

# Environment, Resources and Development Court (Native Title) Rules 2001

The Environment, Resources and Development Court (Native Title) Rules 2001, dated 6 September 2001 that came into operation on 20 September 2001 (Government Gazette 20 September 2001, p. 4221) have been varied by these amendments:

	<i>Gazette</i>	<i>Date of operation</i>
# 1	<b>14 May 2020, p. 1059</b>	<b>18 May 2020</b>

Pursuant to section 48 of the *Environment, Resources and Development Court Act 1993*, and all other enabling powers, we, Michael Lester Wheatley Bowering, Presiding Member of the Environment, Resources and Development Court, and Christine Louise Trenorden, a Judge of that Court, make the following rules.

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# Part 1 Preliminary

## 1.1 Citation

These rules may be cited as the *Environment, Resources and Development Court (Native Title) Rules 2001*, and revoke the *Environment, Resources and Development Court (Native Title) Rules 1995*.

## 1.2 Commencement

These rules will come into operation on the day on which they are published in the Government Gazette.

## 1.3 Interpretation

In these rules -

**applicant** includes both a person applying for a native title declaration and a person claiming compensation under the State Native Title Act;

**Court** means the Environment, Resources and Development Court;

**expedited procedure** means a procedure under an Act for obtaining a summary determination of the Court authorising operations on native title land that -

- (a) will not directly interfere with the community life of the holders of native title in the land on which the operations are to be carried out; and
- (b) will not interfere with areas or sites of particular significance, in accordance with their traditions, to the holders of native title in the land on which the operations are to be carried out; and
- (c) will not involve major disturbance to the land on which the operations are to be carried out;

**Judge** means a Judge of the Court;

**Master** means a Master of the Court;

**native title agreement** means an agreement made under an Act authorising a person to enter native title land and carry out operations on the land;

*Example -*

- a native title mining agreement under Part 9B of the *Mining Act 1971* or Part 7 of the *Opal Mining Act 1995*;

**native title determination** means a determination of the Court made under an Act authorising a person -

- (a) to enter native title land and carry out operations on the land; or
- (b) to acquire native title land;

*Examples -*

- a native title mining determination under Part 9B of the *Mining Act 1971* or Part 7 of the *Opal Mining Act 1995* authorising a mining operator to enter native title land and carry out mining operations;
- a determination under section 28A of the *Land Acquisition Act 1969*;
- a determination under section 20 of the *Land Acquisition Act 1969*;

**proposed operations** includes proposed mining operations as defined in the *Mining Act 1971* and the *Opal Mining Act 1995* and the proposed acquisition of land under the *Land Acquisition Act 1969*.

**Registrar** means the person holding or acting in the office of Registrar of the Court.

**Regulations** mean the regulations made under the State Native Title Act which are in operation at the time;

**State Native Title Act** means the Native Title (South Australia) Act 1994;

#### **1.4 1.4 Application of ERD Court Rules**

[rule 1.4 inserted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

Unless the contrary intention appears, the provisions of the *Environment, Resources and Development Court Rules 2001* apply to a native title proceeding governed by these Rules

#### **1.5 1.5 Expressions used in the State Native Title Act**

[rule 1.4 renumbered to rule 1.5 by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

Unless the contrary intention appears, an expression used in these Rules and in the State Native Title Act has the same meaning in these Rules as it has in the State Native Title Act.

[rule 1.5 Note substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

**Note—**

See, for example, the definitions of claimant application, native title question and non-claimant application in section 3 of the State Native Title Act.

#### **1.6 Cultural or customary concerns**

[rule 1.5 renumbered to rule 1.6 by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

- (1) At any time in a proceeding, the Court may give the directions and make the orders it considers appropriate to take account of the cultural or customary concerns of a party to the proceeding or another person.

*Example*

The Court may make a ruling on the naming of recently deceased people.

- (2) In considering orders to be made, the Court may seek any information it considers appropriate from a party to the proceeding.

## **Part 2 State Native Title Register**

### **2.1 Title of register**

The register kept by the Registrar under section 17 of the State Native Title Act will be called the *State Native Title Register*.

### **2.2 Matters to be recorded**

[Section 17 of the State Native Title Act and regulation 6 of the Regulations specify the information that must be recorded in the register. That includes all decisions by competent authorities under the law of the Commonwealth about the existence of native title in land in the State or the nature of rights conferred over land in the State by native title. Also see Rule 2.6.]

The Registrar may accept a certified extract of the *National Native Title Register* kept under the *Native Title Act 1993* (Cwth.) as a basis for entering decisions of competent authorities under the law of the Commonwealth about the existence of native title in land in the State or the nature of rights conferred over land in the State by native title.

### **2.3 Inspection of register**

[Section 17(3) of the State Native Title Act requires the register to be kept available for inspection during normal business hours on payment of the fee fixed by the regulations.]

- 2.3.1 The register will be available for inspection at the principal registry of the Court at the Sir Samuel Way Building, Victoria Square, Adelaide.

