Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

OPERATION OF THE NATIVE TITLE ACT

Inquiry Into The Effectiveness Of The National Native Title Tribunal

Submission No:15

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Submission to the Senate Parliamentary Committee:

The Effectiveness of the National Native Title Tribunal

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In this submission, I would like to limit my comments to the role of the native title registration process.

After the passage of the *Wik* amendments, I recall how concerned anthropologists were at the new regime for registering native title claims and the application of a *prima facie* test to such applications. We thought that applications would be subject to an initial stringent weeding out process, and that the task of preparing a registration application would place an additional burden upon Native Title Representative Bodies already stretched for resources. As it has turned out, in my experience in Queensland, the only native title registration applications that have been failed have been because of some technical failure in filling out the form itself, or some other obvious failure of the application to conform to the requirements of the *Native Title Act (1993)* [NTA] (for example, the inclusion of tenures that are not subject to native title claim according to the revised Schedule of Interests). No application which has been filled out properly, is not obviously overlapping with another claim, does not have obviously excluded categories of tenures, or otherwise fails to meet the requirements of the form itself, has not been passed by the Registrar.

The roots of this go back to the landmark full Federal Court decision and subsequent High Court ruling in *Waanyi* (FC96/007) under the previous NTA, where the nature of what a "*prima facie*" case for native title was considered, as indicated in s.63(1) of the previous NTA. The then-President Robert French in his "Reasons for Ruling in Relation to Criteria of Acceptance..." (September 15, 1994) concluded that "The Registrar may... make inquires or receive information to determine whether it can be said at the outset that a claim could not be made out" (at 7). Jenkinson J, in the Full Federal Court judgement on the contrary indicated that the process should avoid "too great a risk of erroneous rejection of an application" (at 27). Lee J opined that the NTA "does not require an applicant to prove, or demonstrate the existence of, a 'prima facie' claim" (at 5). Lee J thought that "if important questions of fact... raised by the application were to be treated

as threshold issues to be determined at the time the application is given to the Registrar, a quasi-judicial, and probably adversarial, proceeding would be imposed before access to mediation became available" (at 15). It was clear that one interpretation of this section, ultimately supported by the High Court, was that the garnering of additional information in relation to a native title claim at the stage of registration was inappropriate and contrary to the NTA, even though the Registrar was empowered by ss.155-159 of the original NTA to take additional evidence in support of an application for registration of native title.

However, there are other circumstances under which we may wish to question whether there are risks that attend such an interpretation.

We must first understand that although a form of native title of course is part of most Aboriginal communities' current cultural repertoire, the NTA itself is not a mere passive vehicle for the description of this title. Aboriginal claimants respond to the NTA is a more active way, and the specific form of the NTA configures the kinds of native title claims that are made. Furthermore, the provisions of the NTA make available a channel for intra-Aboriginal competition – groups in competition with each other may be persuaded to use the language and symbolism of native title, with its attendant rewards of recognition and perhaps material benefits, even if the content of that competition has little or nothing to do with rights in country narrowly conceived. Mediation among these groups that, by law, has to focus exclusively on the issue of traditional rights to country will not go to the heart of such intra-Aboriginal conflict.

In the more recent case of *Risk v. the National Native Title Tribunal* (2000), we witnessed such an evolution in the way the Act has provided a venue for conflict within indigenous groups. Here the issue was not the legitimacy of rights and interests to country but dispute over who is authorized from within the group to make decisions concerning claimant group membership, and where the various *loci* of native title rights and interests *within* claimant groups may reside. The NNTT was faced with the understanding that the presence of conflict over authority within claimant groups may indicate the need for more stringent inspection of group composition and the nature of laws and customs pertaining to the delegation of authority within the group. We can expect the Registrar, under s.132, to increasingly use his own powers to demand further evidence during the application process following the *Risk* case. This evidently was the case in *Martin v. Native Title Registrar (FCA 16)* 2001, where the Registrar of Native Title successfully defended his authority to demand further particulars as to the nature of intra-group authorization processes.

Passing the registration test has become an important stage for a native title claim group. In settled Queensland, the prospect of proceeding beyond the registration stage either towards a consent determination or towards litigation in the Federal Court can often seem like a very remote possibility. The symbolic authority vested in a claim group that has

passed the registration test and therefore has acquired *pro tem* rights to negotiate over the claim area is great.

The National Native Title Tribunal [NNTT], either before or after the Wik amendments, has not been in a position to assess the substantive merits of a claim at the registration-test stage. To the best of my knowledge, it does not undertake to provide independent anthropological or legal verification that the group registering the native title claim is who it says it is and possesses the minimal *bona fides* to warrant a *prima facie* granting of interim rights to negotiate. This is largely because the NNTT was set up as a body to administer to the legal requirements of the NTA. It was not set up as a research body to accumulate substantive research material on Aboriginal society and culture—although it fulfils some of this function.

However there is another more practical reason why this is so. Following the passage of the *Native Title Amendment Act (1998)*, a large proportion of registration applications were lodged in response to s.29 notices. This gave claimants only four months within which to lodge an application for native title on areas affected by the future act in question. At the point at which NNTT received these applications, delegates had less than a month to assess each application and under such circumstances the NNTT could not possibly have sponsored its own research into the merits of any of them. I take this opportunity to point out what all of us who have laboured to help prepare native title applications in an s.29 situation knew full well—that this provision of the amended *Native Title Act (1993)* put potential native title claimants and their NTRBs at a severe disadvantage with respect to the developers lodging s.29 notices.

