

NATIVE TITLE: REFORM AND WHY?

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Introduction

1 It should come as no surprise to see the term ‘native title’ linked with the word ‘reform’ in the title of this paper. Those who practise in native title, or are otherwise involved in the conduct of native title proceedings, would no doubt agree: it is as if the words have a natural affinity.

‘Reform’ in context

2 Today is the nineteenth anniversary of the High Court’s historic decision in *Mabo v Queensland (No 2)*.² The *Mabo* decision transformed the law of property in Australia as it stood prior to 3 June 1992. Since then ‘native title’ and ‘reform’ have been inextricably linked.

3 Parliament’s response to *Mabo* came towards the end of 1993 with the passage of the *Native Title Act 1993* (Cth) (NTA).³ The nineteenth century philosopher Thomas Carlyle said that “every noble work is at first impossible”. Whether or not the NTA is a noble work, it certainly has noble aspirations. However, the spectre of constitutional impermissibility in the newly enacted NTA emerged early on. As originally enacted, the NTA provided for the registration and enforcement of determinations made by the National Native Title Tribunal (Tribunal), on the existence or otherwise of native title rights, as if they were orders of the Federal Court.⁴ In February 1995, the High Court handed down its decision in *Brandy v Human Rights and Equal Opportunity Commission*.⁵ In *Brandy*, the High Court held that amendments to the *Racial Discrimination Act 1975* (Cth) that provided for the registration and enforcement of a determination made by the Human Rights and Equal Opportunity Commission, as if it were an order of the Federal Court, were invalid as

¹ The views expressed in this paper are mine and do not represent the views of the Court or any other of its Judges. This paper is part of a presentation made to a Legalwise seminar “Native Title” held in Perth on 3 June 2011. I gratefully acknowledge the assistance of Russell Trott, Deputy District Registrar, Federal Court of Australia, in the preparation of this paper.

² [1992] HCA 23; (1992) 175 CLR 1

³ which came into force on 1 January 1994

⁴ ss 166, 167 and 168 NTA (since repealed)

⁵ [1995] HCA 10; (1995) 183 CLR 245

they purported to invest judicial power in the Commission.⁶ Following this, it was only a matter of time before a court of competent jurisdiction would be asked to consider whether the vesting of power in the Tribunal to make determinations, in a similar manner to the circumstances in *Brandy*, was an impermissible attempt to vest the judicial power of the Commonwealth in an administrative tribunal.⁷

4 What began was a far reaching political debate about the nature and extent of amendments required to ‘reform’ the NTA, not limited to the constitutional question. The debate gathered momentum after the High Court’s decision in *Wik Peoples v Queensland*⁸ in which the High Court, by majority,⁹ held that there was no necessary extinguishment of native title rights by reason of the grant of pastoral leases under the Queensland statutes that were in question.¹⁰ The debate culminated in the enactment of the *Native Title Amendment Act 1998* (Cth)¹¹ which provided for wholesale amendments to the NTA. Henceforth, all native title determination applications are now made to the Federal Court¹² and all native title claims that were lodged with the Tribunal are taken to have been made, as of 30 September 1998, to the Federal Court.¹³

5 The dust never settles: further reforms to the NTA were enacted in 2007¹⁴ and, more recently, in 2009.¹⁵ This paper canvasses some of the 2009 reforms to the NTA, provides recent examples of their effect on the conduct of native title proceedings and considers how native title proceedings might be conducted in the future, in light of other recent reforms. A short overview is also provided of some recent case law developments.

⁶ [1995] HCA 10, per Deane, Dawson, Gaudron and McHugh JJ, at [20]

⁷ as was subsequently found to be the case: *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151 per Burchett J at [155]; Drummond J at [173] – [176]; Cooper J at [187]

⁸ [1996] HCA 40; (1996) 187 CLR 1

⁹ Toohey J, Gaudron J, Gummow J, Kirby J, in separate decisions

¹⁰ [1996] HCA 40, postscript to the decision of Toohey J (with the concurrence of Gaudron, Gummow and Kirby JJ)

