



# QSNTS

## Proving native title; discharging a crushing burden of proof

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### Introduction

Chief Justice French, Sir Gerard Brennan, Justice Ruth McColl, Honourable judicial officers, NNTT President Graeme Neate, distinguished guests one and all, it is indeed a great honour to be invited to speak at this forum, particularly to share this session with someone who has been a significant contributor to the development of native title jurisprudence in this country from its inception, that person being the Chief Justice himself.

Before I go any further, as I am talking about Indigenous issues and I am on someone else's Country, I acknowledge that this is aboriginal land and pay my respect to the Kombumerri people where this venue is located and the broader Yugembeh people whose traditional lands encompass this beautiful Gold Coast region

I have been asked to cover four topics in this presentation:

1. Development of the law of native title
2. The Practice and outcomes
3. Associated institutional arrangements
4. Future directions

I will remain faithful to my terms of reference but I am likely to slightly rearrange the order of some of those topics. I will also foreshadow that I propose to address these topics having regard to a common refrain in native title being:

1. It takes too long; and
2. It costs too much

By way of final introductory comments, many of the views I will express are not given from a lawyer's perspective as I have not actually practised in this area rather my experience is gleaned from other perspectives.

1. Firstly, as an Indigenous person foremost but in particular someone whose people have actually gone through the native title process; from application to determination and life beyond;
2. Secondly, as a senior bureaucrat within the National Native Title Tribunal; and

3. Thirdly, as a current Chief Executive Officer of a native title service provider which provides services to aboriginal claimants.

I should add that those experiences have been acquired in Queensland and my observations are personal ones based on those experiences. I don't for a minute suggest that my views are representative of other Indigenous people or other native title representative bodies/native title service providers.

## Outcomes

If we are considering the issues of costs and delays then it is appropriate to ask what have been the outcomes from 1 January 1994 (when the NTA commenced) to date.

**Native Title Determinations:** There have been 116 determinations (Consent 71; Litigated 21; Unopposed 24). Native Title has been recognised in 82 of those determinations.

**Applications:** There are 540 active applications in the system; the vast bulk being native title determination applications. There have been some 1787 applications since commencement of the NTA; while the reduction from 1787 to 540 applications represents effort it is difficult to fully characterize the reduction as finalized claims as many claims have simply been combined or new applications lodged.<sup>1</sup>

**Indigenous Land Use Agreements<sup>2</sup>** There are currently 347 registered ILUAs; the vast majority being (187) in Queensland.<sup>3</sup> While ILUAs are not strictly part of the claim process they are frequently used as the machinery to dispose of applications, for example, determinations can be made conditional upon the registration of an ILUA or ILUAs can be used as a mechanism for alternative settlements such as the surrender of native title for other land outcomes.

I will not comment on the statistics on the Future Act Regime<sup>4</sup> (which includes the Right To Negotiate<sup>5</sup> and Comment) the only legal linkage to the court process is that there must be a claim that is lodged in the Federal Court but registered on the Register of Native Title Claims to be afforded procedural rights<sup>6</sup>. This linkage to the court is a very important one that I will return to later. Suffice it say that there are thousands of future act agreements.

So we know that these are the outcomes over the past 14 odd years but these figures mean very little in terms of productivity if we do not know the costs.

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<sup>1</sup> National Native Title Tribunal, National Native statistics as at October 2008.

<sup>2</sup> "*indigenous land use agreement*" has the meaning given by sections 24BA Indigenous land use agreements (body corporate agreements), s24CA Indigenous land use agreements (area agreements) and s24DA Indigenous land use agreements (alternative procedure agreements).

<sup>3</sup> National Native Title Tribunal, Indigenous Land Use Agreement statistics as at October 2008.

<sup>4</sup> S233 NTA provides that the future act must affect native title. A future act affects native title 'if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment, or exercise'.<sup>4</sup>

<sup>5</sup> Subdivision P NTA--*Right to negotiate*. If the claim is accepted for registration, the Registrar must, under paragraph 186(1)(g), enter on the Register of Native Title Claims details of only those claimed native title rights and interests that can, prima facie, be established. Only those rights and interests are taken into account for the purposes of subsection 31(2) (which deals with negotiation in good faith in a "right to negotiate" process) and subsection 39(1) (which deals with criteria for making arbitral body determinations in a "right to negotiate" process). For example s 24AA (5), s24 and s31 (1).