- 2.3.2 The Registrar may make the register, or part of the register, available for inspection at district registries of the Court on terms and conditions determined by the Registrar.

### **2.4 Confidential part of register**

[Section 17(4) of the State Native Title Act requires a part of the register to be set aside for the inclusion of information and materials of a nature that cannot be publicly disclosed without contravening Aboriginal tradition. The confidential part is to include information and materials determined by the Court or the Registrar. The confidential part is only to be inspected as authorised by the Court or the Registrar.]

[subrule 2.4.1 amended by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

- 2.4.1 The part of the register set aside for the inclusion of information and materials of a nature that cannot be publicly disclosed without contravening Aboriginal tradition (the confidential part of the register) must be kept as directed by a Judge.

- 2.4.2 The Court or the Registrar may specify conditions on which a person is authorised to have access to the confidential part of the register, including conditions restricting the information or materials to which the person is to have access.
- 2.4.3 The Registrar must keep a written record of each decision of the Court or the Registrar authorising a person to have access to the confidential part of the register, including details of the name and address of the person and the information or materials to which the person was authorised to have access (but that record is not to be made available for inspection by members of the public).

## **Part 3 Applications (native title and compensation) under the State Native Title Act**

### **3.1 Applications (native title and compensation)**

[rule 3.1 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

- 3.1.1 An applicant for a native title declaration under Part 4 Division 2, or for compensation under Part 4A, of the State Native Title Act must file 2 copies of the application and each map and other accompanying document with the Court.

#### **Prescribed forms—**

Form 2AH Originating Application – Native Title Declaration Claimant Application

Form 2AI Originating Application – Native Title Declaration Non-Claimant Application

Form 77N Interlocutory Application – Native Title and Form 77O Schedule to Interlocutory Application – Native Title

Form 1N Claim – Native Title Compensation

#### **Note—**

The above prescribed forms reflect the forms prescribed by the Regulations for applications under Part 4A of the State Native Title Act.

- 3.1.2 An application under Parts 4 or 4A of the State Native Title Act must be accompanied by a supporting affidavit or statutory declaration in the prescribed form.

#### **Prescribed forms—**

Form 12 Affidavit

Form 13 Statutory Declaration

Form 14 Exhibit to Affidavit or Statutory Declaration

- 3.1.3 If the applicant is an individual, the application must be signed, and the accompanying statutory declaration or affidavit sworn or affirmed, by the applicant.
- 3.1.4 If the applicant is a body corporate, the application must be signed, and the accompanying statutory declaration or affidavit sworn or affirmed, by a director, secretary or other principal officer of the body corporate, or by a person employed by the body corporate who is authorised to sign the application and make the statutory declaration or affidavit.

### **3.2 Form of amendment of applications (native title and compensation)**

3.2.1 A person applying under reg 9 of the Regulations to amend an application made under Parts 4 and 4A of the State Native Title Act must file 2 copies of the application and each map and other accompanying document with the Court.

[subrule 3.2.1 Note substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

**Note—**

An application may be amended under Parts 4 and 4A of the State Native Title Act and the Regulations or in any other way as ordered by the Court.

3.2.2 The Court may give the directions and make the orders it considers appropriate, including (but without limiting the generality of this power) an order that claimant applications be combined.

### **3.3 Joinder of parties to applications (native title and compensation)**

3.3.1 This Rule applies to a person who wants to be a party to an application (native title and compensation).

[subrule 3.3.2 amended by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

3.3.2 If the 3 month period mentioned in regulation 10(6)(b) of the Regulations (the relevant period) has not ended for the application, the person must apply to the Court in the prescribed form.

3.3.3 At the end of the relevant period, the Registrar must give notice of each person who applied to be joined to the application to the applicant and to any other party to the proceeding.

[subrule 3.3.4 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

3.3.4 If the relevant period has ended, the person must seek the leave of the Court by applying to the Court in the prescribed form setting out the nature of the person's interests in the proceeding.

**Prescribed form—**

Form 771 Interlocutory Application to be Joined

3.3.5 The person seeking leave must, at the time he or she applies to the Court, give notice of his or her intention to apply to be joined to the applicant and to any other party to the proceeding.

3.3.6 If the Court grants the person leave to be joined, notice of the decision must be given to the applicant and to any other party to the proceedings.

### **3.4 Applications other than applications (native title and compensation)**

[rule 3.4 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

3.4.1 This Rule applies to an application other than an application (native title and compensation).

3.4.2 Unless the Court otherwise orders, an application to the Court for which no form is prescribed under the Regulations must be:

- (a) in the appropriate form under the Environment, Resources and Development Court Rules 2001 with any variations that the nature of the case requires; and
- (b) accompanied by an affidavit in the prescribed form setting out the grounds in support of the application.

