02._org_Just Us Lawyers

Name of organisation: Just Us Lawyers

Colin Hardie and Ted Besley

Question 1:

We support the use of the additional 5 principles in addition to the Preamble and Objects of the Act to provide guidance to the Inquiry. In regard to the Preamble and Objects, we believe that the 1998 amendments to the NTA and the High Court Decisions of *Ward* and *Yort-Yorta* have skewed the operation of the act towards providing certainty to non-Indigenous interests and validating past/future acts, rather than recongising and protecting native title. We hope that the additional principles by which the Inquiry proposes to be guided, will highlight the need to return the operation of the Act into balance. It also should be kept in mind that the NTA will not deliver outcomes to many Indigenous Australians dispossessed of their traditional land and alienated from their traditional laws and customs. The NTA is limited in what it can deliver under Principles 4 & 5 because only some people will be able to obtain relief under the legislation. The NTA was part of a number of initiatives such as the creation of the IBA and ILC. Reform to the NTA needs to be placed in the context of an assessment of the performance of these organisations and whether they also need reform. Lastly, the failure by successive Federal Governments to deliver Paul Keating's "Social Justice Package" has meant that the void created by the inablity of the NTA to deliver benefits to certain people has never been filled.

Question 2:

Over the last five years, we have seen the pendulum swing from a very hard-line, legalisitc approach from the Queensland Government to a more pragmatic attitude, and more recently, a sharp swing back to the earlier stance. We have also seen a trend amongst development proponents to being more concerned within ILUAs to ensure that compensation is directed towards particular expediture items rather than cash payouts. Pastoral and local government respondents have suffered severe cut backs to their funding whilst NTRB's have enjoyed a boost to theirs. Lastly, we have seen a rise in intra-Indigenous disputes giving rise to interlocutory proceedings within substantive claims.

Generally speaking, there are a numer of factors which influence the changes and trends we have observed, including:- the political party in office at Federal and State levels; the Indigenous policy environment eg. 'closing the gap'; the economic climate eg. resource 'boom'; the needs and concerns of key stakeholders such as pastoralists and

resouce/mining/infrastructure proponents; the conduct and strategic priorities of NTRB's; resources available to claimant groups to fund legal proceedings.

Question a)

Many of the broader trends we have observed in relation to the native title system do not relate to connection requirements.

The requirements to prove connection should not be subject to changes and trends but they are. The attitude of the State, key respondents and the Federal Court are the greatest influences on how connection requirements are met. For example, proving connection in the Torres Strait is treated differently by the Qld Government to proving connection in other areas of Queensland. There is also inconsistency between States. The state government in Western Australia has an appetite for litigation which appears to be driven by a concern that native title hinders development. Both it and the Queensland Government, followed by the Northern Territory appear to have the strictest policy position on what evidence is sufficient for the purposes of a consent determination, whereas the South Australian, Victorian, and to a lesser extent, the NSW Government take a more creative and pragmatic approach to proving connection. To highlight this point, the NSW Government consented to the Githabul determination in 2007 which covers a part of Mt Lindesay that falls within NSW but the Qld Government refused to accept connection to the part which falls within Qld, even though the evidence in support of both parts was the same. There appears to be a view within the Qld Government that native title must be stringently proven in some places (generally close to cities and regional centres) but only shown to be capable of being recognised in others (islands and remote areas). We are also concerned about the reliability of the State's assessment of connection material in some cases. For example, in 2011 - 2012 we joined an Indigenous respondent to four claims in Nth Qld brought by a NTRB on behalf of a neighbouring group, despite previously representing our clients. The State had accepted connection in each of the matters and they were heading for consent determinations. Following case management between representatives of both groups, the claims were either substantially amended or withdrawn altogether. How can respondents continue to have confidence in the State's assessment of connection in such circumstances?

Recently, the resources available to Crown Law appears to be inadequate. The State is increasingly pushing back deadlines and timeframes for responding to connection material. This is due to a shortage of in-house resources, particular Counsel being over briefed and an unwillingness to engage more staff or alternatve Counsel.