<sup>6</sup> S253 NTA "*procedural right*", in relation to an act, means: (a) a right to be notified of the act; or (b) a right to object to the act; or (c) any other right that is available as part of the procedures that are to be followed when it is proposed to do the act.

The Commonwealth Government funds the native title claim system; all the key institutions and bodies including the Courts, the NNTT, Representative Bodies<sup>7</sup> and most of the Respondents (other than the States/Territories). Unfortunately the Commonwealth does not have these global figures readily on hand (I have checked Treasury, Attorney-Generals and other Departmental websites to no avail – they may exist and it could very well be a reflection on my research skills!). The information can be sourced but it would involve scouring a decade or more of departmental annual reports- not an attractive option. Anecdotally, we know that the appropriation has averaged around \$100 Million a year<sup>8</sup> having regard to funding peaks and troughs; at least half of this amount going to Representative Bodies to represent native title applicants. So we are talking in global amounts of \$1.4 Billion<sup>9</sup> (in reality probably much more) since the inception of the NTA. We can't say precisely how much has gone into the claim process but we know the bulk of it has.

The National Native Title Tribunal has recently commented that on current disposition rates it will take another 30 years<sup>10</sup> to deal with the outstanding claims; presumably at a similar rate of investment. I would argue more resources will be needed as the claims in the rest of the country are not going to get factually easier due to the increased number of respondents as we move into more populated areas and the historical impact of more extensive colonization. Leaving aside whether the outcomes to date have been derived efficiently, from where I am sitting there are billions of dollars yet to be invested in the system just to have the legal debate as to whether native title exists; in areas where there is likely to be only relatively little exclusive possession recognised.

Before I move on from the outcomes, I don't want to dismiss or understate the value of the achievements to date. Achievements, that have not only resulted in tangible economic and cultural benefits from having native title recognized but important intangibles; being, the emotional and psychological strengthening of Indigenous people individually and collectively, along with the forging of constructive working relationships with other parties in the process.

Sadly though, comparing those who currently enjoy those tangible and intangible benefits with those who don't and the knowledge of what they have to do to get there, simply underscores and reinforces the current problem and the future challenge. Having regard to what lies ahead my personal view is simply that the system is not working for Indigenous Peoples.

So how did we get to this current point? I would argue that it is not one or two factors but a combination of many. The law itself, while unique and relatively new, is not the only cause. There are many factors but I will concentrate on the following:

- The sheer number of legal changes within a short space of time.
- Native title practice ( here I will focus on the inherent challenges that Indigenous people face in prosecuting claims; the challenges for representative bodies; the lack of resources; and the high number of non-government respondents).
- The complex institutional arrangements ( here I will touch upon the interrelationship between certain provisions in the Native Title Act, that at a practical level cause tensions within the

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<sup>7</sup> S203C NTA.

<sup>8</sup> Attorney- General's Portfolio Budget Statements 2007-08 allocated \$33.20 million dollars allocated to National Native Title Tribunal. FaHCSIA Budget Portfolio Statements 2008-09 indicate Native Title and Land Rights total resources 2007-08 \$65.25 million.

<sup>9</sup> Based on current allocation of funding resources.

<sup>10</sup> National Native Title Tribunal, "National Report: Native Title", June 2008 at 1.

system; but also I will outline the tensions occasioned by the institutional arrangements per se; there are also real tensions at the intersection of native title and other statutory regimes for instance in NSW many non-claimant applications are brought for the primary purpose for resolving native title so that Aboriginal people can avail themselves of statutory land rights: similarly notification rights under the Queensland *Aboriginal Cultural Heritage Act* are linked to the NTA which causes its own unique challenges<sup>11</sup> – I will not however be commenting on these other regimes as time does not permit).

- I will conclude with Future Directions.