¹¹ most, but not all, of which came into force on 30 September 1998

¹² s 61(1) NTA

¹³ by reason of transitional provisions in Part 3 of Schedule 5 of the *Native Title Amendment Act 1998*: *Bullen v State of Western Australia* [1999] FCA 1490, at [26]

¹⁴ *Native Title Amendment Act 2007* (Cth); *Native Title Amendment (Technical Amendments) Act 2007* (Cth)

¹⁵ *Native Title Amendment Act 2009* (Cth)

The 2009 reforms to the NTA

6 The intention of the *Native Title Amendment Act 2009* (Cth)¹⁶ (Amendment Act) as exposed in the Second Reading Speech¹⁷ was to, “contribute to broader, more flexible and quicker negotiated settlements of native title claims. These changes will result in better outcomes for participants in the native title system” and that the “government’s key objective for the native title system is to resolve land use and ownership issues through negotiation, where possible, rather than through litigation”. Furthermore, the Attorney-General added that, “outcomes can extend beyond the bare recognition of legal rights. They can include sustainable benefits that deliver improved economic and social outcomes for generations of traditional owners”.¹⁸ The key objectives of the Amendment Act are to improve the operation of the native title system and the outcomes that parties can achieve in the system.¹⁹ In summary, the provisions of the Amendment Act relevantly allow the Court to:

- (a) decide whether the Court, Tribunal, or another individual or body should mediate native title proceedings,²⁰ rather than referring every case to the Tribunal for mediation;
- (b) rely on an agreed statement of facts between the key parties;²¹
- (c) make orders in proceedings about matters other than native title;²² and
- (d) apply amended evidence rules as referred to in the *Evidence Amendment Act 2008* (Cth)²³ to any case where the evidence has been heard and either the parties agree the rules should apply, or the Court has considered the views of the parties and considers it is in the interests of justice for the rules to apply.²⁴

¹⁶ the majority of which came into force on 18 September 2009

¹⁷ Hon R McClelland, Second Reading Speech, Hansard, House of Representatives, 19 March 2009, pp 3248

¹⁸ *Ibid*, p 3249

¹⁹ *Native Title Amendment Act 2009* (Cth), Information Sheet, Commonwealth Attorney-General’s Department www.ag.gov.au

²⁰ s 86B NTA

²¹ ss 87(8) and 87A(9) NTA

²² ss 87(4) and (5) NTA; ss 87A(4) and (5) NTA

²³ which came into force on 1 January 2009

²⁴ s 214 NTA

7 This last reform ensures that the amended evidence rules, including changes designed to assist claimants to give evidence by removing hurdles presented by traditional rules of evidence, may now apply to all native title proceedings, not just those made after 1 January 2009. However, the purpose of this paper is not to traverse the provisions of the Amendment Act in any great detail, but highlight some of the amendments to the NTA that are being used in practice today, and which might be used in future.

8 The jurisdiction conferred on the Federal Court by the NTA has been extended to enable the making of orders in a native title proceeding that may give effect to terms of an agreement that involve matters other than native title,²⁵ in either of the following circumstances:

- (a) if the order does not otherwise involve the Court making a determination of native title;²⁶ or
- (b) if the order does involve the Court making a determination, in which case the Court may also make an order that gives effect to the terms of the agreement that involve matters other than native title.²⁷

9 Subsections 87(1A), (2), (3), (4), (5) and (6) of the NTA are in these terms:

87 Power of Federal Court if parties reach agreement

...

Power of Court

- (1A) The Court may, if it appears to the Court appropriate to do so, act in accordance with:
 - (a) whichever of subsection (2) or (3) is relevant in the particular case; and
 - (b) if subsection (5) applies in the particular case - that subsection.

...

Agreement as to order

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

²⁵ ss 87(6) and 87A(6) NTA

²⁶ ss 87(4) and 87A(4) NTA

²⁷ ss 87(5) and 87A(5) NTA

Agreement as to part of proceedings

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

Orders about matters other than native title

- (4) Without limiting subsection (2) or (3), if the order under that subsection does not involve the Court making a determination of native title, the order may give effect to terms of the agreement that involve matters other than native title.
- (5) Without limiting subsection (2) or (3), if the order under that subsection involves the Court making a determination of native title, the Court may also make an order under this subsection that gives effect to terms of the agreement that involve matters other than native title.
- (6) The jurisdiction conferred on the Court by this Act extends to:
- (a) making an order under subsection (2) or (3) that gives effect to terms of the agreement that involve matters other than native title; and
 - (b) making an order under subsection (5).