The attitude of the Federal Court, and particular Judges, towards the disposition of native title claims and its case management system has also had a great impact on the way the parties to proceedings have dealt with addressing connection requirements. Orders have sometimes been made for connection material to be provided in stages or to address a threshold issue such as the identity of the "pre-sovereignty society". Whether or not this occurs, largely depends on the views of the docket Judge. The efficacy of case mangement conducted by the Federal Court in resolving connection issues varies, depending on the nature of the dipsute, the willingness of the parties to compromise and the consequences of non-compliance.

Lastly, the time and resources available to NTRBs, as well as the manner in which they exercise their functions, greatly affects the way connection requirements are sought to be met.

b) As mentioned, we have observed an increase in interlocutory proceedings brought by Indigenous litigants over the last five years. Many of these proceedings relate to disputes over the authorisation of amendments to claim groups, the repleacement of applicants and joinder by people who believe they have either been wrongfully excluded from a claim or assert a competing native title. The balance generally relate to disputes over the authority and conduct of the applicants. In some areas of Qld, disputes within and between claim groups is unavoidable. However, we are concerned that many are directly caused by or exacerbated by the conduct of NTRB's/NTSP's. Rather than concentrate on achieving determinations, these bodies often engage in inter and intra-group politics, providing resources and assistance to one side ofa dispute over the other. The resulting interlocutory proceedings waste valuable time and resources which could be put to greater effect, namely achieving native title determinations. They also test the patience of Judges, who in many cases do not allow additional time for steps to be taken to progress the substantive proceedings once these interlocutory skirmishes are resolved. In fact, there appears to be an expectation that the parties to such disputes progress matters in parallel resulting in foreshortened timeframes for producing evidence and preparing for trial.

Question 3:

We are not aware of variations between jurisdictions in respect of authorisation and joinder but have addressed in our answer to Question 2 variations within and between jurisdiction in respect of connection. One glaring inconsistency is the willingnes of the SA. NSW and Victorian government to develop and offer alternative settlement proposals to claimants groups. The lack of any alternative is a major cause of claims being pursed at great cost for many years in Qld over areas where very little native title may survive.

Question 4:

a. We have limited knowledge of the models used in other countries in relation to connection, authorisation and joinder. For this reason, we do not wish to make submissions on this issue.

b. We believe that the tribunals established under the Land Rights Act in the NT and Aboriginal Land Act in Qld, and associated law and practice, offer an alternative to the processes of the NTA. In particular, we see these as appropriate models for the provision of 'alternative settlements' for Indigenous people who cannot obtain relief under the NTA. It may also be more appropiate for delivering outcomes where there are minimal stakeholders such as protected areas (national parks, conservation reserves and state forests). This would have the added benefit of reducing the number of claims brought under the NTA which deliver outcomes inversely proportionate to the inputs. That is, a lot of money is often spent on claims over areas where very little native title is actually recognised. Authorisation is a product of the NTA. Hopefully, more cost effective and less technical processes could be developed to determine who represents a claimant group in tribunal processes. Similarly, joinder refers to a process in litigation. Tribunal processes would ideally be less formal and more flexible in determining the persons who have a genuine interest in the oucomes of and should be involved in hearings.

Question 5:

No, it does not. Judicial interpretation of section 223 has whittled away what can be recognised as native title rights and interests. It is hard to see how the worthy aspirations of the NTA's preamble have been achieved. Indigenous notions of "country" do not make technical distinctions between rights and interests in land and waters, and those that relate to other apsects of the relationship they have with their ancestral land, waters and/or sea. The rights traditional owners have over stories, designs and songs and other rights which the Courts have held to not be native title rights are examples of the disjuncture between traditional law and native title jurisprudence. .