## The Development of the law of native title – the impact of frequent change

Native title has evoked such a wide array of sentiment since its inception that it is easy to lose sight of the fact that native title has only been a feature on the Australian legal landscape for a relatively short time - 16 years.<sup>12</sup> Therefore it is useful to outline the significant changes. I propose to give a potted history of the significant legal changes, more to highlight the frequency of change rather than expounding upon the legal principles that underpin each change:

- We all know of the historic *Mabo (No 2)*<sup>13</sup> High Court judgment in June of 1992 that started this process.
- After one of the longest parliamentary debates since federation the *Native Title Act* was enacted in December 1993.<sup>14</sup>
- The handing down of the *Wik*<sup>15</sup> Judgment in December 1996 that gave rise to the principle that pastoral leases did not necessarily extinguish native title; this judgment was later to prompt major amendments to the NTA by the new Howard Government that was elected earlier in that year.
- The 1998 Amendments significantly altered the administration of the Act and while it did not change the legal definition under s223, the amendments I would submit, deviated from the intent that this was to be beneficial legislation.<sup>16</sup> For the purposes of this paper I wish to highlight only three of the changes:

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<sup>11</sup> S34 identifies who is a Native title party for an area, this can include s34 (b) a person who, at any time after the commencement of this section, was a registered native title claimant for the area, but only if-- (i) the person's claim has failed, but there is no other registered native title claimant for the area, and there is not, and never has been, a native title holder for the area;

<sup>12</sup> There was significant critical response from the non-indigenous community. Some questioned whether the Court had carried 'judicial activism too far in departing from principles that were thought to be settled for over a century'. Sir Harry Gibbs, 'Foreword' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) xiii, xiii.

<sup>13</sup> (1992) 175 CLR 1.

<sup>14</sup> The Bill was passed by the Senate on 22 December 1993 after the longest debate in the Parliament's history (at that time) of 51 hours and 45 minutes. Commonwealth, *Parliamentary Debates*, Senate, 16 December 1993, 5500 (Gareth Evans, Minister for Foreign Affairs). The debate on the 1998 amendments holds the record for the longest Parliamentary debate on legislation. Graeme Neate *Dealing with native title applications and related issues – past developments, present practice and future trends* University of Queensland, 7 April 2005.

<sup>15</sup> (1996) 187 CLR 1.

<sup>16</sup> In his second reading speech, the Prime Minister identified the 'twin goals ... to do justice to the *Mabo* decision in protecting native title and to ensure workable, certain, land management. Paul Keating Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 287-8.

1. **Introduction of new Registration Test provisions** – this test is an administrative decision applied to claims by the Native Title Registrar; registration status affording important procedural rights upon native title applicants ( something I shall return to later);
  2. **Introduction of Indigenous Land Use Agreements (ILUAs)**; a statutory contract to make agreements enforceable as between the native title party and other parties;
  3. **Changing the institutional arrangements** so that all applications for determinations were lodged with the Federal Court of Australia rather than the National Native Title Tribunal to comply with the 1995 High Court judgment in *Brandy v Human Rights and Equal Opportunity Commission*<sup>17</sup>
- The 2002 High Court Judgment of *Ward on behalf of the Miriuwung and Gajerrong People v Western Australia*<sup>18</sup> that, inter alia, described native title as a “bundle of rights”; each right in the bundle being capable of extinguishment; from a practical point this decision is significant as it not only required the particularization of the traditional laws and customs but also the particularization of each right and interest possessed under those laws and customs.
  - The 2002 *Yorta Yorta Aboriginal Community v Victoria*<sup>19</sup> judgment introduced a construct being the need to prove a pre-sovereign **society** that had continued to the present and that each generation of that society had continued to acknowledge and observe laws and customs substantially uninterrupted since sovereignty – the criticism of this case has been that in other overseas jurisdiction, courts have presumed continuity upon proof of establishing the pre-sovereign society.<sup>20</sup>
  - 2007 Amendments - there were a raft of amendments designed to improve the claim resolution process including giving additional powers to the National Native Title Tribunal.<sup>21</sup>

There have been other important legal developments occasioned by a number of High Court, Full Federal Court and Federal Court judgments but I highlight the above legal changes that have significantly altered the operation of the native title system; each change event ushering in an orientation phase that in turn has influenced the positioning of the myriad of parties in the system.

In this regard we cannot understate the significance of *Ward and Yorta Yorta*. Although the burden of proof is always on the applicant to discharge and it is clear that these cases raised the evidentiary bar, these two cases also significantly influenced the negotiation of native title to the extent that the legal requirements that applicants might need to prove at trial became the gate to the negotiation table. In my opinion, some State

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<sup>17</sup> [1995] HCA 10.