10 In a paper entitled “The 2009 Amendments to the *Native Title Act 1993*: The Extended Powers of the Federal Court”,²⁸ Mansfield J stated that both the Preamble to the NTA and the Attorney-General’s remarks, in the Second Reading Speech, support a broad interpretation of s 87 and s 87A of the NTA, rather than one which is restrictive.²⁹ I respectfully agree with what Mansfield J has said.

11 In *Brown v South Australia*³⁰ at [24] Mansfield J considered the power of the Court under s 87 of the *Native Title Act* and, amongst other things, observed that:

[24] Section 87 now contemplates that, in an application under s 61 of the NT Act for determination of native title, the Court may make such orders as it considers appropriate even if it does not proceed to make a determination of native title. Such orders as the parties agree may include orders which do not relate directly to the determination of native title rights and interests. They may be confined to orders which do not directly relate to the determination of native title rights and interests... The only step the Court must take to include the terms of an agreement is to be satisfied that it is appropriate to do so: s 87(1A).

12 The task of considering whether it appears appropriate to make an order, which the Court is required to undertake under s 87(1A) of the NTA, was outlined by

²⁸ “The 2009 Amendments to the *Native Title Act 1993*: The Extended Powers of the Federal Court”, a paper based on a presentation by Mansfield J to the AIATSIS Conference, 2 June 2010

²⁹ *Ibid*, at para 4

³⁰ [2010] FCA 875

Greenwood J in *Wik and Wik Way Native Title Claim Group v State of Queensland*³¹
in the following terms:

[16] A number of considerations are to be taken into account in determining whether the proposed orders appear appropriate to the Court. First, the Act recognises and encourages the resolution of applications by mediation, negotiation and ultimately agreement without the need for a hearing and the assessment of evidence and fact-finding by the Court necessary in the course of a resolving a controversy. Second, the Court will be concerned to understand and place emphasis upon whether the agreement is freely made on an informed basis by all parties and whether the parties are represented by experienced independent lawyers. In the case of a State party representing the public interest, the Court will consider whether appropriate consideration has been given to the issues raised by the proposed consent determination. Third, so far as the State is concerned, the Court recognises that a State has access to its own archival material and generally has had a long period of engagement with Aboriginal communities and is therefore likely to be familiar with the historical arrangements within those communities. Fourth, although it is not necessary for the Court to consider the body of material that would be available to it in the course of a contested hearing, the Court ought to have regard to sufficient material which is capable of demonstrating that the agreement and the proposed orders are “rooted in reality” (*Native Title – A Constitutional Shift?*, University of Melbourne Law School, JD Lecture Series, Chief Justice French, 24 March 2009).³²

13 It can readily be seen that the 2009 reforms encourage the parties to reach agreement about matters that may be related to a native title proceeding but are not proposed to be included in any determination of a proceeding, regardless of whether or not the proceeding is ultimately resolved by the making of any determination. Section 87(7) of the NTA provides for regulations to be made specifying the kinds of matters that could be given effect to by an order of the Court. No such regulations have yet been made but the terms of agreements that might be contemplated by the parties might include such things as arrangements for future negotiations about Aboriginal heritage protection and protocols, land access and land use. The onus to make agreements is on the parties, rather than the Court. Assistance for the parties to reach agreement is also available through referral of matters to mediation by a Registrar of the Court, or by the Tribunal, or to other forms of assisted dispute resolution as may be ordered.³³

14 Last week, I had the privilege of giving effect to the first orders to be made under the new provisions in ss 87 and 87A of the NTA involving two proceedings concerning native title claims relating to land and waters located in the Kimberley region of Western Australia. In each of the judgments I delivered, a consent determination of native title was made and each resolved the respective proceeding,

³¹ [2009] FCA 789

³² [2009] FCA 789, at [16]

³³ s 86B NTA

except in relation to small areas comprised in the first application: *Goonack v State of Western Australia*;³⁴ *Barunga v State of Western Australia*.³⁵ For the first time however, simultaneously with the making of orders that there be a determination of native title, in each application the Court also made consent orders that gave effect to the terms of agreements reached, by the principal parties involved, about matters other than native title.