Question 6:

Yes, it should.

a. The threshold to trigger the rebuttable presumption should be descent from a person shown to have traditional association with the relevant areas at the time of sustained European settlement, not the assertion of British sovereignty in 1788.

b. The presumed facts should go to the issue of "continuity". It would need to be rebutted that the descendants of the identified ancestor have maintained connection, a spiritual connection at the very least, to the relevant area.

c. The presumption of continuity could be rebutted by evidence that a substantial number of the present and any of the interveneing generations of descendants have ceased to acknowledge and observe their ancestor's laws and customs by which they claim to hold native title in the relevant area.

Question 7:

In our view, the presumption could be easily rebutted and therefore should not be viewed as a controversial or radical change to the way connection is proven/disproven. Instead, it will focus the parties' attention on the real issues facing each claim rather than wasting time and resources on proving the existence, identity and laws/customs of people from information that is generally very limited.

In practice, orders could be made upon the threshold trigger being met requiring the State and Respondents such as pastoralists and miners to provide their 'rebuttal evidence'. The applicants could then be ordered to provide evidence in reply which, if not accepted by the other parties, would provide the basis for a discrete question being put to the Court for determination at trial. Similarly, if the State considers that the threshold trigger has not been met, this could form a separate question to be Judicially determined. If the Court finds in the negative, this would obviate further expenditure on meeting/responding to continuity requirements.

In terms of approach, the State and Respondents would focus their attention/resources on the the two critical phases - the evidence required to trigger the presumption and its rebuttal. Once the presumption is triggered, applicants would not expend as much of their resources as they do presently on evidence towards proving continuity of acknowledgement and observance.

In essence, adoption of a presumption would result in more focused litigation with associated adjustments to the practices of the parties and their approach to both contested and consent determinations. It wouldd save time and money.

Question 8:

The key issue which should be dealt with in overlapping claims is whether the laws and customs of each group are substantially different. If not, the dispute is generally one as to the tribal or language group identity of the

respective ancestors and their descendants. That should not be relevant to the threshold trigger, namely the ancestors' traditional association with the area. If there is evidence of a substantial divergence between the groups' laws and customs, then a discrete issue should be referred to the Court as to which set of ancestors must descent be proven to trigger the presumption.

Question 9:

Where claimants cannot demonstrate descent from an ancestor associated with the area or can only show descent from a single person.

Question 10:

There are myriad probems associated with having to establish native title rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal or Torres Strait Islander people. These chiefly arise from the findings of the High Court in *Yorta Yorta* and successive decisions of the Court.

- a. Given that Indigenous Australians were not credited with even possessing laws or systems of land tenure giving rise to ownership for most, if not all of, the 19th century, it is often very difficult to find a useful account of their laws and customs from the pre-sovereignty era. This is coupled with the impossibility of obtaining direct (ie.affidavit evidence) about observance by the relevant pre-sovereignty society of such laws and customs. In many cases, we are left with infering and extrapolating from the observations of 19th century ethnographers (of various quality), pastoralists, explorers and others from an era whose attitude towards Indigenous culture does little to assist claimants establish a 'normative society' as enunciated by the Courts.
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- b. The test of "substantial interruption" has created a gulf between the sufficiency of continuity evidence for a consent determination and that required for a contested determination. This operates as a strong incentive for applicants to settle for consent determinations below their expectations lest they risk losing at trial because of 'substantial interruption'. Because of the High Court's interpretation of what is required for law and customs to be "traditional", there is no escaping the problems caused by the scarcity and perjorative nature of evidence from the pre-sovereignty era. Perversely, if a detailed account exists of the pre-sovereignty normative system it often poses a problem for many claim groups as they will struggle to demonstrate continuity of observance. There appears to be no allowance made for the adatation and adjustment of laws and customs that were and continue to be required to meet the challenges of depopulation, dispossession and government policies of segregation and assimilation.
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- Many of these problems would be addressed by either stautory amendment to insert more realisitc criteria for what is "traditional" or providing an alternative option from the NTA for Indigenous people unable to meet the current strictures.
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Question 11:

Yes. However, considering the diversity of circumstances under which Indigenous people currently live and the rapid change undergone by Indigenous societies over a relatively short period of time, it is hard to recommend a definition of univeral application. Having said that, any defintion must involve a link between past and present practice. The laws and customs of today in relation to key social mores must derive from those practicesed by forebears. Any definition must distill common elements from the laws and customs practiced in the past and present. In our experience, there must be general agreement with a claimant group about the principles and rules which govern group membership, decision making and the nature/allocation/exercise of rights & interests amongst members.