<sup>18</sup> [2002] HCA 28.

<sup>19</sup> 214 CLR 422.

<sup>20</sup> In other jurisdictions upon native title being proven to exist at the time of sovereignty, there is a presumption that it continues thereafter. See *Amoudu Tijan v Secretary, Southern Nigeria* [1921] 2 AC 399, see also *Calder v A-G (British Columbia)* 1973 34 DLR (3d) 145 at 308.

<sup>21</sup> The *Native Title Amendment Act 2007* (Cth) is part of a package of reforms aimed at providing more efficient and effective outcomes from the current native title system. The changes affect native title representative bodies and prescribed bodies corporate; many respondent parties to native title claims; the Federal Court (‘the Court’) and the National Native Title Tribunal (‘the Tribunal’), Graeme Neate 2007 ILB, *New Powers and Functions of the National Native Title Tribunal*.

and Territory governments have formulated and implemented Connection Guidelines<sup>22</sup> that have significantly contributed to additional costs and delays. It is the aboriginal parties that bear the brunt of that dogmatic approach.

The number of changes has definitely influenced the timeframes for resolving native title but it is how the parties have responded to the legal changes rather than the legal principles themselves that has compounded problems which in turn has had a direct bearing on practice.

## Practice

There are some key factors that have a bearing on the complexity of native title practice which I will outline below.

- The inherent challenges that face Indigenous people in prosecuting a claim.
- The broader role that Rep Bodies play in the native title system.
- The availability of Resources – financial and human.
- The number of non government respondent parties and hence the span of rights and interests that need to be reconciled with the native title rights and interests.

## Challenges for Indigenous people in prosecuting native title claims

I appreciate that many of your Honours would have had experience with Aboriginal People and Torres Strait Islanders as parties or witnesses before your respective courts and tribunals and that many of you would have indeed represented Indigenous people as legal practitioners before being elevated to the bench.

You are all aware of the cultural, linguistic and historical factors that impact upon Indigenous people's interaction with the legal system. Such factors that include:

- Fragmentation of knowledge as to who can speak on certain matters.
- The complex kinship systems that may influence who can speak to whom.
- The protocols around sorry business and the periods for grieving.
- Different decision-making processes.
- English is a second, third or fourth language for many Indigenous peoples and that Aboriginal English has its own syntax which can cause its own cross - cultural communication difficulties.

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<sup>22</sup> Western Australia rely on the *Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title* (October 2004) (“Connection Guidelines”). The QLD government also published guidelines. The Department of Premier and Cabinet, Queensland Native Title Services released the *Compiling a Connection Report*.

- For historical reasons, the deep-rooted and perfectly understandable mistrust that Indigenous people have of the legal system and all those within it – sometimes, even their own legal representatives.
- Many Indigenous people are disadvantaged across the full range of social indicators; health, housing, employment, education, etc – this disadvantage impacts upon their ability to understand and engage in the process

There are countless other factors at play that you have all doubtless had some experience with. In my view those same factors are at play in native title matters but are considerably magnified; after all native title applications are brought on behalf of “societies”.

An applicant is authorized to make application under s61 NTA to represent the broader claim group<sup>23</sup>. While this might make the proceedings infinitely more manageable it does not mean that those cultural and other factors are not in existence when taking instructions from an applicant group that can be as large as twenty people.

Other realities include:

- The applicants are more often than not geographically spread out across a claim area that spans hundreds if not thousands of kilometers.<sup>24</sup>
- The areas are invariably remote where there is no public transport.
- Applicants are generally not remunerated and undertake these serious responsibilities for their people on a voluntary basis, usually afterhours.
- Many applicants are cultural Elders so they have other functions to perform within their communities; many are also elderly and frail so there are real capacity constraints.

In concluding this point, I would make three observations that could be misconstrued as disrespectful but need to be said:

1. Many Indigenous people don't understand the process that they are in to the level that is required to obtain instructions and provide advice within tight timeframes; I daresay that there is a good number on the respondent side of the ledger that are in the same boat – the difference being that those respondents don't have the burden of proof and they have the benefit of riding on the coat tails of a well resourced 'model litigant' in the form of the State as the principal respondent.
2. Just like the claim process has the ability to unite and strengthen a native title claim group, conversely but just as powerfully, it can rip a group apart – there are real human tragedies being played out underneath the civil veneer of court proceedings that involve seeking legal recognition; people need to think through what this process might do to their families and communities.