15 With the publishing of the judgments, the terms of both agreements have become a matter of public record. By way of summary, they provide for the State of Western Australia and the prescribed body corporate, which holds the native title on trust for the native title holders, within the Determination Area, as defined, to negotiate in good faith about certain matters other than native title. In broad terms, the matters the subject of the negotiations include:

- (a) future mining and petroleum interests, including access and alternative processes for the grant of exploration and prospecting licences;³⁶
- (b) standard Aboriginal heritage agreement provisions;
- (c) the creation, maintenance and upgrade of roads and tracks in the future to allow access by mining and petroleum interest holders;
- (d) agreed processes for approving and constructing houses and public works, Community Layout Plans, low impact future acts; and
- (e) agreed processes to assist native title holders and non-native title holders alike to understand and apply their rights and the relationship between those rights that may relate to certain matters as specified.

16 It is worth noting that the above matters are far from being an exhaustive list. Other matters that might well be considered appropriate to include in such agreements could include:

- (a) employment opportunities;

³⁴ [2011] FCA 514

³⁵ [2011] FCA 516

³⁶ i.e. in lieu of the provisions in Subdivision P of the NTA

- (b) recognition of non-native title rights;
- (c) land grants and transfers, agreements in regard to vesting and changes in use of existing parcels of land; and
- (d) co-management of national parks and reserve land.

17 Whilst the terms of each of the agreements have been made the subject of the respective orders, the Court has no role in overseeing the conduct of any negotiations. These further negotiations, which the principal parties wish to undertake, will now proceed with certainty and without contributing to further delay in the resolution of the proceedings. This has allowed the final resolution of one of the proceedings and the near to final resolution of the other, in a timelier manner than would otherwise have been the case. By implementing these initiatives, the parties have embraced one of the facilities offered by the 2009 reforms to the NTA. This can only auger well for the approach taken to resolve other native title applications in future.

18 The 2009 reforms to the NTA also amended s 87 to allow the Court to accept and act upon agreed statements of fact between some or all of the parties to a proceeding.³⁷ Subsections 87(8), (9), (10) and (11) of the NTA are in these terms:

87 Power of Federal Court if parties reach agreement

...

Agreed statement of facts

- (8) If some or all of the parties to the proceeding have reached agreement on a statement of facts, one of those parties may file a copy of the statement with the Court.
- (9) Within 7 days after a statement of facts agreed to by some of the parties to the proceeding is filed, the Registrar of the Court must give notice to the other parties to the proceeding that the statement has been filed with the Court.
- (10) In considering whether to make an order under subsection (2), (3) or (5), the Court may accept a statement of facts that has been agreed to by some or all of the parties to the proceedings but only if those parties include:
 - (a) the applicant; and
 - (b) the party that the Court considers was the principal government respondent in relation to the proceedings at the time the agreement was reached.

³⁷ s 87(8) NTA

- (11) In considering whether to accept under subsection (10) a statement of facts agreed to by some of the parties to the proceedings, the Court must take into account any objections that are made by the other parties to the proceedings within 21 days after the notice is given under subsection (9).

19 The Registrar of the Court is required to give notice of the filing of a statement that has been agreed to by some or all of the parties within 7 days after the statement is filed.³⁸ In considering whether to make an order under s 87(2), (3), or (5), the Court may accept such a statement that has been agreed to by some but not all of the parties, if those parties include the applicant and the party considered by the Court to be the principal government respondent at the time agreement was reached³⁹ but, in such circumstances, must take into account any objections that are made by the other parties within 21 days after notice of the filing of a statement of facts is given.⁴⁰

Section 37M of the *Federal Court of Australia Act 1976 (Cth)*

20 The 2009 reforms to the NTA have some synergy with the operation of s 37M of the *Federal Court of Australia Act 1976 (Cth)* (Federal Court Act), which provides for a codification of the collective duty to resolve disputes the subject of proceedings before the Court. In my view, the enactment of s 37M does no more than reflect, in statutory terms, what parties to proceedings and their representatives have always regarded as their respective obligations.