Question 12:

Yes. Members of pre-sovereingty societies were free, subject to ceratin customary restrictions, to trade and exchange whatever resources they could obtain from their country. Torres Strait Islanders and Cape York Aboriginal people engaged in international trade with people from Papua New Guinea. Top end groups traded with Macassans.Trade routes spanned the mainland continent. If native title is to contribute to the improving Inidgenous people's lives, it is vital that they be entitled to derive a commercial benefit from the exercise of such rights.

Question 13:

If it is still traditional to hunt with a rifle rather than a spear, then the same logic should apply to commercial native title rights and interests. The source of the right to trade is in the ancestral connection to the land from where the commodity is obtained. Difficulties arise from the processing and value adding to resources obtained from the exercise of native title rights and interests. Traditional owners used and employed available technology to maufatire or trade for the latest technology (eg, double outrigger canoes). So, It could be argued that it is a native title right to manufacture steel from iron ore mined from areas where native title has been found to exist. A reasonable balance will need to be struck as to when a commercial activity is and is not undertaken in exercise of a native title right or interest.

Question 14:

As discussed in our answers to questions 11 & 14, any definition of commercial native title rights must include a link with, or derivation from, past practices.

Question 15:

We do not have specialised expertise in this area and would refrain making comment for this reason.

Question 16:

Physical occupation and use is legally impossible in many cases without the permission of land holders and/or managers. Allowances need to be made to reflect the prevention of access and use of country by native title claimants. Access to esential services such as health and education means that many traditional owners cannot live on their traditional country. This has been the case for many people since the 1960's when they had to move to the closest towns so their children could go to school. It was and is an offence to do otherwise.

In practice, a dichotomoy emerges within many claim groups between the claimants who only have an ancestral connection and those that have maintained varying degrees of physical connection with country. Possession and transferral of traditional knowledge is often concentrated in families who have maintained physcial connection with or proximity to the claim area. In many cases, the people who merely have an ancestral connection are either removed from the claim or effectively carried by the others. Such 'disapora' people often had to leave country in search of work but are fully aware of their ancestral connection to country yet they are punished by the native title system for doing what they had to do to survive.

Firstly, a lack of physical occupation or recent use should not of itself be a bar to demonstrating connection, especially where acknowledgement/observance of the traditional laws and customs is still occurring. This was the case in De Rose Hill but State governments generally expect phsycial occupation and ongoing use of at least parts of the claim area to be demonstrated for the purposes of a consent determination.

We believe that the State and Cth Governments need to put together funding and a package of measures which can be used to encourage Indigenous people who will struggle to demonstrate connection because of a lack of physical occupation or recent use to settle proceedings or desist from making a claim.

Question 17:

Yes, because that is consistent with *De Rose Hill* and other relevant authorities. Any wording, however, should make clear that continuity of practices derived from the laws and customs of the pre-sovereignty society is required to establish native title in the absence of physical occupation and continued/recent use.

Question 18:

We refer to relevant parts of our previous answers which describe the problems associated with this requirement. If substantial interruption is to be strictly applied, then this simply highlights the need for alternative processes to be made available to Indigenous people who cannot obtain relief under the NTA. To do otherwise is to punish people for the practical impacts of colonisation and dispossession.

Question 19:

If a definition were to be included in the NTA, it would need to acknowledge that customs and behaviours change between every generation of every society (Indigenous or not). To treat Indigenous societies differently would be unfair. For this reason, the definition should not be exhaustive but be capabale of objective assessment. For example, if more than half of a claimant group no longer know of or observe particular customs in common, then it may be said to have been abandoned. How this can be ascertained is another matter.