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<sup>23</sup> S61 (2) (c) the person is, or the persons are jointly, the applicant; and (d) none of the other members of the native title claim group or compensation claim group is the applicant.

<sup>24</sup> The *Combined Wongatha People Claim* relates to some 160,000 sq kms of land in Western Australia.

3. Unless the first and second points are understood, Indigenous people can remain blinkered to how the process can be used to pursue alternative settlements that realize land aspirations which may include but are not limited to a native title determination.

### The Broader role that Representative Bodies play

Native Title Representative Bodies and Native Title Services Providers have a pivotal role to play in representing applicants in the prosecution of their claims. In many respects, the true rigour of the native title system is dependent upon the capacity of these bodies to perform the myriad of statutory functions that are bestowed upon them.<sup>25</sup>

These functions are not limited to legal representation, facilitation and assistance in a claim context; it is easy for other parties and institutions to think that claim representation is all these bodies do! Legal representation extends to the future acts regime and negotiations of ILUAs and statutory access. Additionally, the functions also extend to:

- Certification of ILUAs and native title determination applications.<sup>26</sup>
- Notification<sup>27</sup> – Rep Bodies are effectively “mail-boxes” for a range of future acts which seemingly cover every industry under the sun; from mining and exploration under the right to negotiate regime to the right to comment on minor road infrastructure, issuing irrigation permits and fishing licenses, etc – literally hundreds of these notices come across our desks in any given month, which are in turn forwarded to the applicant to try and make sense of this avalanche of paper work.
- Dispute resolution functions<sup>28</sup> – many claims are overlapped and it is a Rep Body function to traverse the prickly field of potential conflicts of interest when representing overlapping claimants to assist in their resolution.
- Agreement-making function.<sup>29</sup>

There is one observation I made very early in the short time I have been with QSNTS; **all** the statutory functions that representative bodies possess are in constant, high demand and it is really a question of demand outstripping resources and capacity which makes prioritization of work all the more important. An overworked and underfunded Rep Body system has been the subject of many funding reviews and parliamentary inquiries – after all the talk we still remain in the same parlous condition.<sup>30</sup>

In any event we must do the work with what is available. Operating differently is the only way. I can only speak on behalf of QSNTS but building the applicants understanding of the process and giving very clear

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<sup>25</sup> S203B (1) A representative body has the following functions: (a) the *facilitation and assistance functions* referred to in section 203BB; (b) the *certification functions* referred to in section 203BE; (c) the *dispute resolution functions* referred to in section 203BF; (d) the *notification functions* referred to in section 203BG; (e) the *agreement making function* referred to in section 203BH; (f) the *internal review functions* referred to in section 203BI;

<sup>26</sup> S203BE.

<sup>27</sup> S29.

<sup>28</sup> S203BF.

<sup>29</sup> S203BH.

<sup>30</sup> For further discussion on overworked and underfunded Rep Bodies, see Richard Potok *A report into the professional development needs of Native Title Representative Body lawyers*, Final Report, 7 April 2005 Monash University.

advice on the prospects of success is vital. This might sound trite from a legal practice point of view but it is really a matter of ensuring that clients understand the merits of their case within a prevailing legal framework and not solely on higher ideals of social justice; they can, of course co-exist but the pressures are such that sometimes broader principles must yield to what is in the best interest of the client. In this regard, I see no social justice benefit in failing to apprise a client of an unmeritorious claim! This work demands that legal representatives deliver some hard messages as well as what options are available.

## Resources – financial and human

I have highlighted repeatedly that native title is not conventional litigation. The unique legal and factual issues coupled with the inherent complexities of running a representative action for a large group of people (that happened to be also severely disadvantaged) and responding to the myriad of respondent parties and their interest, demands adequate resources to meet those needs.

These resources are both financial and human. In conventional litigation, the legal representative wouldn't dream of paying the travel costs of his or her clients for the purpose of taking their instructions or giving advice. In fact, some clients you may never see if the work can be done electronically. This luxury does not exist in native title work, at least, when representing applicants. This is for all the reasons outlined earlier. If the representatives can't get the applicants together at least three or four times a year, the work can't be done, case file momentum is lost, solicitor-client rapport is diminished if not damaged, sometimes irreparably and the claim languishes.