21 The introduction of Part VB of the Federal Court Act, including s 37M, occurred shortly after the commencement of the Amendment Act. Section 37M concerns the overarching purpose of civil practice and procedure provisions contained in the Federal Court Act. The operation of s 37M and how it affects practitioners' obligations as well as those of their clients was referred to in *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Limited*.⁴¹ Rares J, at [16] observed:

[16] On 1 January 2010, Pt VB http://www.austlii.edu.au/au/legis/cth/consol_reg/fcr186/index.html - p5b of the *Federal Court of Australia Act 1976 (Cth)* commenced. In s 37M, the overarching purpose of the civil practice and procedure provisions of the Act are stated to be the just resolution of disputes according to law and as quickly, inexpensively and as efficiently as possible. The Act now codifies the duty, not only of the Court, but of the parties and their lawyers, to cooperate in the achievement of the overarching objective.

³⁸ s 87(9) NTA

³⁹ s 87(10) NTA

⁴⁰ s 87(11) NTA

⁴¹ [2010] FCA 274

22 The parties, their representatives and the Court collectively hold a duty to cooperate effectively to ensure just outcomes. The 2009 reforms can be expected to provide not only for more timely outcomes in the resolution of native title proceedings, but also more innovative ones. Practitioners will note that the Federal Court Act makes no distinction between the jurisdiction conferred on the Court by the NTA and that conferred on the Court by any other statute.⁴²

23 Native title proceedings are given no preferential treatment by the Federal Court Act. It is trite that native title proceedings are complex and may involve multiple parties, many witnesses, including experts across a range of disciplines, lengthy trial hearings and diverse and often difficult circumstances for conducting hearings in remote locations.⁴³ To that list can be added the following additional factors:

- (a) limitations on the capacity to secure Commonwealth funding for legal representation of parties involved in native title proceedings; and
- (b) the relatively small pool of professionals (lawyers, anthropologists, archaeologists, linguists, historians, ethno-botanists etc.) with expertise in native title.

Anecdotally, the difficulties imposed by limitations on funding are not insignificant, as to which native title practitioners will have some experience. The securing of adequate funding for the conduct of native title trial hearings has often caused practical difficulties for the parties, their representatives and the Court and impacted on the timely conduct of proceedings.⁴⁴

The Federal Court's way of operating and priority list of native title claims

24 Mediation, either by a member of the Tribunal, or by a Registrar of the Court remains the primary method of progressing cases. Section 86B deals with the referral of matters to mediation and subsections (1) to (4) are in these terms:

⁴² cf. *Civil Dispute Resolution Act 2011* (Cth), from which proceedings under the NTA are expressly excluded, at s 16

⁴³ see for example the introductory comments of Lindgren J in *Harrington-Smith v Western Australia* (No. 9) [2007] FCA 31; (2007) 238 ALR 1

⁴⁴ see for example *Harrington-Smith v Western Australia* (No 6) [2003] FCA 663

86B Referral of matters to mediation

Federal Court must refer applications for mediation

- (1) Unless an order is made under subsection (3) that there be no mediation under this Act, the Federal Court must refer each application made under section 61 to an appropriate person or body for mediation, including the ascertaining of agreed facts, as soon as practicable after the end of the period specified in the notice under section 66.
- (2) In deciding whether to refer the application to a particular person or body, the Court may take into account the training, qualifications and experience of the person who is to be, or is likely to be, the person conducting the mediation.
- (2A) Without limiting subsection (1), the application may be referred to the Registrar, a Deputy Registrar, a District Registrar or a Deputy District Registrar of the Court

No mediation if it will be unnecessary etc.