Again, as a matter of fairness and equity, alternative pathways for relief need to be established for people who fall foul of any legislative definition should it be enacted.

Question 20:

Such an amendment is appealing because in our view 'substantial interruption' operates punitively to withold relief from the most dispossessed Indigenous people who undeniably deserve some form of redress for the impact this has had on them.

However, to do so would admit argument over whether such an amendment should operate retrospectivity as well as other complex legal and policy considerations regarding the exercise of Judicial discretion and what is in the interests of justice. This will spawn more litigation whilst Indigenous people wait for an outcome from the process and lawyers/politicians will be the main beneficiaries.

We would prefer an alternative settlement process to be developed across all jurisdictions (not just SA, NSW and Vic) which delivers a range of benefits to Indigenous people whose connection to country has been substantially interrupted or changed to an impermissable extent,

Question 21:

We refer to our answer to question 20. We believe that it is prefereable to offer an alternative to the native title system for Indigenous people whose connection to country has been substantially interrupted or changed to an

impermissable extent rather than attempt to address a failure to deliver anything to such people caused by current interpretations of the NTA. The present system and the key concepts which underpin it have been developed over twenty years and during this time, far less benefits have been delivered by native title determinations (as distinct from future act negotiations) than what was apparently envisaged by the NTA's enactors. For example, freehold properties could have been purchased for less than the cost of obtaining the many determinations which have delivered non-exclusive rights. Many claimants have died before ever seeing an outcome, which if they lived to see them, they would no doubt have thought them a waste of time/money. Making the amendments proposed in this question would result in further litigation, with associated human and financial costs, before the operation of the relevant provisions are fully understood and bear fruit. In the current political climate where governments contemplate the sale of public assets and other measures to generate capital, perhaps thought should be given to a 'Future Fund' for Indigenous Australians that could finance alternative settlements. Alternatively, consideration could perhaps be given for adjusting the functions and objectives of the ILC to achieve or contribute to alternative settlements.

Question 22:

Evidence relating to a particular claim area which identifies and describes the traditional (ie. pre-sovereignty) society, its members, their laws and customs and their rights and interests in respect of land often does not exist. This is not surprising given Indigenous people were not credited by many early observers as even having laws and customs in the sense used in native title juridprudence. For this reason, arguments in support of connection are often advanced by extrapolating or inferring from the body of evidence that does exist for nearby areas and their people.

We submit that the NTA should specifically provide for the admission of such evidence where a sufficient nexus exists. For example, evidence with respect to a group in one part of S/E Qld should be able to be used to support the connection of another where no such evidence exists.

Question 23:

Legal issues:-

Unnecessary meetings

The NTA needs to be amended to ensure that authorisation meetings are only held where a substantive issue needs to be determined by the claim group. For example, we aware of the following factual scenario which actually occurred:-

- a claim group held an authorisation meeting for the purposes of s66B as there was uncertainty over whether the applicants continued to hold the authority of the claim group
- the meeting broke down and no new applicants were authorised
- the Cth insisted upon another meeting to confirm the authority of the existing applicants or choose new ones
- another meeting was held at which a senior Elder died of a massive heart attack

The original applicants had authority to bring the claim in the absence of authorised replacements. Instead, an expensive, contentious meeting was required at which a senior claimant died.

Crystalisation of authorisation

There is a view held by some practitioners that authorisation takes effect at the time of a validly moved resolution of a claim group at a properly notified and constituted meeting. We take the view that, as with all legal proceedings, the relevant decision (eg. to amend the claim in some way) only take effect when the Court makes the relevant order that is sought. This needs to be clarified in the NTA otherwise there can be no certainty as to a claim's status because, if the earlier view is correct, an authorisation meeting could be held which may resolve to change some part of the claim. Recently we have seen an increase in competing authorisation meetings being held by the same claim group to make decisions and then seek to rescind them.

