in, or there is a change of state government and a different policy, and suddenly what was heading towards a particular form

46 Available at NNTT website at http://www.nntt.gov.au

47 NNTT Submission No 22, p 99.

48 NNTT Submission No. 22, p 109.

49 Except for Division 6 of Part 2 and Part 11 (which relate to prescribed bodies corporate and representative Aboriginal/Torres Strait Islander bodies, respectively), which are administered by the Minister for Immigration and Multicultural and Indigenous Affairs.

of agreement is at the very least on hold while people reassess their position relative to the changing environment.[50]

State and Territory Government matters

2.60 The intention of the Act is to allow native title to be dealt with in a manner that is both flexible and appropriate to each State and Territory jurisdiction. Sections 26 and 43 of the Act allow States and Territories to develop their own native title regimes that apply instead of the right to negotiate - where the Commonwealth Minister determines that the regime complies with criteria set out in the Act. In addition, States and Territories may apply to the Commonwealth Minister to have certain procedures apply under that State/Territory law instead of the right to negotiate.

2.61 Three States have alternative regimes in operation:

- South Australia, which has three section 43 regimes;
- New South Wales, which has two section 26A determinations and two section 26C determinations; and
- Queensland, which has three section 26A determinations and four section 43 determinations.

2.62 However, from 1 July 2003, Queensland reverted to using the provisions of the Act for handling applications for mineral exploration and mining on land where native title has been claimed. This was due to the Federal Court ruling that the section 43 determinations made by the Federal Attorney General were invalid.

2.63 Evidence heard during the inquiry suggested that jurisdictions have been slow in committing resources to, and moving forward on, native title matters. There has also been a climate of uncertainty generated by evolving legal decisions with some jurisdictions reluctant to move forward on negotiations until pending decisions are known.

2.64 The Cape York Land Council, for example, stated that the Queensland Government was "not going to move on any claim in Cape York" until they had seen the impact of the Yorta Yorta and Ward decisions. [51] According to the Queensland Government, the post-Yorta Yorta "Guidelines to Connection" document, and the post-Ward decision registration guidelines had not yet been updated. Delays in Cape York claims were due to the State's new tenure resolution approach to a substantial claim that the State anticipates will have significant flow-on effects[52]. In addition, the North Queensland Aboriginal Land Council notes that the State only has limited

50 *Committee Hansard*, 20 June 2003, p 419.

51 *Committee Hansard*, 14 April 2003, p 79.

52 *Committee Hansard*, 15 April 2003, pp 203-207.

resources to deal with claims, and can only deal with two major claims at any one time. [53]

2.65 In Western Australia, the Bardi Jawi Native Title Claimant Group suggest that the State refused to agree on the parameters for negotiation prior to mediation as a stalling tactic to keep the matter out of court due to the potential impact of impending legal decisions.[54]

2.66 Prior to the Mabo decision and with the exception of the Northern Territory, Australian States and Territories had no legislation to deal with Indigenous land issues. Years have since been spent in developing capability and legal frameworks in the States so that native title claims can be effectively processed. Evolving legal developments have raised the bar for States struggling to implement their own regimes and deal with native title within their boundaries.

2.67 In addition, some States are working out their land tenure research arrangements which will help to inform parties whether or not native title has been extinguished by the types of leases granted on a parcel of land. Queensland is developing a position on the research of historical land tenure. They are considering the practicalities of looking over paper files going back 150 years in some cases, to understand the history of land tenure in claim areas.[55] During the inquiry, the President of the Tribunal noted that:

> most of the work on tenure research would be done by state government officials, … states are looking very closely at what sorts of resources might be required.[56]

2.68 He continued by indicating that initial assessments may not have been realistic. The enormity of the task was becoming evident and the President gave the example of a directions hearing in which a Judge of the Federal Court expressed some concern when the State government tendered evidence about the amount of work involved. The President indicated that the Judge recognised that it:

> was just very difficult and that the people—to paraphrase his words—needed to think laterally and strategically about dealing with these issues and not simply say it is going to take decades or 150 years to do the tenure research. That just was not practical. People had to find some other way of dealing with it.[57]

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53 *Committee Hansard*, 14 April 2003, p 107.

54 *Committee Hansard*, 11 June 2003, pp 305-309.

55 Executive Director, Native Title and Indigenous Land Services, Queensland Department of Natural Resources and Mines, *Committee Hansard*, 15 April 2003, p 206.

56 *Committee Hansard*, 27 March 2003, p 19.

57 *Committee Hansard*, 27 March 2003, p 19.

Legal decisions

2.69 Since the commencement of the Act, there have been a number of landmark decisions which have had an impact on the working of the Tribunal. These include:

- *The Wik Peoples v the State of Queensland and Others (1996)* 187 CLR 1;
- *Bodney v Westralia Airports Corporation Pty Ltd (2000)*180 ALR 91;
- *Commonwealth v Yarmirr(2001)* 168 ALR 426;
- *Little v State of Western Australia [2001]* FCA 1706;
- *Miriuwung Gajerrong - Western Australia v Ward and others (2002)* 191 ALR 1;
- *Members of the Yorta Yorta Aboriginal Community v Victoria (2002)* 194 ALR 538.

2.70 In each case, the major findings have resulted in refinement of the law and the work of the Tribunal, whether through direct application of the principles or through legislative amendments. This has brought greater clarity to the concept and definition of native title under the Act, which rights and interests of Indigenous people will be recognised as native title, and the principles in relation to the extinguishment or suspension of native title.[58]

2.71 The High Court's decision in *The Wik Peoples v the State of Queensland and Others; the Thayorre Peoples v the State of Queensland and Others (1996)* 187 CLR 1 was determined by a narrow majority of the Court (4-3) and concerned the status of pastoral leases with a suggestion that other types of leasehold property could be affected. In its decision the High Court said that native title could survive extinguishment in cases where land has been the subject of a pastoral lease, because the grant of a pastoral lease did not confer exclusive possession. Native title could exist alongside a pastoral lease, although it was subject to the rights of the pastoral lease holder. Pastoral leases were negotiated under Queensland statute, and the common law principles concerning leasehold did not apply.