In the Waanyi decision, the issue was not the *bona fides* of the applicants or their case for native title—in fact, hundreds of pages of supporting material accompanied their application for registration of native title. The *Risk* and *Martin* cases indicated, however, that as the NTA has developed as a political process in Australia, a sharp contrast between the substantive historical and cultural content of claims to country, and the mechanisms by which such claims are authorized and recognized in the Aboriginal world cannot be easily drawn.

The question can then be raised: How is the Registrar to determine, on *prima facie* grounds alone, that the information contained in an application for registration is true or not? The types of improper claims we can imagine are not exhausted by the labels "frivolous" or "vexatious". Some may well be duplicitous. Some may be sheer fabrications. How is the Registrar to protect both legitimate claimants and other interested parties from applications that have been falsely made, in some cases perhaps knowingly?

If all native title registration applications were subject to authorization by the relevant Native Title Representative Body [NTRB], then this would not be an issue. The assessment of the legitimacy of a native title claim group would be up to the NTRB to carry out. In fact, NTRBs have frequently sponsored their own anthropological assessments of the

native title claim group at the registration test stage which are submitted as annexures to the registration application.

However, not all applications are vetted by the relevant NTRB. Claimant groups often lodge their own native title registration applications independently of the NTRB, especially in the case where there is conflict between the claimant group and the NTRB, or where the claimant group perceives that their interests are not being adequately pursued by the NTRB. It could be the case that a claimant group wishing to lodge a native title application that overlaps or is in conflict with an existing native title claim group will be told by the relevant NTRB that such a claim cannot be pursued.

Native title claim groups acting independently of the NTRB might nevertheless secure access to their anthropological and legal experts with the aid of their own resources. Once their applications for registration have been accepted, they will then proceed to mediation with other registered native title claim groups with whom they are in conflict over rights and interests in land.

It is not unthinkable that claims of a spurious nature, claims that substantively have no *prima facie* merit, claims that are vexatious or stimulated by political or financial rivalry, claims that have not been subject to proper authorization procedures, can proceed successfully through registration without any of these features of the native title claim coming to the attention to the NNTT until mediation, at which point the challenge before the NNTT is much more difficult. It is not inconceivable that years may pass (or have already passed) before an improperly registered native title claim group is revealed, at which point the group may have entered into all manner of agreements with non-claimant parties concerning future acts over the claim area in question.

The number of these hypothetical cases may be small. It may be that in the interest of fairness, the NNTT is willing to admit the possibility of a few bogus applications slipping through the registration process. Otherwise, the threshold for *prima facie* demonstration of native title would be much higher and would as I suggested earlier pose an unacceptable burden to both claimants and NTRBs. On the other hand, the revelation of even a single case of this type might cause untold damage to the native title process and to the aspirations of legitimate claimants. Since Hindmarsh Island, the Australian media has become acutely sensitive to the possibility, real or imagined, that Aboriginal persons may desire to "rort" existing beneficial legislation by making false claims of one sort or another. It is essential to the native title process that it be shown to be capable of detecting such claims at an early stage in the process. I emphasize that my own primary goal here is the protection of the interests of legitimate native title claimants. They have the most to lose if improper applications for native title are allowed to proceed through the process too far.

I offer some possible solutions:

1. The NNTT can stipulate that no native title application can be submitted without the approval of the NTRB. This, admittedly, may be unachievable, given the high levels of institutional conflict between officers of the NTRBs and their constituent claimant groups engendered by the politics of the native title process.

2. The NNTT can utilize more effectively the provisions under s.131A and s. 132 of the NTA and make more use of independent consultants. The emphasis of the NNTT is on the legal function of the NTA, and not on any of its substantive content. From my point of view as an anthropologist involved in the native title process, this has been a severe shortcoming of the manner and stage at which the NNTT becomes involved in mediation of claims. Most case officers in the NNTT come from a legal background. They are not necessarily in a position to assess the social and cultural *bona fides* of a native title claim group, especially in the early stages. There is scope to utilize anthropological consultants early in the application process to forestall and obviate conflicts among indigenous groups that have either been caused directly by the native title process, or who are using the native title claim process in pursuit of other rivalries not directly related to the issue of native title identity or rights and interests.

3. The NNTT can restrict its own early anthropological investigations to those applications originating outside the NTRB jurisdiction. Since most NTRBs employ full time anthropologists, it can be assumed that an application authorized by the NTRB will have drawn initial scrutiny from the staff anthropologist(s) at the NTRB. This cannot be guaranteed for applications lodged without NTRB authorization.

4. Therefore, an amendment to the NTA, allowing that in the case of non-NTRB authorized applications, the Registrar will be free to make initial inquiries as to the *bona fides* of an application, would strengthen the NTA and be beneficial to all legitimate claimants and to the authority of the NTRBs – although given the fact that most ambit native title applications have already been lodged, this may have the effect of locking the stable door after the horse has bolted.