We provide the following non-exhaustive list of problems:-

a. For claimants

- The ultimate authority must lie with the claim group but having to revert to authorisation meetings too often in order to progress proceedings can create/widen divisions;

- Not enough time and resources are given to authorisation meetings for claims as opposed to ILUA's. Proponents will pay for a result and will resource information sessions in the lead up to an authorisation meetings. NTRB's, who generally represent the bulk of claims, do not devote such resources to authorisation meetings for claims. For example, we are aware of an authorisation meeting at which amendments were made to a claim to remove certain families' ancestors and remove areas from the claim which was attended by less than 15 claimants. Certfication provides a cloak of legitimacy in such circumstances.

- The decision making process chosen often creates dispute, especially where a mandatory traditional decision making process is used (s251B(a)). Disputes often arise over what is required by the traditional process.

A common example is where a group of Elders, or the heads of family/descent groups, must make the decision for the claim group.

Some of the difficulties in authorizing claims using a mandatory traditional decision making process include:-

- disagreement over whether and how decisions about things like native title claims were made in the pre-sovereignty era;
- disagreement over who has the authority to make such decisions (eg. who/what is an Elder?; must an Elder from every family group be present or endorse the decision?; can families have more than one Elder?); and
- disagreement about how such decisions were and should be made.

Where an agreed/adopted process is used, disputes arise for other reasons, often about the process used to vote. For example, we are aware of an authorisation meeting where it was proposed that decisions were made by the members of each consituent 'descent group' representing a single vote by secret ballot majoirty. This would have resulted in devaluation of the votes of members of more populous descent groups and disproportionate power being wielded by the members of smaller descent groups.

The problems we have described above create barriers to accessing justice for claimants

b. For potential claimants

The expense of conforming with the requirement of holding a valid authorisation meeting effectively means that it is very hard for Indigenous people to authorise a new native title claim without the support of a proponent or NTRB. For claims not supported by NTRB's, this is a barrier to access to justice.

c. For respondents

The requirement of authorisation create a barrier for proponents and land users such as small miners, pastoralists and developers who must authorise particular acts such as freeholding land of low monetary value. They do not have the resources to compensate NT parties, the land itself isn't worth much and the cost of an authorisation meeting is disporoportionate to the land dealing.

Question 24:

Yes. Consideration should be given to provisions which direct claim groups at intial authorisation meetings to:-

- clearly set out the authority of the applicants so certain decisions can be made by them without always reverting to authorisation meetings; and
- authorising an alternative decision making process by which later decisons can be made which do not involve the costs associated with an authorisation meeting (ie. if that process is followed, then the decision is taken to have been authoirsed by virtue of the authority given at the original meeting)

Question 25:

Government agencies (registries) and institutions (eg.archives and museums etc) should be required to provide data and information without the absurd level of restrictions which currently apply. For example, it is very difficult to obtain a Tindale genealogy. Other archival information should be digitised, indexed and made searchable and available to claimants' legal representatives.

Question 26:

NTRB's should not be able to act for both sides to a dispute. They should be held to the same ethical standards as law firms. A panel of ex-Federal Court judges, assisted by qualified Indigenous mediators, should be resourced by NTRBs to facilitate meetings between groups or within groups to seek resolution of overlaps or claim group issues. Standard form deeds of settlement and Court orders should be developed and made available to ensure mediated outcomes are implemented and the parties stick with what was agreed.

Question 27:

Authorisation meetings should only be required in the circumstances of c and d.

In relation to c., the grounds for demonstrating lack of authority must be strict and discourage the frivolous use of the provision. The giving and withdrawing of authority should not be done lightly, otherwise applicants will be encouraged to exercise their authority in such a way as to maintain their support base.

In relation to d., an order should only be available where the applicant was appointed under specific terms of authority which they have allegedly breached or exceeded. To do otherwise leads to interminable disputes over the limits of their authority when initially authorised and whether and how they exceeded their authority.

