

Policy

Registrar's policy on preliminary assessments in relation to the registration testing of claims made in native title determination applications

Issued 6 June 2007

Introduction

A preliminary assessment is an initial assessment of a claim's capacity, on the face of it, to meet all conditions of the registration test.

Power of the Registrar to provide a preliminary assessment

The Native Title Registrar may provide assistance to applicants in relation to consideration of claims, including claims in amended applications, by way of a preliminary assessment.

Preliminary assessments are provided as assistance under section 78 of the *Native Title Act 1993* (Cwlth), which enables the Registrar to give such assistance as he or she considers reasonable to help people prepare applications and accompanying material and to help them, at any stage of a proceeding, in matters related to the proceeding.

Function of preliminary assessments

Preliminary assessments are not intended as advice, legal or otherwise. They do not set out or recommend any particular course of action. Actions taken in response to a preliminary assessment should not give rise to a legitimate expectation that the application will be accepted for registration. As applications need to be read as a whole, amendments to one part of a claim may adversely impact on the capacity of another part of the claim to meet the requirements of the registration test, even if that latter part seemed sufficient on preliminary assessment. Applicants are encouraged to seek independent legal advice about how to meet the requirements of the registration test.

Circumstances in which a preliminary assessment will be given

When a written request is required

The Registrar or his delegate may provide a preliminary assessment on a draft claim prior to the filing of the native title determination application in the Federal Court. In these cases, the applicant must request the preliminary assessment in writing.

When a written request is not required

Where a new application is filed in the Federal Court and the claim in the application is being considered against the conditions of the registration test, the Registrar or his delegate will

provide a preliminary assessment of the claim where it is apparent that the application is not likely to pass the conditions of the registration test, and no previous preliminary assessment has been provided on the claim in the application. In this instance, no written request for a preliminary assessment is required.

Where a preliminary assessment has already been provided

Where a preliminary assessment has already been provided on a claim in either a draft or filed application, the Registrar or his delegate will only provide one further preliminary assessment if, in the opinion of the Registrar/delegate, the new draft or draft amended application contains substantial changes, and the assessment is requested in writing.

Where an applicant requests a preliminary assessment and the Registrar or his delegate makes a decision not to provide one, this decision will be communicated to applicants prior to the registration test being applied.

Circumstances in which a preliminary assessment will not be given

A preliminary assessment will not be given if:

- an incomplete application is provided by the applicant (e.g. the applicant has provided one schedule only)
- a full application is provided but contains only minor variations from the application which originally received the preliminary assessment (e.g. minor wording changes have been made to one or two schedules or the revised application does not appear to have substantially addressed issues raised by the earlier assessment)
- further material or information regarding authorisation or the factual basis is provided to support an application, but no other changes are made to the application.

Applications affected by the Transitional Provisions of the Native Title Amendment Act 2007

In the case of applications which are to be registration tested, or re-registration tested, under the Transitional Provisions of the *Native Title Amendment Act 2007*, the following applies:

- applications which have not been registration tested previously will receive a preliminary assessment if it is apparent that the application is likely to fail the conditions of the registration test
- if an application has already been registration tested, applicants will not automatically receive a preliminary assessment. However, they may receive a preliminary assessment if they provide a draft amended application which contains substantial changes and request that a preliminary assessment be conducted. This applies whether or not the application previously received a full registration test decision or an abbreviated decision.

If an applicant chooses to provide further information to support their application under Items 89(4) or 90(4) of the Transitional Provisions of the *Native Title Amendment Act 2007*, this will not be regarded as a substantial change to the application and the application will not receive a preliminary assessment.

Prioritisation of registration test decisions over preliminary assessments

When prioritising the work of delegates, priority will be given to making registration test decisions above making preliminary assessments on draft applications. Timeframes for preliminary assessments may need to be negotiated accordingly.

Requirements of procedural fairness

Applicants should be made aware that when they submit a draft application for a preliminary assessment, a copy of their draft application may need to be given to other persons or parties affected by the registration test decision as a matter of procedural fairness. This might occur, for example, in a situation where there is a geographic overlap with another application which is undergoing registration testing.

Applicants should also be made aware that information contained in draft applications may be considered when a registration test is applied to a later version of an application. In particular, applicants should be made aware that inconsistencies between versions of applications can create problems for a delegate unless they are explained and a rationale provided for the changed information.