There are 58 claims in my area and at an average of \$10 000 a meeting (this cost is due to the number of applicants<sup>31</sup> some who need support persons - and the remoteness of and the distance between their respective residences) at four times a year; the client travel budget alone is \$2,320, 000. The primary evidence<sup>32</sup> in native title claims is that of the claimants themselves but native title work is heavily dependent on expert witness such as anthropologist to provide supporting evidence on issues of society, membership, continuity of connection, etc. A connection report costs around \$100 000; reports generally require 100 days of field, research and writing time at around \$1000 a day. There is a range of other experts that might be used such as linguist, historians, etc at similar rates.

QSNTS has an annual budget of \$7.8 Million to cover half the state of Queensland. This budget might sound considerable but when funds are allocated across meeting with clients, engaging experts, staff salaries and other corporate costs there is not much left. In fact there is nothing left.

Financial resources is but half of the equation. The shortage of senior anthropologist to undertake this work is such that there are simply not enough appropriately qualified experts to do the work. Representative bodies then effectively become competitors with each other as we attempt to engage anthropologist in a very thin market. This limited resource is further depleted as some anthropologist may be conflicted out of a region as they may have done work for an overlapping claim group in the past.

With such a valuable resource it is important that very clear terms of reference are provided to Anthropologist. I have read some reports that simply don't cover the range of issues that such expert reports need to address. This is not always poor communication between the lawyer and the consultant anthropologist. Many reports were written prior to the numerous legal changes and the connection policies referred to earlier. Leaving that excuse to one side, in my opinion, this is a matter of not providing clear terms of reference in the first place and not managing the contract appropriately. This is an area that needs

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<sup>31</sup> The number of Applicants on a Native Title can range from one to more than ten.

<sup>32</sup> *Sampi v State of Western Australia* [2005] FCA 777.

to be closely monitored having regard to the scarcity of the resource, the time and resources required and the importance of the evidence to the success of the claim.

### Parties – the sheer number!

Native title applications invariably have a high number of respondent parties<sup>33</sup> which reflects the large geographical area of claims but also the many layers of proprietary interests that can attach to a parcel of land. Prior to the 2007 amendments, parties were ‘automatically’ entitled to become a party if the person held a proprietary interest registered in any public register, provided application was made in writing to the court within 3 months of a notification date.<sup>34</sup> Parties had a right to join outside of time upon application to the Federal Court.

The 2007 amendments included an additional requirement that the interest be affected by a determination in the proceedings. In spite of the amendment, many interest holders remain as parties. Bear in mind that native title will yield to any interest holder that has an inconsistent right or interest; in my rather partial view, most respondents will sustain no loss and in my view there is no interest affected and should withdraw or be removed from proceedings. It is of no surprise that native title claims can have tens if not hundreds of respondent parties that are eligible for tax-payer funded legal assistance to potentially resist an application. As if applicants didn’t have enough on their plates!

It is clear that there are a number of issues that impact upon native title practice that go far beyond the normal constraints of conventional litigation.

### Institutional Arrangements

At this point I am going to throw caution to the wind. In light of the resource impediments and real challenges that my clients and staff are facing over this financial year, it would be doing them a disservice if I did not speak candidly. The institutional arrangements place a burden on a number of my clients - not all, but a good number of them - that seriously puts their current and long term economic aspirations at risk.

The reality is that this current unprecedented resource sector boom presents an opportunity for a good number of clients to engage in the real economy for the first time and possibly *only* time. On the other hand, my clients are acutely aware that a native title determination application allows for the recognition of rights and interest to land and waters for the benefit of both current and future generations.

The *NTA* sets up a real conflict of duty and duty for many of our clients; the duty of prosecuting a claim to ensure that substantive rights and interests are recognized while simultaneously discharging their moral duty to their claim group to exercise procedural rights to negotiate fair compensation for mining on their ancestral lands. The irony, somewhat perversely, is that under the current arrangements they must do the former to preserve the latter. The perversity lies in the reality that after two hundred years of valiantly and defiantly withstanding waves of colonization the legislation that delivered *some* hope might in fact be the Tsunami that dashes *all* hope. Not because they do not want to engage in both processes but because of the bureaucratic, highly legalistic and expensive burden of being simultaneously engaged in *both* processes.