- (3) The Court, either on the application of a party or of its own motion, must order that there be no mediation under this Act in relation to the whole of the proceeding or a part of the proceeding if the Court considers that:
 - (a) any mediation will be unnecessary in relation to the whole or that part, whether because of an agreement between the parties about the whole or the part of the proceeding or for any other reason; or
 - (b) there is no likelihood of the parties being able to reach agreement in the course of mediation under this Act on, or on facts relevant to, any of the matters set out in subsection 86A(1) or (2) in relation to the whole or that part; or
 - (c) the applicant in relation to the application under section 61 has not provided sufficient detail (whether in the application or otherwise) about the matters mentioned in subsection 86A(1) or (2) in relation to the whole or that part.

Factors to take into account

- (4) In deciding whether to make an order that there be no mediation under this Act in relation to the whole of the proceeding or a part of the proceeding, the Court is to take the following factors into account:
 - (a) the number of parties;
 - (b) the number of those parties who have appointed the same agent under section 84B or same representative;
 - (c) how long it is likely to take to reach agreement on the matters set out in subsection 86A(1) or (2) in relation to the whole or the part of the proceeding;
 - (d) the size of the area involved;
 - (e) the nature and extent of any non-native title rights and interests in relation to the land and waters in the area;
 - (f) any other factor that the Court considers relevant.

...

25 The Court must still refer all applications made under the NTA to mediation, unless certain circumstances as set out in the NTA apply and, in that regard, the Court may take into account the matters set out therein.⁴⁵ The Court may refer an application to mediation by a person or body other than the Tribunal.⁴⁶ In deciding whether to refer an application to a particular person or body, the Court may take into account certain matters, such as a person's qualifications and experience.⁴⁷ In relation to cases filed in the Western Australia District Registry, the Court is yet to make an order referring a matter to mediation by an individual or body other than the Tribunal, or a Registrar of the Court.

26 The Court employs a number of mechanisms to monitor on-going progress of native title applications. The Court has a case management system under which Judges of the Court are actively involved in managing a case from beginning to end. Once an application has been filed it will be allocated to a 'provisional docket judge' who monitors the application for the Court. Cases may subsequently be allocated 'substantively'. The native title priority list of cases is managed as a national list. The progress of all cases is reviewed regularly at regional directions hearings. In Western Australia, there are now 106 native title determination applications awaiting resolution by the Court. Of these, 30 are included on the Court's native title priority list of cases.⁴⁸ The cases included in the priority list are those in which there is general agreement amongst those involved that priority ought to be given to progressing the resolution of the case. Of the 30 priority cases:

- (a) 15 are referred to mediation being conducted by the Tribunal:
 - (i) 5 involve cases where native title determinations have been made in part;
 - (ii) 1 matter is also part heard;
- (b) 4 are referred to mediation being conducted before a Registrar of the Court;

⁴⁵ s 86B(1) NTA; the particular circumstances are set out in s 86B(3); the factors to be taken into account are set out at s 86B(4)

⁴⁶ s 86B(1) NTA

⁴⁷ s 86B(2) NTA

⁴⁸ http://www.fedcourt.gov.au/litigants/native/litigants_nt_cases_current.html#list

- (c) 1 is referred to case management being conducted before a Registrar of the Court;
- (d) 5 are programmed for trials due to commence in 2011;
- (e) 4 are part heard; and
- (f) 1 is part heard and in which orders have been made for the proceeding to be referred to mediation.

Recent case law developments

27 Whilst mediation remains the primary method of progressing native title determination applications it will not always be appropriate to resolve all issues without resort to litigation in part or in whole. Further, not all native title proceedings involve applications for a native title determination. Matters that otherwise come before the Court include:

- (a) appeals and matters referred to a Full Court;
- (b) appeals from determinations of the Tribunal;⁴⁹
- (c) applications for review made under s 169 of the NTA;⁵⁰
- (d) interlocutory applications seeking specific relief;
- (e) other applications in the nature of declaratory relief.⁵¹

28 Some recent examples include: *Roe v Western Australia (No 2)*;⁵² *Roe v Western Australia*;⁵³ *FQM Australia Nickel Pty Ltd v Bullen*;⁵⁴ *Dale v State of Western Australia*;⁵⁵ and *James v State of Western Australia*.⁵⁶ The Court's

⁴⁹ made pursuant to s 169 NTA

⁵⁰ made pursuant to s 190F(1) NTA

⁵¹ eg applications made pursuant to the *Judiciary Act 1903* (Cth)

⁵² [2011] FCA 102

⁵³ [2011] FCA 421

⁵⁴ [2011] FCAFC 30

⁵⁵ [2011] FCAFC 46

⁵⁶ [2010] FCAFC 77

paramount role remains – to resolve disputes as a court of record and as a court of law and equity, limited by the jurisdiction conferred upon it by statute.