2.72 In *Bodney v Westralia Airports Corporation Pty Ltd [2000]* 180 ALR 91, the Federal Court considered whether land acquired by a municipal body for an airport and subsequently acquired by the Commonwealth was subject to native title. The Court further considered whether the Crown owed a general duty to indigenous people in relation to dealings with land. The Court found that the acquisition by the Crown of an estate in fee simple extinguishes native title, just as a grant to any other corporation or person does so.

2.73 In the *Commonwealth v Yarmirr (2001)* 168 ALR 426 (the Croker Island case), parties sought to clarify:

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58 For a discussion of the impact of recent native title decisions, see Wright, L. NNTT Occasional Paper Series No. 1/2003, *Themes emerging from the High Court's recent native title decisions*, Perth, 2003.

- whether the Act provides the basis for recognition of native title beyond the limits of the Northern Territory (that is, to areas of sea and sea-bed); and
- whether the native title holders had exclusive native title rights and interests (including an exclusive right to fish, hunt and gather) in the waters and sea-bed in the claim area.

2.74 The Croker Island case was pursued as a test case to establish the fundamental question of whether native title may be recognised and protected in relation to Australia's coastal seas. The High Court confirmed that native title may exist below the low water mark. It also clarified that exclusive native title rights to the sea will not be recognised on the basis that those rights are inconsistent with the common law public rights to navigate and fish and the international right to innocent passage.

2.75 In the case of *Little v State of Western Australia (2001) FCA 1706*, the Court dismissed an appeal from two Tribunal determinations WO00/167 and WO00/351.[59] The grounds for appeal were failure to accord procedural fairness, and error in law in reliance on subsections 36(1) and (3) of the Act in both determinations. The Tribunal's finding was that all material to be submitted by the applicants was not received by the date of the set hearing, and that the Tribunal had an obligation to take all reasonable steps to make a determination as soon as practicable[60].

2.76 The Court dismissed the appeal, finding that the Tribunal member was entitled to expect parties to be ready to proceed before him when an opportunity of hearing is offered. The Court found that the Tribunal had relied on subsections 36(1) and (3) in error as they apply to an application for determination in relation to whether a future act may be done, rather than a decision upon an expedited procedure objection application. However, the Court found that the Tribunal has an obligation to act promptly (s109) and chose not to remit the matter unless the procedural fairness ground was made out.

2.77 The decisions of the High Court in *State of Western Australia v Ward & Ors*; *Attorney-General of the Northern Territory v Ward & Ors*; *Ningarmara & Ors v Northern Territory & Ors*; *Ward & Ors v Crosswalk Pty Ltd & Anor* 191 ALR 1 ("WA v Ward") were four appeals from decisions of the Full Court of the Federal Court. The issue was the determination of native title rights and interests under the Act in approx 8000 square km in the East Kimberley of Western Australia and into the Northern Territory. The Court held:

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59 Little and others had lodged an objection application to an exploration licence claiming that it would interfere with many Aboriginal sites of significance and constitute a major disturbance to the land and to the claimant's attachment (including spiritual attachment) to the land, in accordance with section 237 of the Act. Evidence presented by the objectors did not contain a statement of the nature or location of sites or areas of particular significance or of community or social activities that are likely to be interfered with. The applicant's solicitors were unavailable on the date of the hearing and sought adjournment, without success. The determinations were made on the papers.

60 NNTT. *Little and the State of Western Australia and Wildbeach Corporation P/L, application nos WO00/167 and WO00/351*.

- native title is a bundle of rights, parts of which can be extinguished.
- the granting of mining leases and pastoral leases, does not necessarily extinguish native title.
- in relation to mining leases, where the rights granted under those leases are not inconsistent with native title, the rights of the mining leaseholder will prevail over native title but will not extinguish it.
- pastoral leases also do not give a right of exclusive possession to the pastoral leaseholder. The High Court said (at 131) "To the extent that rights and interests granted by a pastoral lease were not inconsistent with native title rights and interests, the rights and interests under the lease prevailed over, but did not extinguish, native title rights"
- the evidence established no native title right to or interest in any mineral or petroleum.[61]
- The creation of public reserves in Western Australia does not necessarily extinguish all aspects of native title, although it is inconsistent with any native title rights to determine the use of that land.

2.78 In the *Members of the Yorta Yorta Aboriginal Community v Victoria (2002)* 194 ALR 538, the Yorta Yorta community had sought to overturn previous Federal Court findings that the claimants were unable to demonstrate their continued acknowledgement and observance of traditional laws and customs to the land claimed. The High Court subsequently found that the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs and that there was no evidence that they continued to acknowledge and observe those laws and customs. This had ramifications for section 223 of the Act, particularly in defining "tradition". The rights and traditions granted under "traditional" laws require a system which has existed continuously since sovereignty. If that system has ceased to exist, so will the rights and interests, and they cannot be revived.

Concluding comments

2.79 This chapter briefly examined the complex and dynamic legislative and caselaw environment which native title occupies, and within which the National Native Title Tribunal must operate. Over the last ten years, the Tribunal has sought to develop and define its role while discharging its statutory functions; the following chapters provide an assessment of the Tribunal's effectiveness in doing so.

61 High Court of Australia: *WA v Ward* Statement 8 August 2002 at www.austlii.edu.au/au/special/hca/ward statement html