One might argue, “The claim group will just have to use the mining compensation money to prosecute their claim”. The obvious response, being “Why should they have to when the tax-payer is footing the entire bill for respondents to resist the claims, the Tribunal to mediate and the court to determine the application”.

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<sup>33</sup> The number of Respondent parties can quite easily be into the hundreds.

<sup>34</sup> S66 (3) identifies which persons or bodies the Registrar must provide notice to.

In these parsimonious times, we need to also look at the institutional arrangements afresh. In this current financial year at the end of a funding triennium, the representative body system is devoid of any spare money. It figures that if representative bodies are at full capacity doing work to prosecute claims then all respondents and institutions that are waiting on the next step have spare resources to put back into the system. I am not trying to be provocative but just saying it as it is.

I appreciate that we are just 18 months after the last round of amendments but this resourcing issue is so dire that we need to examine whether the legislative objectives under those amendments have been met so that allocated resources are not sitting idle in anticipation of spikes in work envisaged by those changes. If the work has not materialized some 18 months after the introduction then will it ever?

## Future Directions

In light of my comments about simultaneously prosecuting a claim in the current environment of unprecedented exploration and mining, and also having regard to the fact that a fair proportion of that activity covers a sizable number of claims, it is time to consider de-coupling the claim process from the right to negotiate process.

An Alternative Procedure ILUA<sup>35</sup> or Area ILUA<sup>36</sup> could allow for the replication of negotiation rights without the need for a claim. This serves the dual purpose of acting as a pressure valve to the claim process and liberating financial and human resources to the rest of the system. Under this model there would be no claim hence respondent funding could be reallocated and Tribunal and Federal Court resources devoted to meet the remaining claims. The non-extinguishment principle applies under the ILUA provisions so substantive rights would not be affected; applicants may choose to lodge a claim at a future time when resources are more readily available.

The Tribunal has expertise in negotiating these ILUAs and the Native Title Registrar maintains the register of ILUAs. There is sufficient expertise in the system to facilitate this model, now. An amendment to the NTA empowering the Tribunal to exercise arbitration powers under any AP ILUA would be helpful in light of the Tribunal's considerable mining arbitration experience.

There is also proven good will between miners and native title parties. The scheme would be largely cost neutral for the State as the tenement application process is currently a user-pays system with proponents considering the costs of agreement-making part of the compliance costs; it may in fact be a boon for the State with increased royalties that flow to the entire economy. The system would have to guard against a proliferation of non-claimant applications to avoid this model being frustrated. Funding criteria could readily address this.

Leaving this alternative model to one side, if clients chose to stay in the current system then statutory changes to s223 would help considerably. Presumptions of continuity would be a good start. However, the net result should not simply shift the anthropology costs from applicants to respondents. In this regard, I don't have a lot of confidence in how Australia's colonial past was recorded and I fear that the presumption could be readily rebuttable, taking us nowhere. Moreover, I am not that confident that respondents after failing to discharge the rebuttable presumption will be falling over themselves to consent to a determination. We might find ourselves in trial gridlock!

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<sup>35</sup> S24 DA an Indigenous land use agreements (alternative procedure agreements) is an agreement meeting the requirements of sections 24DB to 24DF of the NTA.

<sup>36</sup> S24 CA, An *indigenous land use agreement* area agreements is an agreement meeting the requirements of sections 24CB to 24CE of the NTA.

## Conclusion

Finally and somewhat idealistically, the fundamental issue for me is ensuring that Indigenous peoples get a real opportunity to realize their land aspirations whatever that might mean for them. In many respects native title has been a useful platform to start that discussion but it should not be with the world at large – although I appreciate that native title is an *in rem* interest.

These discussions ought to be trilateral only; Indigenous People and State/Territory and Commonwealth Governments. Native title has served its purpose in raising the issues but it should not be an end in itself. Native title placed the unfinished business between aboriginal societies and the colonizing society squarely on the table. I am not talking necessarily about treaties or even constitutional reform but I am talking comprehensive settlements. We know how much in human and financial costs it will take to continue walking on the current path. It's time for a new path, a better path.

I wish you well in the remainder of your meeting.