Roe (No 2)

29 In *Roe (No 2)*, six people applied to the Court for an order to replace Mr Shaw and Mr Roe, as applicant, under s 66B of the NTA. Mr Roe opposed the orders being sought whereas Mr Shaw did not and he sought to be removed as a named applicant. A question arose about whether the persons proposing to become the applicant were all descended from named apical ancestors referred to in the native title claim group description in the application. Also at issue was the construction of the authorisation resolution made by a meeting of the claim group and a number of related issues. Ultimately, in the exercise of the Court’s discretion, it was ordered that Mr Roe and Mr Shaw be replaced as applicant, by three of the six people who applied to the Court for an order to replace them.⁵⁷

Roe v Western Australia

30 Mr Roe sought a grant of leave to appeal from the decision in *Roe No 2*. Siopis J refused leave for the reasons that the decision at first instance was not attended to with sufficient doubt, the findings then made were open to be made,⁵⁸ nor would a substantial injustice arise if the order made under s 66B(2) to replace Mr Roe and Mr Shaw, as applicant, was not set aside. Siopis J reasoned that Mr Roe had no authority to complain on behalf of the native title claim group in circumstances where other persons at an authorisation meeting were appointed to act as the applicant to replace the current applicant.⁵⁹

FQM Australia Nickel Pty Ltd v Bullen

31 In *FQM*, a Full Court⁶⁰ dismissed appeals by a mining company and the State from the decision of Siopis J to grant relief by making a declaration that immediately before the grant of certain mining leases, there was a ‘registered native title claimant’ as that term is defined in s 253 of the NTA.⁶¹ The background to the decision under appeal involved circumstances dating back to 2003 when the State gave notice under s 29 of the NTA of its intention to grant mining leases within the area of the

⁵⁷ [2011] FCA 102, at [156]

⁵⁸ [2011] FCA 421, at [25], [26] and [33]

⁵⁹ *Ibid*, at [40]

⁶⁰ Constituted by North, McKerracher and Jagot JJ

⁶¹ [2010] FCA 900

Esperance Nyungars native title claim. One of two persons authorised as the applicant died in 1999 and the other person died in 2005. Subsequently, in 2007, the State granted the tenements under the *Mining Act 1978* (WA) purportedly on the basis that s 28(1)(b) of the NTA was satisfied, as immediately prior to the grant there was no native title party, or registered native title claimant, that would be affected by the grant. Amongst other things, the Full Court considered the meaning of the term ‘registered native title claimant’ in the NTA and whether a person continues to be a registered native title claimant after the person has died and pending replacement on the Register of Native Title Claims. The Full Court noted that the applicant alone is empowered to deal with all matters arising in relation to the application under the NTA⁶² and that there is a tension between the provisions of the NTA in that s 66B contemplates that the applicant may be replaced by reason of death or incapacity and the fact that registered native title claimants are required under the NTA to negotiate in good faith with other negotiation parties concerning proposed tenement grants.⁶³ Ultimately the Full Court concluded that s 28(1)(b) continues to apply to an applicant who has died until removal of that person’s name from the Register of Native Title Claims and is consistent with the representative character of native title proceedings and of the purposes of the NTA.⁶⁴

Dale v State of Western Australia

32 In this case, a Full Court⁶⁵ dismissed an appeal from the decision of the primary judge to dismiss an application for a determination of native title brought on behalf of the Wong-Goo-TT-OO People. The primary judge dismissed the Wong-Goo-TT-OO People’s application based on the findings of Nicholson J in *Daniel v Western Australia*⁶⁶ and the determination his Honour ultimately made⁶⁷. Having unsuccessfully appealed from that decision, the Wong-Goo-TT-OO People sought to pursue their claim for a determination of native title in relation to areas that were not the subject of Nicholson J’s determination in *Daniel*. The Full Court held that the application constituted an abuse of process and, as a consequence, the primary judge was correct in making an order for dismissal of the application. Although the Full Court found it unnecessary to resolve the question, it is noteworthy that the

