



## FEDERAL COURT OF AUSTRALIA

### Native Title Allocation Guidelines 2021

#### 1 PREAMBLE

The Native Title National Practice Area (NPA) is unique. The NPA requires a unique commitment from judges of the NPA.

It is the responsibility of the judges of the NPA to apply the *Native Title Act 1993* (Cth) (the **Act**). The Preamble to the Act identifies the unique circumstances of Aboriginal peoples and Torres Strait Islanders in Australia. These include:

- *The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.*
- *The progressive dispossession of Aboriginal peoples and Torres Strait Islanders largely without compensation and the failure of successive governments to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.*
- *The fact that Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.*
- *That the Act is intended to rectify the consequences of past injustices and to secure the adequate advancement and protection of Aboriginal peoples and Torres Strait Islander and to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.*

The judges of the NPA recognise that in order to discharge their functions under the Act it is necessary to not only develop and possess knowledge of the law, but also to recognise and understand the unique historical, social, economic and individual circumstances of Aboriginal peoples and Torres Strait Islanders, their relationships with the land, one another, with governments, and with other people.

To facilitate the development and continuity of this recognition and understanding by judges of the NPA, it is appropriate that guidelines be adopted and published concerning the allocation of matters to judges on the NPA.

In this NPA, expertise involves both knowledge of the law and the required recognition and understanding of the unique circumstances of Aboriginal peoples and Torres Strait Islanders. This

recognition and understanding takes time, commitment and experience with Native Title matters on the part of each judge.

The judges of the NPA recognise that for the Court to maintain its expertise in this NPA it is necessary that:

- the NPA maintain a sufficient number of judges, which requires the appointment of judges new to the NPA by the Chief Justice as and when required;
- judges with experience in the NPA mentor judges new to the NPA, particularly in respect of the case management of Native Title matters; and
- judges new to the NPA are given appropriate matters to develop their expertise in the NPA.

These guidelines are intended to be reviewed every two years.

## 2 DEFINITIONS

- **NPA experienced judge:** means all judges on the NPA with 3 years' or more experience on the NPA or substantial prior experience in practice and includes all co-ordinating and regional case managing judges.
- **NPA other judge:** means any other judge appointed on the NPA who is not an NPA experienced judge.

## 3 APPOINTMENT TO THE NPA

**Appointment to the NPA is within the authority of the Chief Justice: s 15(1AA) of the *Federal Court of Australia Act 1976 (Cth)*.**

**Aim:** to ensure judges who are appointed to the NPA understand the unique commitment appointment to the NPA requires.

**Aim** to ensure the dissemination, continuity and development of expertise of all judges on the NPA.

**Aim:** to ensure judges in the NPA have sufficient time and allocations to develop the required expertise.

**Aim:** to have appropriate gender representation on the NPA.

**Aim:** for all judges on the NPA to complete culturally relevant training.

## 4 NT REGISTRARS

- Maintain current system of NT Registrars for regions.

## 5 REGIONS

- Maintain regions for case management purposes.
- Regional case managing judges are responsible for ensuring that, well in advance of them ceasing to be a regional case managing judge and in consultation with the Chief Justice, they have facilitated the appointment of another NPA judge to be the regional case manager for the region, including jointly case managing the matters in the region for an appropriate period.

## 6 GENERAL

**All allocations of a matter to the docket of a judge are within the authority of the Chief Justice under s 15(1AA) of the Federal Court of Australia Act 1976 (Cth).**

Under the Court’s National Court Framework (NCF), matters are allocated in rotation to judges in the NPA in the registry of the filing, subject to:

- the availability of judges in the NPA in the registry of filing;
- considerations of balance of workload and commitments of judges; and
- the character of a matter calling for a different approach. However, this will only be in very limited circumstances.<sup>1</sup>

In the Native Title NPA, allocations will be in rotation to judges on the NPA on a national basis, subject to the considerations identified above and in accordance with these guidelines.

Where appropriate, the use of video-technology is encouraged to facilitate the national operation of the NPA and to acknowledge the importance of cost effective case management in this NPA, as a prima facie “no-cost” jurisdiction, where almost all parties are publicly funded.

**Aim:** substantive allocations to dockets should facilitate the following objectives:

- maintain the national operation of the NPA;
- provide excellence in the administration of justice in the NPA, recognising its unique character; and
- facilitate the dissemination of relevant knowledge and experience of judges on the NPA across Australia.