3.4.3 If the applicant is an individual, the accompanying affidavit must be sworn or affirmed by the applicant.

3.4.4 If the applicant is a body corporate, the accompanying affidavit must be sworn or affirmed by a director, secretary or other principal officer of the body corporate, or by a person employed by the body corporate who is authorised to sign the application and make the affidavit.

3.4.5 Unless the Court otherwise orders, the application must be served on the applicant for native title or compensation and on the State Minister.

3.4.6 The Court may order that the application be served on, or notice of the application be given to, other parties to the application for native title or compensation.

**Note—**

For giving notice, see Rule 9.3.

3.4.7 If an applicant, or the State Minister served with an application under this Rule, believes another person has an interest in the application, the applicant, or the State Minister may, within 14 days of receiving the application, notify the Court of the name and address of the person believed to have an interest.

3.4.8 The Court may order that the application be served on, or notice be given to, any person that the Court is satisfied has an interest in the application.

3.4.9 A person served with, or given notice of, the application may file and serve a notice of acting in the prescribed form and, unless the Court otherwise orders, becomes a respondent to the application on filing the notice of appearance.

**Prescribed form—**

Form 23 Notice of Acting

3.4.10 In this Rule, *person* may include a group of persons or an organisation.

3.4.11 Nothing in this Rule affects any right a person may otherwise have to be joined as a party to a proceeding, or the power of the Court, on its own initiative or at the request of a party, to order that a person be joined as a party to a proceeding.

### **3.5 Application for review of decision not to accept claim for registration**

3.5.1 This Rule applies to an application under section 19B of the State Native Title Act for review of a decision of the Registrar not to accept a claim for registration.

[subrule 3.5.2 inserted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

3.5.2 An application for review of a decision not to accept a claim for registration must be made by filing an Originating Application in the prescribed form.

#### **Prescribed form—**

Form 4H Originating Application for Review

[subrule 3.5.2 renumbered to 3.5.3 by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

3.5.3 The application must be filed within 42 days from the date of notification of the decision under subsection 19A (7) of the State Native Title Act.

[subrule 3.5.3 renumbered to 3.5.4 by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

3.5.4 An application for review will be heard by a judge.

[subrule 3.5.4 renumbered to 3.5.5 by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

3.5.5 On a review, the Judge may give directions to the Registrar or the applicant.

## **Part 4 Applications under the Mining Act 1971, Opal Mining Act 1995 and the Land Acquisition Act 1969**

### **DIVISION 1: General requirements for applications and appeals**

#### **4.1 Form of applications and notices of appeal**

[rule 4.1 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

Unless these Rules or the applicable statute otherwise provides, an application, a proceeding to review an administrative decision or a proceeding to appeal against an administrative decision relating to a native title question must be instituted by filing an Originating Application in the prescribed form.

#### **Prescribed forms—**

Form 2AD Originating Application

Form 2AJ Originating Application – Summary Determination Authorising Operations on Native Title Land

Form 2AK Originating Application – Native Title Determination

Form 4H Originating Application for Review

Form 5G Originating Application – Appeal Against Administrative Decision

#### **4.2 Service of applications and notices of appeal**

[subrule 4.2.1 amended by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

4.2.1 The applicant must give a copy of the application or notice of appeal –

- (a) to each person to whom it is required to be given under these Rules; or
- (b) if no specific requirement is included in the Rules – to each person to whom it is required to be given by directions given by or at the direction of a Judge.

- 4.2.2 Service must take place as soon as reasonably practicable after the application or notice is lodged in a registry of the Court.
- 4.2.3 The method of service must –
- (a) if the person to whom the copy is to be given holds or may hold native title in the land – comply with Part 5 of the State Native Title Act and regulation 17 of the Regulations; and
  - (b) in any other case not provided for by paragraph (a) – comply with Part 12 of the *Environment, Resources and Development Court Rules 2001*.
- 4.2.4 Proof of service in accordance with rule 12.3 of the *Environment, Resources and Development Court Rules 2001* must be promptly sworn and filed in a registry of the Court.

## **DIVISION 2: Additional requirements**

### **4.3 Requests for mediation**

[rule 4.3 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

**Note—**

Certain provisions allow native title parties and others negotiating with native title parties to request the Court to mediate between the parties to assist in obtaining their agreement (see eg section 63P(3) *Mining Act 1971*, section 58(3) *Opal Mining Act 1995*, and sections 19(3) and 23(3) *Land Acquisition Act 1969*).

[subrule 4.3.1 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

- 4.3.1 An application requesting the Court to mediate between parties to assist in obtaining their agreement about a native title question must be instituted by filing an Originating Application in the prescribed form which–
- (a) gives the name and address of each other party to the proposed mediation; and
  - (b) includes an outline of the circumstances of the case and the matters in dispute; and
  - (c) is accompanied by a copy of the notice initiating negotiations between the parties and a copy of any other notice or document relating to the matter given to or by the applicant under the Act authorising the request for mediation.