⁶² [2011] FCAFC 30, at [15]

⁶³ *Ibid*, at [11]

⁶⁴ *Ibid*, at [31] and [37]

⁶⁵ constituted by Moore, North and Mansfield JJ

⁶⁶ [2003] FCA 666

⁶⁷ [2005] FCA 536

judges doubted that the doctrine of issue estoppel has any field of operation in proceedings involving applications for determination of native title.⁶⁸ Note that an application seeking special leave to appeal from the decision of the Full Court has been filed in the Registry of the High Court of Australia.

James v State of Western Australia

33 In this case a Full Court⁶⁹ held that the grant of certain leases was a ‘past act’ as that term is defined in s 228 of the NTA and that each lease was a category C past act as defined in s 231 of the NTA. The background facts as referred to in the Full Court’s judgment⁷⁰ are that the Martu People’s native title determination application was lodged with the Tribunal in 1996 and became a proceeding in this Court in 1998. It was partly determined in 2002.⁷¹ The area within the application that was not determined remains on foot and is in mediation conducted by the Tribunal. A member of the Tribunal considered that it would expedite the reaching of an agreement on any subject matter within the mediation, to refer to the Court a question of fact or law that had arisen and relating to matters the subject of the mediation. The member proceeded to refer the questions to the Court pursuant to s 136D of the NTA⁷² and the referral of the questions, as a Special Case, was reserved to a Full Court. The area the subject of the referral was subject to various mining leases and general purpose leases granted under the *Mining Act 1978* (WA) before 1 January 1994 but on or after 31 October 1975 when the *Racial Discrimination Act 1975* (Cth) commenced, and a mining lease issued pursuant to clause 13 of the agreement scheduled to and ratified by the *Western Mining Corporation (Throssell Range) Agreement Act 1985* (WA) during the same period. In relation to each lease the questions of law reserved for consideration were answered, as follows:

- (a) The grant of each lease is a ‘past act’, as defined in s 228 of the NTA, for the purposes of Part 2 of the *Titles (Validation) and the Native Title (Effect of Past Acts) Act 1995* (WA); and

⁶⁸ [2011] FCAFC 46 at [88]

⁶⁹ constituted by Sundberg, Stone and Barker JJ

⁷⁰ [2010] FCAFC 77, at [3]

⁷¹ *James v Western Australia* [2002] FCA 1208, per French J

⁷² Since repealed and replaced by s 94H

- (b) Each lease is a Category C past act, as defined in s 231 of the NTA for the purposes of Part 2 of the *Titles (Validation) and the Native Title (Effect of Past Acts) Act 1995* (WA).

Conclusion

34 Dowsett J has observed that:

There can be no doubt that Native Title litigation poses problems which are different from those posed in most other litigation. But being a member of a profession is about being able to recognize new problems and solve them by reference to principles based on past experience. It has been, and continues to be, a real challenge to apply established case management and trial techniques to Native Title cases. Mediators must face their own challenges in applying established techniques and experience to new problems.⁷³

35 The reforming zeal, set loose by the transforming nature of the *Mabo* decision exactly nineteen years ago remains. So too does the obligation to resolve disputes according to law as quickly, inexpensively and as efficiently as may be possible. If we are to embrace the challenges and opportunities of the future the pathways to resolution must continue to be built and existing pathways repaved. Making full use of the opportunities provided by the 2009 reforms to the NTA is but one way to embrace the challenge. For my own part as a member of the Court I look forward to its continuing involvement in the facilitation of the resolution and ultimate conclusion of the native title caseload.

⁷³ “Native Title Litigation – An ADR Free Zone?” a paper presented by Dowsett J at the University of Queensland Law School on 8 April 2010 as part of a course “Mediation Strategies for Native Title Stakeholders” <http://www.law.uq.edu.au/documents/e-newsletter/justice-dowsett-paper.pdf>