**Note:** this does not exclude the Chief Justice, or National Operations Registry (NOR) advising the Chief Justice, from considering budgetary and other matters as may be relevant in the making of allocations to a docket of a judge.

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<sup>1</sup> See <https://www.fedcourt.gov.au/about/national-court-framework/allocations> which explains allocations under the Court’s NCF.

**Aim:** co-ordinating judges and regional case managing judges should receive sufficient allocations to develop and maintain expertise.

**Aim:** other judges should receive sufficient and appropriate allocations to enable them to develop expertise.

## **7 APPEALS**

**Aim:** to include one other judge on all appeals.

**Aim:** to include at least one co-ordinating judge/regional case managing judge on all appeals.

- On filing, refer the appeal to an NPA experienced judge and to the NT Registrar responsible for the matter at first instance for case management.

## **8 CLAIMANT APPLICATIONS**

- On filing, refer the claimant application to the NT Registrar for the region and the regional case managing judge for case management.
- If and when it appears to the regional case managing judge that the claimant application will proceed to a consent determination (**CD**), the regional case managing judge should recommend to the NOR that the matter be substantively allocated to any NPA judge for a consent determination hearing.
- If and when it appears to the regional case managing judge that the claimant application will not proceed to a CD, the regional case managing judge should case manage the claimant application to a point the regional case managing judge considers appropriate in the circumstances. As soon as it appears reasonably practicable to do so, the regional case managing judge should recommend to the NOR that the matter be substantively allocated to any NPA judge, an NPA experienced judge, or an NPA other judge as may appear appropriate having regard to the nature of the claimant application.
- Interlocutory application/separate question – on filing, the regional case managing judge should recommend to the NOR whether the interlocutory application/separate question should be determined by the regional case managing judge or substantively allocated to any NPA judge, an NPA experienced judge or an NPA other judge as may appear appropriate having regard to the nature of the interlocutory application/separate question.

## **9 NON-CLAIMANT APPLICATIONS**

- On filing, refer the non-claimant application to the NT Registrar for the region and the regional case managing judge pending completion of the notification under s 66 of the Act.
- If the non-claimant application is undefended – substantively allocate to any NPA judge, with preference for an NPA other judge if available.

- If the non-claimant application is defended – the regional case managing judge should recommend to the NOR that the matter be substantively allocated to any NPA judge, an NPA experienced judge, or an NPA other judge as may appear appropriate having regard to the nature of the non-claimant application.
- If the non-claimant application prompts the filing of a claimant application – the NOR should notify the regional case managing judge who is or was managing the non-claimant application and that regional case managing judge should recommend to the NOR whether: (a) the claimant application should be substantively allocated to the judge who has been allocated the non-claimant application; or (b) both applications should be substantively allocated to an NPA experienced judge.

## **10 COMPENSATION APPLICATIONS**

- On filing, substantively allocate to an NPA experienced judge.

## **11 NNTT DECISION REVIEW**

- On filing, the NOR should consult with the relevant regional case managing judge to determine if the review application should be allocated to any NPA judge, an NPA experienced judge or an NPA other judge as may appear appropriate having regard to the nature of the review application.
- Following the consultation, substantively allocate to any NPA judge, an NPA other judge or NPA experienced judge as may appear appropriate having regard to the nature of the review application.

## **12 SECTION 13 VARIATION APPLICATION**

- On filing, substantively allocate to an NPA experienced judge.

## **13 JUDICIAL REVIEW APPLICATIONS**

- On filing, substantively allocate to any NPA judge.

## **14 FUTURE ACT APPLICATIONS**

- On filing, substantively allocate to any NPA judge.

## **15 PBC DISPUTES**

- On filing, PBC disputes should be characterised as matters within the Native Title NPA, regardless of the characterisation of the cause of action identified by the filing party on the initiating application.
- On filing, substantively allocate to any NPA judge.

## **16 MISCELLANEOUS DISPUTES**

- The NOR should consider in consultation with the regional case managing judge if allocation should be to any NPA judge, an NPA experienced judge or an NPA other judge as appears appropriate having regard to the nature of the dispute.
- Following consultation, substantively allocate to any NPA judge, an NPA experienced judge or an NPA other judge as appears appropriate having regard to the nature of the dispute.