**Prescribed form—**

Form 2AD Originating Application

- 4.3.2 The applicant must give a copy of the application to each other party to the mediation.
- 4.3.3 If mediation has been requested, it may continue even after an application for a native title declaration has been made to the Court seeking a resolution of the matters in dispute.

#### 4.4 Application for summary determination authorising operations on native title land

[rule 4.4 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

**Note—**

Certain provisions allow the Court to make a summary determination authorising operations on native title land if no native title parties have come forward following notification of an intention to negotiate with native title parties (see eg section 63N of the *Mining Act 1971* and section 56 of the *Opal Mining Act 1995*) or if the operations are of a kind attracting the expedited procedure (see eg section 63O of the *Mining Act 1971* and section 57 of the *Opal Mining Act 1995*).

4.4.1 An application for a summary determination authorising operations on native title land must be instituted by filing an Originating Application in the prescribed form and must—

- (a) identify and describe the land on which the proposed operations are to be carried out;
- (b) describe the interest (including any authority or tenement authorising the proposed operations) that the applicant holds or has applied to hold in the land;
- (c) describe the general nature of the proposed operations that are to be carried out on the land;
- (d) set out the terms of the determination sought;
- (e) if the applicant is relying on the expedited procedure –
  - (i) set out the grounds on which the applicant alleges that the expedited procedure applies to the proposed operations; and
  - (ii) be accompanied by a supporting affidavit in the prescribed form exhibiting copies of any objections to reliance on the expedited procedure received by the applicant;
- (f) be accompanied by a supporting affidavit in the prescribed form exhibiting a copy of the notice initiating negotiations with native title parties in relation to the proposed operations given by the applicant; and
- (g) set out to whom, when and how that notice was given.

**Prescribed forms—**

Form 2AJ Originating Application – Summary Determination Authorising Operations on Native Title Land

Form 12 Affidavit

Form 14 Exhibit to Affidavit or Statutory Declaration

4.4.2 If the applicant is relying on the expedited procedure – the applicant must give a copy of the notice to each person (if any) who has objected to reliance on the expedited procedure.

#### **4.5 Application for decision on payment to native title parties under native title agreement**

[rule 4.5 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

**Note—**

A native title agreement may provide for payment to the native title parties based on profits or income derived from operations on the land or on production from the operations on a basis to be decided by the Court (see eg section 63Q(1) and (2) *Mining Act 1971* and section 59(1) and (2) *Opal Mining Act 1995*. Note that under section 63S(3) *Mining Act 1971* and section 61(3) *Opal Mining Act 1995* a native title determination cannot impose such an arrangement).

4.5.1 An application requesting the Court to determine the basis of payment to native title parties under a native title agreement (as required by the agreement) must be accompanied by a copy of the native title agreement.

4.5.2 The applicant must give a copy of the application to –

- (a) each other party to the agreement; and
- (b) the Minister responsible for the Act under which the agreement is made.

#### **4.6 Appeal against Minister’s order prohibiting registration of native title agreement**

[rule 4.6 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

**Note—**

Certain provisions allow a Minister, if of the opinion that there is reason to believe that a native title agreement may not have been negotiated in good faith, to make an order prohibiting registration of the agreement (see eg section 63Q(5) *Mining Act 1971* and section 59(5) *Opal Mining Act 1995*). The decision of the Minister is subject to appeal (see eg section 63Q(6) *Mining Act 1971* and section 59(6) *Opal Mining Act 1995*).

4.6.1 An appeal against a decision of a Minister prohibiting registration under an Act of a native title agreement must be instituted by filing an Originating Application in the prescribed form which must–

- (a) give an outline of the circumstances of the case;
- (b) give details of the decision appealed against;
- (c) set out the terms of the order sought;
- (d) set out the grounds of appeal; and
- (e) be accompanied by a copy of –
  - (i) the native title agreement; and
  - (ii) the order of the Minister prohibiting registration of the agreement.

4.6.2 The appellant must give a copy of the Originating Application to –

- (a) each other party to the native title agreement; and

- (b) the Minister.

**Prescribed form—**

Form 5G Originating Application – Appeal Against Administrative Decision

**4.7 Application for native title determination**

[rule 4.7 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

**Note—**

Negotiations with native title parties must occur in relation to various matters including creation of a right to mine (see eg Part 9B *Mining Act 1971* and Part 7, *Opal Mining Act 1995*), the conferral of rights under the *Land Acquisition Act 1969*. If agreement cannot be reached between the negotiating parties, an application may be made to the Court for a native title determination (see eg section 63S *Mining Act 1971*, section 61 *Opal Mining Act 1995* and section 20 *Land Acquisition Act 1969*).

- 4.7.1 An application for a native title determination following the failure of negotiating parties to reach agreement must be instituted by filing an Originating Application in the prescribed form which must—
- (a) identify the land subject to the negotiations;
  - (b) identify the other parties with whom negotiations have taken place;
  - (c) identify the representative Aboriginal body for the area in which the land is situated;
  - (d) identify any person who holds an interest in the land (including an authority or tenement authorising mining or other operations on the land) but has not been a party to the negotiations and give details of the nature of the interest;
  - (e) include a statement of the effect of the proposed operations on:
    - (i) the enjoyment of native title rights and interests by the native title parties;
    - (ii) the way of life, culture and traditions of the native title parties;
    - (iii) the development of the social, cultural and economic interests of the native title parties;
    - (iv) the freedom of access by any of the native title parties to the land and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land in accordance with their traditions;
    - (v) any area or site on the land of particular significance to the native title parties in accordance with their traditions; and
    - (vi) the natural environment of the land.
  - (f) set out the terms of the determination sought;

- (g) if it is made by a person other than a native title party –
  - (i) describe the interest (including any authority or tenement authorising proposed operations on the land) that the applicant holds or has applied to hold in the land;
  - (ii) describe the general nature of the operations proposed to be carried out on the land or the purpose for which the land is to be acquired;
  - (iii) be accompanied by a supporting affidavit in the prescribed form exhibiting a copy of the notice initiating the negotiations; and
  - (iv) set out to whom, when and how that notice was given; and
- (h) if it is made by a native title party –
  - (i) give details of the nature of the rights conferred by the native title in the land held or claimed by the applicant and the basis on which native title is held or claimed; and
  - (ii) give details of any request for non-monetary compensation.

**Prescribed form—**

Form 2AK Originating Application – Native Title Determination

Form 12 Affidavit

Form 14 Exhibit to Affidavit or Statutory Declaration

4.7.2 However, if the Court has mediated between the parties to assist in obtaining their agreement, any party to the mediation may apply for a native title determination by written request to the Court setting out the terms of the determination sought (rather than by application in the form referred to above).

4.7.3 The applicant must give a copy of the application or written request to –

- (a) each other party to the negotiations; and
- (b) the representative Aboriginal body for the area in which the land is situated; and
- (c) the Minister responsible for administration of the Act under which the determination is sought.

**4.8 Application for review of compensation under native title determination**

[rule 4.8 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

**Note—**

The Court may be asked to review provisions of a native title determination providing for payment of compensation if a native title declaration is made subsequent to the determination (see eg section 63ZB of the *Mining Act 1971* and section 70 *Opal Mining Act 1995*).

An application for review of the provisions of a native title determination providing for the payment of compensation following a native title declaration must be in the prescribed form which must –

- (a) identify the determination and the provisions of the determination sought to be reviewed and set out the terms of the order sought; and
- (b) be accompanied by a supporting affidavit which provides details of the native title declaration, including –
  - (i) the date of the declaration;
  - (ii) the land to which the declaration relates;
  - (iii) if native title is declared to exist in the land –
    - the persons declared to be the common law holders of native title;
    - the body declared to be the registered representative of the common law holders of native title;
    - the nature and extent of the rights and interests conferred by the native title; and
    - the nature and extent of other interests in the land that may affect the native title rights and interests deriving from the native title;
  - (iv) the operations authorised by the determination and the authorities or tenements under which the operations authorised by the determination may be carried out;
  - (v) if the applicant is a person who is liable to pay compensation under the determination – the operations that have been carried out under the determination;
  - (vi) any person who holds an interest in the land but who was not a party to the negotiations leading to the determination and give details of the nature of the interest;
  - (vii) the reasons for changing the provisions of the determination for payment of compensation.

**Prescribed forms—**

Form 4H Originating Application for Review

Form 12 Affidavit

Form 14 Exhibit to Affidavit or Statutory Declaration

4.8.1 The applicant must give a copy of the application to –

- (a) each other party bound by the determination; and
- (b) the representative Aboriginal body for the area in which the land is situated; and
- (c) the Minister responsible for administration of the Act under which the determination was made.

## Part 5 Native title questions referred to Court

[text substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

### Note—

Section 6 of the State Native Title Act and section 20A of the *Environment, Resources and Development Court Act 1993* empower the Supreme Court, and require other courts, to refer proceedings involving a native title question (as defined in the State Native Title Act) to the Environment, Resources and Development Court.

### 5.1 Pleadings in referred proceedings

[subrule 5.1.1 substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

5.1.1 If a proceeding involving a native title question is referred to the Court for hearing and determination before the pleadings are completed, the parties must, subject to direction by the Court, complete the pleadings in accordance with the rules applicable to the Court in which the proceeding was commenced.

5.1.2 The Court may exercise interlocutory powers that could have been exercised by the court in which the proceedings originated.

## Part 6 Evidence

### 6.1 Evidentiary matters generally

6.1.1 The Rules generally and the Rules of evidence apply, subject to this Order, to a proceeding under this Order.

[subrule 6.1.2 amended by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

6.1.2 The Court may, at any time in a proceeding, make any order it considers appropriate relating to evidentiary matters.

6.1.3 Without limiting subrule 6.1.2, the Court may make orders:

- (a) restricting access to the transcript of proceedings; or
- (b) restricting access to the content of any pleading or any other document on the Court file; or
- (c) relating to the manner in which evidence may be presented to the Court; or
- (d) relating to the time when and the place where certain evidence is to be taken; or
- (e) relating to the manner of identifying and referring to evidence about specified subject matters; or
- (f) relating to the presentation of evidence about a cultural or customary subject.

## **6.2 Evidence of a cultural or customary subject**

If evidence of a cultural or customary subject is to be given by way of singing, dancing, storytelling or in any other way other than in the normal course of giving evidence, the party intending to adduce the evidence must inform the Court, within a reasonable time before the evidence is proposed to be given:

- (a) where, when and in what form it is proposed to give the evidence; and
- (b) of any issues of secrecy or confidentiality relating to the evidence or part of the evidence.

## **6.3 Documents referring to certain material**

6.3.1 A document used in proceedings that refers to material relating to a cultural or customary subject that a party claims is of a confidential or secret nature must contain a notice of the claim.

6.3.2 The notice must:

- (a) appear on the front page of the document; and
- (b) include a short description of the material and the reason for its confidential or secret nature.

6.3.3 The material must be contained in a sealed envelope attached to the document.

6.3.4 The sealed envelope must not be opened except by leave of the Court.

6.3.5 Leave may be conditional on non-disclosure of the material or part of the material.

## **6.4 Evidence given in consultation with others**

6.4.1 The Court may, if it considers that in the circumstances it is in the interests of justice to do so, receive into evidence statements from a group of witnesses, or a statement from a witness after that witness has consulted with other persons.

6.4.2 If a statement is made by a witness after consultation with other persons, the identity of the persons may, at the direction of the Court, be recorded in the transcript.

## **6.5 Evidence given not in normal course**

6.5.1 If the Court considers that a person's evidence should be given at a time other than when such evidence would normally be given, the Court may give directions as to how, when and in what form the evidence is to be given.

6.5.2 Subrule 6.5.1 applies even if proceedings have been referred to mediation.

## **6.6 Evidence that may disclose certain information, contrary to a Court order**

- 6.6.1 This rule applies if the adducing of evidence or inspection of a document in a proceeding might disclose evidence or information relating to the culture, genealogy, customs or traditions of Aboriginal peoples or Torres Strait Islanders contrary to a direction or order of a court or tribunal.
- 6.6.2 The person wishing to adduce the evidence or inspect the document must give reasonable notice to:
- (a) the court or tribunal that gave the direction or made the order; and
  - (b) each person, or the representative of each person, who gave the evidence or produced the information; and
  - (c) any other person as the Court may direct.
- 6.6.3 Notice may be given under subrule 6.6.2 (a) by giving notice to the Registrar of the court or tribunal, or a person performing the duties of a Registrar or holding a similar office.
- 6.6.4 In this rule, a *court or tribunal* includes the Aboriginal Land Commissioner and any other body or entity with jurisdiction under a law of the Commonwealth or a State or Territory to hear and determine, or make findings and recommendations, or mediate or otherwise act in relation to indigenous land proceedings.

## **6.7 Inspection**

- 6.7.1 To enable the proper determination of any matter in question in proceedings, the Court may make orders for the inspection of any place.
- 6.7.2 Without limiting subrule 6.7.1, the Court may make orders about the method, manner and means of inspection, including orders relating to:
- (a) the provision of maps; or
  - (b) the obtaining of permission of owners and occupiers of land; or
  - (c) the giving of notice; or
  - (d) particulars of travel and accommodation details; or
  - (e) particulars of arrival and departure times; or
  - (f) the type, number and description of motor vehicles; or
  - (g) route description (for example the physical features of route including condition of road surfaces); or
  - (h) particulars of distances to be travelled and estimated times of travel and inspection; or
  - (i) details of any third party controlling the inspection and any related costs.

## **Part 7 Directions hearings**

### **7.1 Directions hearing must be convened for all matters**

7.1.1 The Registrar must convene a directions hearing before a Judge as soon as practicable after -

- (i) registering a claimant application; or
- (ii) receiving a non-claimant application; or
- (iii) receiving an application for variation or revocation of a native title declaration; or
- (iv) receiving a request for mediation under Part 4 of these Rules; or
- (v) proceedings referred or removed to the Court under Part 5 of these Rules; and
- (vi) receiving an application for compensation for an act extinguishing or otherwise affecting native title.

7.1.2 However, the Registrar may defer convening a directions hearing until satisfied that all notices and copies of documents required to be given in the circumstances of the case have been given.

### **7.2 Adjournment of hearing**

A directions hearing may be adjourned from time to time and may be resumed before the same or a different Judge.

### **7.3 Directions that may be given at hearing**

At a directions hearing, the Judge may give directions to the parties to the proceedings or the Registrar in order to define and clarify the issues between the parties and to facilitate the efficient and expeditious hearing and determination of the issues raised by the proceedings, including directions -

- (a) about the giving of notice of the proceedings (*see section 16(1) of the State Native Title Act*);
- (b) inviting or requiring a person (or representative of a group) to be joined as a party to the proceedings or to introduce evidence, or make submissions, relevant to the proceedings;
- (c) about service of a notice or other document;
- (d) about whether the proceedings should be heard in the Environment, Resources and Development Court or the Supreme Court;

- (e) about whether the proceedings should be heard together with other proceedings before the Court relating to the same land (*see section 26 of the State Native Title Act*);
- (f) if the proceedings have been commenced in the Court or referred or removed to the Court by another court –
  - (i) giving interested persons a specified time within which to apply for registration of a claim to native title in land or for a native title declaration;
  - (ii) about the procedure for pleadings, if not completed;
- (g) requiring a party to undertake investigations, make inquiries or ascertain facts that may be relevant to the proceedings;
- (h) requiring a party to provide (to the Court or another party) reports, maps, records or other documents that may be relevant to the proceedings;
- (i) requiring a party to provide particulars of his or her case, including a written summary of the evidence intended to be introduced;
- (j) about the convening of a conference of the parties, including –
  - (i) the selection of a mediator;
  - (ii) the procedure, places, timing and other arrangements for the conference;
- (k) dispensing (either prospectively or retrospectively) with compliance with the rules or specified rules.

#### **7.4 Reference to Master of matters raised at hearing**

A Judge may refer a particular matter raised at a directions hearing to a Master for direction or decision.

## **Part 8 Native title conferences**

[text substituted by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

### **Note—**

Section 8 of the State Native Title Act requires the Court to call a conference of the parties to contested proceedings involving a native title question, unless the Court is of the opinion that no useful purpose would be served by a conference between the parties before the hearing of the matter or there is some other adequate reason for dispensing with a conference.

### **8.1 Selection of mediator**

[rule 8.1 amended by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

### **Note—**

Section 9 of the State Native Title Act requires the Court to select a mediator from among the native title commissioners to preside at the conference in accordance with the rules.

The mediator to preside at a conference under section 8 of the State Native Title Act must be selected from among the native title commissioners by a Judge.

## **8.2 Appointment of assistant to mediator**

8.2.1 A Judge may appoint a native title commissioner to assist the mediator if the Judge considers that appropriate for reasons of Aboriginal tradition or for other reasons.

8.2.2 A native title commissioner appointed to assist a mediator –

- (a) must do so in the manner requested by the mediator; and
- (b) is, unless all parties agree to the contrary, disqualified from taking further part in the proceedings (as is the mediator under section 12 of the State Native Title Act).

## **8.3 Purpose of conference and conduct of parties**

8.3.1 The purpose of a conference is to enable the mediator to assist the parties to explore the possibility of resolving the matters in dispute by agreement and without resorting to a formal hearing (*see section 8(1) of the State Native Title Act 1994*), and to that end, it is expected that as far as possible the issues or matters in dispute, from the perspective of each party, will be aired and discussed openly at the conference, with a view to a fair and reasonable exchange of views in good faith.

8.3.2 Each party or a representative of each party attending the conference should attend in good faith, and, in the case of a representative, have the authority to discuss, negotiate and authorise a settlement of the proceedings, or agree on issues or parts of the proceedings.

8.3.3 Each party or a representative of each party should be prepared at the conference to discuss the party's case and its grounds, identify the issues proposed to be argued and respond to the case of each other party to the best of his or her ability.

## **8.4 Powers of mediator**

[Section 9(4) of the State Native Title Act allows the mediator to exercise powers of the Court delegated by the rules.]

The mediator may, at any time in the course of the conference, exercise any of the following delegated powers of the Court:

(a) the powers of a Judge to issue directions –

[subpara 8.4(a)(i) amended by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

- (i) requiring a party to undertake investigations, make inquiries or ascertain
- (ii) requiring a party to provide (to the Court or another party) reports, maps, records or other documents that may be relevant to the proceedings;

- (iii) requiring a party to provide particulars of his or her case, including a written summary of the evidence intended to be introduced;
- (iv) about the procedure, places, timing and other arrangements for the conference;

[para 8.4(b) amended by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

- (b) with the consent of all parties to the proceedings, to take and record evidence which may be admissible in proceedings before the Court (see section 11 of the State Native Title Act).

## **8.5 Conclusion of conference**

[Section 10 of the State Native Title Act provides that if a settlement is reached at a conference, the Court may make orders to give effect to the terms of agreement. The section also provides that if it appears that there is no reasonable prospect of reaching a negotiated settlement within a reasonable time, the mediator must close the conference and report the failure to reach agreement to the Court.]

- 8.5.1 If a settlement is reached at a conference, the mediator must, as soon as reasonably practicable, close the conference and give a written report of the terms of agreement (including the terms of any proposed orders of the Court) to the presiding member of the Court.
- 8.5.2 If it is proposed that the Court make an order to give effect to the terms of agreement, the Court will be constituted of a Judge.
- 8.5.3 In making an order, the Judge –
  - (a) will have regard to the views of the mediator who presided at the conference; and
  - (b) will, if the order is a final order in the proceedings, give the parties an opportunity to make submissions about the terms of the order.

## **Part 9 Other**

### **9.1 Change of address for service**

[rule 9.1 amended by ER&D Court (Native Title) Rules 2001 (Amendment No. 1)]

A party to a proceeding must inform the Court in writing of any change in address for service or contact details in the prescribed form within 14 days of the change.

#### **Prescribed form—**

Form 25 Notice of Change of Address for Service

### **9.2 Appointment of agent**

- 9.2.1 If a party to proceedings appoints an agent in relation to the proceedings, the party must inform the Court in writing, within 14 days of the appointment, of the name, contact details and address for service of the agent.

9.2.2 The party must inform the Court in writing of any change in name, contact details or address for service within 14 days of the change.

### **9.3 Notice**

9.3.1 If notice is required to be given under the State Native Title Act, these rules or by order of the Court, the notice must be:

- (a) in writing; or
- (b) in any other form that the Court considers appropriate.

9.3.2 The notice must be given:

- (a) by ordinary pre-paid post; or
- (b) in any other way the Court considers appropriate.

9.3.3 The Court may direct an applicant or the Registrar to give public notice of any hearing before the Court, or any order of the Court, in the manner and at the time the Court considers appropriate.

### **9.4 Overlapping applications**

9.4.1 If any party to an application has knowledge of the existence of another proceeding before the Court that relates to a native title declaration that covers (in whole or in part) the same area as that application, the party must immediately give notice to the Court identifying the other application.

9.4.2 If the Court receives notice under subrule (1), the Court must convene a directions hearing in both proceedings together to consider the future conduct of the proceedings.

9.4.3 The Court may give the directions and make the orders pursuant to subsection 26(2) of the State Native Title Act, which it considers proper for the future conduct of the proceedings.

### **9.5 Court may order adjournment for the purpose of negotiation between parties**

9.5.1 The Court may, at any time in proceedings, on its own initiative or at the request of a party, order an adjournment to allow the parties time for negotiation.

9.5.2 Negotiations for which an adjournment may be allowed may relate to an agreement about matters other than native title.

9.5.3 This rule does not limit the general power of the Court in relation to mediation.

## **9.6 Agreements regarding the practical outcomes of a native title declaration**

Before the Court makes a final declaration as to native title, the Court may, at the request of a party or on its own initiative, direct the parties to confer, with the aim of reaching agreement about the practical management of any aspect of the rights and interests to be the subject of the final declaration.

## **Index to Schedule 1 – Forms**

### **Index of Forms**

Form 1N Claim – Native Title Compensation

Form 2AH Originating Application – Native Title Declaration Claimant Application

Form 2AI Originating Application – Native Title Declaration Non-Claimant Application

Form 2AJ Originating Application – Summary Determination Authorising Operations on Native Title Land

Form 2AK Originating Application – Native Title Determination

Form 13 Statutory Declaration

Form 25 Notice of Change of Address for Service

Form 77N Interlocutory Application – Native Title

Form 77O Schedule to Interlocutory Application – Native Title (ERD)

**Note—**

Each individual form in the above Index is available separately on the “Rules, Forms and Fees” page of the CAA website.

## History of Amendment

Rules	Amendments	Date of Operation
am = amended; del = deleted; ins = inserted; ren = renumbered; sub = substituted		
1.4	ins am01	18 May 2020
1.4 to 1.5	renum am01	18 May 2020
1.5	sub am 01	18 May 2020
1.5 to 1.6	renum am01	18 May 2020
2.4.1	am 01	18 May 2020
3.1	sub 01	18 May 2020
3.2.1	sub 01	18 May 2020
3.3.2	am am01	18 May 2020
3.3.4	sub am01	18 May 2020
3.4	sub am01	18 May 2020
3.5.2	ins am01	18 May 2020
3.5.2 to 3.5.3	renum am01	18 May 2020
3.5.3 to 3.5.4	renum am01	18 May 2020
3.5.4 to 3.5.5	renum am01	18 May 2020
4.1	sub am01	18 May 2020
4.2.1	am am01	18 May 2020
4.3 (text)	sub am01	18 May 2020
4.3.1	sub am01	18 May 2020
4.4	sub 01	18 May 2020
4.5	sub am01	18 May 2020
4.6	sub am01	18 May 2020
4.7	sub am01	18 May 2020
4.8	sub am01	18 May 2020
Part 5 (text)	sub am01	18 May 2020
5.1.1	sub am01	18 May 2020
6.1.2	am am01	18 May 2020
Part 8 (text)	sub am01	18 May 2020
8.1	am am01	18 May 2020
8.4(a)(i)	am am01	18 May 2020
8.4(b)	am am01	18 May 2020
9.1	sub am01	18 May 2020
Schedule 1 – Forms	ins am01	18 May 2020