Question 28:

Our experience is that s84D has not operated to effectively deal with issues over authorisation. The most common problem with respect to

authorisation relates to defects in the process used to amend the claim group description. In relation to the Bigambul People's claim, four attempts were made to authorise amendments to the claim group, however, the Court found that s84D was not available to deal with fundamental questions over authorisation such as who should be part of the claim group through the addition or removal of a named apical ancestor. In our view, s84D should be amended to give the Court a discretion to deal with all defects in authorisation in a cost effective and pragmatic manner.

Question 29:

Organising and holding successful authorisation meetings requires a unique skill set. Lawyers and law firms generally do not have the community networks and other contacts that are crucial to achieving success. Practitioners and proponents often use the services of an experienced Indigenous community relations consultant and chair to assist with organizing and holding authorisation meetings. Doing so, or failing to do so, often makes the difference in acheiving a positive outcome. This highlights the need for NTRB's, who generally represent claimants in determination applications, to direct greater resources to authorisation meeting, and in particular, community meetings held in preparation for the final meeting.

If claimants are to be fully informed about the decisions they are asked to make at authorisation meetings, which are often complex and contentious, greater effort needs to be made in the lead up. A series of information sessions is desirable so that all the relevant information can be given and any questions or debate can precede the final meeting.

The fact that authorisation meetings are so costly often means that decisions are made hastily and therefore claimants do not 'own' the decisions.

Question 30:

Standard/pro-forma's should be developed by the NT Council for use at all authorisation meetings.

a. Yes. This is a principle of the law of agents which should apply to applicants too, although that is not to say that we believe that applciants owe fiduciary duties to all claimants. Defining the scope of the applicant's authority is desirable. In fact it should already be best legal practice and a failure to do so is unprofessional. It creates uncertainty, allows applicants to wield disproportionate power and deadlocks between applicants leading to arbitral proceedings to allow future acts and other acts to proceed which require unanimity amongst applicants;

b. Yes. This is best legal practice and to do otherwise allows a single person or minority to capriciously withold conset.

Question 31:

Yes. Self-represented Indigenous people seeking to join proceedings when they are well progressed face cosiderable legal obstacles to become respondents, especially when they do not hold the affection of the relevant NTRB.

Once they become respondents, or if they join under a Form 5 during notification, many self-represented Indigenous respondents struggle to comply with orders, cannot afford to commission connection reports, cannot engage senior Anthropologists to review the applicant's material and cannot afford legal representation. For these reasons, they are often dismissed by the operation of "guillotine orders".

Question 32:

Late joinder of non-Indigenous parties needs to be distinguished from late joinder by self-represented Indigenous respondents who are either asserting a competing native title or say they have been wrongfully excluded from the claim group. As long as the delay in seeking joinder is adequately explained, they should be referred to intensive case management as a matter of priority and resources provided to them by the NTRB (eg, independent legal representative and expert) to try to resolve the dipsute quickly and avoid holding up a determination or causing a trial.

Late joinder should not be allowed where a reasonable excuse cannot be given for the late joinder of a non-Indiegnous party who had the resources and opportunity to do so earlier. This is particularly justifiable in light of how vigorously State governments conduct themselves in native title proceedings as the First Respondent.

Question 33:

For non-Indigenous parties, whether their interests can be adequately protected by the State, provided the necessary information as to the nature of their interests is disclosed or can be discerned.

For Indigenous parties, whether sufficient reason is given for the delay and whether their interests are such that a failure to have them recognised and protected runs a real risk of either causing a miscarriage of justice or lead to an aplication under s13 of the NTA.

Question 34:

a. Where it is shown that either the State or applicant cannot or will not adequately protect their interests in the proceedings

b. Where their interests are suffciently unique so as to require their involvement to protect their interests

Question 35:

We do not believe that further changes should be made to the party provisions other than:

- the joinder of NTRBs to proceedings in their own right should not be allowed; and
- members of the claim group should be allowed to join as respondents in certain circumstances (eg. where they have valid concerns over the key elements of the claim such as the claim area or claim group description; where they can demonstrate misuse of funds at the direction of the applicants; where they been excluded from decision making or do not have an applicant representing their interests)

File 1:
File 2: