NATIVE TITLE HOT SPOTS

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Contents

National Native Title Tribunal

Future act determination – mining lease must not be granted

WDLAC (Jamukurnu–Yapalikunu)/Western Australia/Holocene Pty Ltd [2009] NNTTA 49

Deputy President Sumner, 27 May 2009

Issue

In this case, the native title party sought a determination that a future act (the grant of a mining lease) must not be done. The area the mining lease would affect is a site of particular significance to the native title party. The National Native Title Tribunal determined that the lease must not be granted essentially because the interests, proposals, opinions and wishes of the native title party in relation to the management, use and control of the area concerned should be given greater weight than the potential economic benefit or public interest in the mining project proceeding. This is the first determination made by the Tribunal to that effect.

Request for Minister to overrule

On 10 June 2009, Holocene asked the Commonwealth Attorney General to overrule the Tribunal's determination on the grounds that it is in the national interest or in the interests of the State of Western Australia for the minister to do so. Any declaration must be made before 28 July 2009—see ss. 42(2) to (4).

Background

The state (the government party) gave notice under s. 29 of the *Native Title Act 1993* (Cwlth) (NTA) of a proposal to grant a mining lease under the *Mining Act 1978* (WA) to Holocene Pty Ltd (the grantee party). More than six months after the s. 29 notice was given, the grantee party made an application pursuant to s. 35(1) on the basis that negotiating parties had been unable to reach agreement of the kind mentioned in s. 31(1)(b). The native title party submitted that the grantee party had not negotiated in good faith but the Tribunal rejected that submission—see *Holocene Pty Ltd/Western Desert Lands Aboriginal Corporation (Jamukurnu–Yapalikunu)/Western Australia* [2009] NNTTA 8.

The lease was to cover 3144 hectares, around 87% of which affected part of Lake Disappointment in the Gibson Desert. The area concerned wholly overlapped a site registered under the *Aboriginal Heritage Act 1972* (WA) (AHA). It also entirely overlapped part of the determination area of the Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu) (WDLAC, the native title party). WDLAC is the registered native title body corporate that holds the Martu People's native title on trust—see *James v Western Australia* [2002] FCA 1208 (*James No. 1*) and *James v Western Australia (No 2)* [2003] FCA 731.

Contentions

The grantee party sought a determination that the act may be done subject to the conditions it proposed, which were based largely on conditions imposed by the Tribunal in other matters. The government party sought a determination that the act may be done but reserved its position regarding the proposed conditions. The native title party sought a determination that the act must not be done. This is one of only three cases in which the native title party has maintained this position in an inquiry before the Tribunal.

The parties agreed that:

- the registered native title rights and interests relevant to this proceeding were those set out in the determination of native title made in *James No. 1* and included the right to possess, occupy, use and enjoy the land and waters of the determination area to the exclusion of all others ('exclusive' native title);
- the Tribunal may accept the facts set out in *James No. 1*—at [61] to [62].

Details of the project

The grantee party proposed to use the lease area to extract and process potash (potassium sulphate). A resource of 25 million tonnes had been established within the exploration licences the grantee party already held. Mining was to take place on the surface of the Lake Disappointment by means of a five-metre wide and three-metre deep brine collection trench. A causeway would be built adjacent to the trench. Brine would be pumped from the trench into evaporation ponds near the northern shore of the lake. Potassium salts would be harvested using a fleet of harvesters and trucks. The final product would be transported to Perth along a public access road to the Talawana Track, which runs through the Martu determination area. Existing roads and tracks would be upgraded and a new access road from the lake to the Talawana Track built. The area affected by the various project facilities would be around 25 square kilometres. The anticipated lifespan of the project was 40 to 50 years, with a workforce of about 60 people employed on a fly in/fly out basis unless local people could be employed.

Relevance of 'term sheet' agreement

The relevance of what was called the 'term sheet' agreement, entered into by the native title and grantee parties as part of the good faith negotiations and tendered by the native title party in these proceedings, was in issue. The grantee party's solicitor referred to it in correspondence as an 'in principle' agreement. The term sheet agreement was the subject of public announcements, including a release by the Martu People's commercial advisor entitled 'Traditional Owners Fully Support Reward Minerals Limited Lake Disappointment Potash Project' and a release by Reward Minerals Ltd (the grantee party's parent company) entitled 'Commercial terms agreed with Martu for Lake Disappointment', which summarised those terms. The grantee party submitted the term sheet was subject to a 'without prejudice' privilege.

The Tribunal found that the term sheet agreement was subject to a 'without prejudice' privilege but that the public announcements made in relation to it, with the consent of both parties, were admissible for the purpose of establishing the fact of the in principle agreement and some of its terms—at [60].

Native title party's evidence

An on-country hearing, held at a community called Jigalong, was attended by the Tribunal and native title party. (It was digitally recorded for the grantee and government parties.) The oral evidence was limited to matters addressed in an affidavit by Teddy Biljabu, Mitchell Biljaba, Billy (Nyaparu) Landy, Timmy Patterson, Bobby Roberts, Brian Samson and Allan Charles (the Martu elders' affidavit). All but one of the deponents of that affidavit gave oral evidence, along with six additional witnesses. The native title party provided interpreters. It was agreed that leave to cross-examine would not be requested. The native title party's evidence also included:

- a statement about the cultural significance of Lake Disappointment by Professor Robert Tonkinson (the Tonkinson statement);
- the 2001 Martu native title claim connection report;
- the affidavit of Jeremy Maling, an anthropologist, annexing a draft heritage survey report (the Maling report);
- a DVD of the Lake Disappointment Aboriginal heritage survey discussions conducted by Mr Maling;
- financial and ASX documents relating to Reward Minerals Limited for the 2008 and 2009 period.

Section 155 direction varied

A confidentiality direction, made by the Tribunal under s. 155, provided that the Tonkinson statement and the connection report evidence must not be disclosed to anyone except certain identified people (e.g. counsel, instructing solicitors, expert anthropologists). The Tribunal thought it appropriate to refer to some of that evidence and so, to that extent, varied the s. 155 direction because much of it was already in the public domain in a book written by Professor Tonkinson. Deputy President Sumner:

> [A]ppreciate[d] that from an Aboriginal perspective the fact that material which is of secret and sacred kind has been made public does not mean that they are happy to see its continuing dissemination. However ... I considered it important to refer publically again to the material ... to ensure ... my reasons are fully understood and the factual basis of my determination is clear—at [28], referring to *Parker v Western Australia* (2008) 167 FCR 340; [2008] FCAFC 23 (summarised in *Native Title Hot Spots* Issue 27).

Beneficial construction of the NTA

The native title party made contentions based on the importance of protecting Martu native title rights, including that the wishes of the native title party should be a paramount consideration, which 'undoubtedly' was 'one of the central matters for consideration'—at [40].

In support of that contention, reference was made to the Preamble to the NTA and to the fact that a beneficial construction should be given to provisions of the NTA designed to protect (among other things) native title rights and interests. The Tribunal accepted that this principle applied:

> As the Federal Full Court recently noted, the right to negotiate regime is an element of the protection of native title, one of the main objects found in s 3 of the NTA and, given its beneficial nature, it is not to be narrowly construed—at [42], referring to *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 at [18], Spender, Sundberg and McKerracher JJ.

The Tribunal also noted (among other things) that:

- the relevant 'main objects' in s. 3 of the NTA are to provide for the recognition and protection of native title, establish ways in which future dealings affecting native title may proceed and set standards for those dealings;
- the NTA was enacted with knowledge of the mining industry's importance and the right to negotiate provisions were intended to deal with the ongoing grant of mining titles—at [45].

Relevance of international instruments

The native title party contended that the underlying principles of the *Racial Discrimination Act 1975* (Cwlth) (RDA) were reflected and supplemented in international law, including in instruments such as the Universal Declaration of Human Rights and the Declaration on the Rights of Indigenous People. The Tribunal found that:

> [T]he use which can be made of international instruments is as an aid to the interpretation of statutes where the terms of the statute are ambiguous. ... [T]here is no relevant ambiguity in s 39 of the NTA and thus these are not matters which can directly impact on the Tribunal's deliberations in this inquiry—at [46].

Legal framework—the s. 39 criteria

Pursuant to s. 38(1), the Tribunal must make one of three types of determination:

- that the act must not be done;
- that the act may be done;
- that the act may be done subject to conditions to be complied with by any of the parties.

The criteria for making a future act determination are found in s. 39. It was noted (among other things) that:

- in exercising its power, the Tribunal weighs those criteria by giving proper consideration to each on the basis of the evidence;
- there is no common thread running through the s. 39 criteria and so the Tribunal may be required to take into account diverse and sometimes conflicting interests;
- the NTA does not direct that greater weight be given to some criteria over others and so the weight given to each depends upon the evidence—at [37] to [38].

The Tribunal went on to consider the evidence against the s. 39 criteria.

Enjoyment of registered native title rights and interests—s. 39(1)(a)(i)
Under s. 39(1)(a)(i), the Tribunal must take into account 'the effect of the act on the enjoyment by the native title parties of their registered rights and interests'. In this case, this meant the rights and interests determined by the court and registered on the National Native Title Register. Pursuant to s. 29, the 'native title party' was WDLAC but, as was noted, it was 'self-evident' that the Tribunal was concerned with the effect of the act on the Martu People's enjoyment of those rights and interests—at [64].

The Tribunal makes its assessment against this criterion by examining the evidence relating to the actual exercise or enjoyment of the registered rights in the relevant area. In this case, it was the effect of the grant of the proposed lease considered in the context of the whole project. Most of the proposed mining operations would affect the surface of Lake Disappointment. The Martu evidence was that (among other things):

- they go to the lake at least once or twice a year to look after sites and keep their Law strong but they 'cannot walk over' some parts of the lake, 'no one can';
- over parts that were safe, Martu hunted and collected bush foods.

Overall (but leaving to one side issues as to the significance of the lake and the impact on the Martu People's culture and authority in relation to it) the Tribunal found that the effect of the act on the physical enjoyment of the Martu People's registered rights would not be substantial—at [81].

It was agreed that the native title right to 'exclusive possession' would be affected by the grant of the lease and that the right to make decisions about the use and enjoyment of the area of the proposed lease would be abrogated for the life of the lease. It was also agreed that the following rights (in summary) would be affected:

- to live on the area of the lease;
- to hunt, fish and gather;
- to use ochre, soils, rocks and stones and flora and fauna;
- to take, use and enjoy waters—at [72] to [74] and [78] to [79].

However, the evidence was that the Martu did not exercise these last four rights over the area concerned. As to the native title right to be acknowledged as the traditional Aboriginal owners of the area: '[E]ven if other Aboriginal people were to be employed on the Project ... [t]he fact of them being [so] employed ... could not in any way be used to say that they are traditional owners of the area'—at [77].

Way of life, culture and traditions—s. 39(1)(a)(ii)
Under this criterion, the Tribunal must take into account the effect of the act on the way of life, culture and traditions of the native title party. The strength of Martu traditional culture and connection to country was accepted by all parties.

Part of Professor Tonkinson's statement regarding the cultural significance of Lake Disappointment summarised the Martu traditional social structure, culture and attachment to land as follows:

> [T]he Martu believe that, during the world-creative activities of all the ancestral Dreaming beings, all the structural and legal essentials of life were laid down, and in a kind of contract, these beings demanded from their human descendants two big things: obedience to the dictates of 'the Law' and the faithful performance of rituals, which together will guarantee the continuing flow of enabling powers into the human realm, thus assuring the ongoing fertility of all living things and the continuance of Martu society.

The Martu elders' affidavit provided a 'more contemporary confirmation' of the position and oral evidence given on country 'was a powerful endorsement of the strength of feeling about Martu culture'—at [84] to [85].

The native title party contended that, if the proposed lease was granted without the permission of the Martu People, the authority of Martu culture would be undermined and the social and cultural structures of the native title party would thereby suffer. The Tribunal found that, generally speaking, the grant of the proposed lease would not detrimentally impact on the way of life, culture and traditions of the native title party in any substantial way—at [87].

However, Deputy President Sumner was careful to point out that:

> The effect of the future act on Lake Disappointment ... does have relevance to this criterion because of the importance of the Lake to the Martu and its connection to their way of life, culture and traditions in a spiritual way and otherwise—at [88].

Development of social, cultural and economic structures—s. 39(1)(a)(iii)
Under this criterion, the Tribunal must take into account the effect of the act on 'the development of social, cultural and economic structures' of the native title party. There was no evidence of any economic structures of the Martu which could be affected in an adverse way. As to the Martu People's social structures, there was no specific evidence relating to this factor. It was noted (among other things) that:

- the mine would be some distance from the two nearest Aboriginal communities and there were restrictions on entry to both of those communities;
- conditions could be crafted to minimise activities or contact which could have a detrimental effect on the Martu People's social structures—at [93] to [94].

As the effect on Martu cultural structures was 'inextricably bound up' with the importance of Lake Disappointment, it was dealt with later in the Tribunal's reasons.

Freedom of access and freedom to carry out rites and ceremonies—s. 39(1)(a)(iv)
The Tribunal must take into account the effect of the act on the native title party's 'freedom of access' and 'freedom to carry out rites, ceremonies or other activities of cultural significance' on the area concerned 'in accordance with their traditions'.

The conditions proposed by both the government and the grantee party attempted to maintain Martu access to the area to the greatest extent possible. However: 'In this case the conditions would be of little significance as the evidence only suggests minimal access to the subject area and would in any event only be a relatively minor amelioration of that impact'—at [97].

Areas or sites of particular significance—s. 39(1)(a)(v)
The question considered under this criterion was 'whether there is an area or site of particular significance (being that which is of special or more than ordinary significance to that native title party) that will be affected by the future act'. This involved making a value judgement about whether, from the Martu's point of view (and according to their traditions), the area or site was special or different from other areas or sites—at [99].

It was found that the project would affect a site of particular significance. However, in the Tribunal's view, it was important 'to explore the detailed evidence which provides the basis for this finding and examine how the site will [actually] be affected' by the grant of the lease—at [103].

The main area of dispute was the level of significance of the Lake Disappointment site. The native title party said it was of profound cultural significance and danger. The grantee party said that it was of special significance but not of such a level that mining could not be contemplated without the formal consent of the Martu.

The total area of the site as registered is 3,758 square kilometres, comprised of the main lake (over which the mining operations would occur if the lease was granted), a number of smaller lakes and a larger area of land around the lakes. Under the AHA, it is a 'closed' site i.e. written consent is required to view the site file information. The Tribunal found that the fact that the site was classified as 'closed access' and described as 'ceremonial and mythological' suggested it was of special significance—at [108].

Professor Tonkinson's statement on the lake's cultural significance contained evidence that:

> [N]o Mardu ever set foot near it [the lake], because to them it is the home of the dreaded Ngayunangalgu (will eat me). These cannibal beings, which dwell in their own complete world beneath the lake and emerge to attack human trespassers, are mythologically and totemically important to the Mardu. They are involved in certain curative magical activities ... but a strong fear of them keeps Mardu well away from their habitat.

Professor Tonkinson also said that: 'Traditionally, the salt lake Kumpupintil [Lake Disappointment] would almost certainly have constituted by far the largest no-go area in the Martu homelands'. As to the situation now, according to the Tribunal:

> It is ... clear that ... some Martu Elders and the Martu community generally, as expressed through two community meetings, ... are prepared to contemplate mining on parts of the Lake. ... The evidence of some Elders at Jigalong that they are

> opposed to mining is consistent with Professor Tonkinson's view. But that must be balanced against other evidence which shows that this is not a case of absolute prohibition on mining by current Martu Elders—at [111].

However, it was found (contrary to the grantee party's submissions) that the Martu connection report reaffirmed the importance of the site to the Martu:

> What the Connection Report shows is that, consistent with other evidence, it is not a site which requires the total exclusion of certain categories of people unless accompanied by certain rituals or senior men nor is it a site from which women are excluded. .... Nevertheless, I am satisfied that the evidence overwhelmingly established it as a very important place in Martu culture and tradition—at [122].

The report of a site survey conducted by Dr Guy Wright in 2006 allowed for the grant of exploration licences that comprised part of the project. Eight Martu men took part. The exploration program surveyed involved using a helicopter to lift a geoprobe that retrieved a 42 millimetre diameter core of sediment and brine from the lake. A small trench would also be dug in the lake with a shovel. Dr Wright reported that, at the conclusion of the survey, the Martu men felt they should discuss the issue of exploration more broadly within the Martu community.

The exploration program was approved over areas identified in a map attached to Dr Wright's report at a community meeting convened by WDLAC in October 2006. However, no consent was given to access certain identified areas and the consent that was given was for the limited purposes specified. The Martu elders' affidavit evidence was that they consented on the basis that disturbance to Lake Disappointment would be minimal and the period when men would be on the lake 'would be very short'. The Tribunal accepted that the exploration program was confined to the activities as described but noted that the Martu elder's evidence did not reflect the fact 'that it must have been known to the Martu that exploration may lead to a proposal to mine'—at [128].

A second heritage survey (the Maling Report) was commissioned by the grantee party and specifically related to the proposed lease and a pending miscellaneous licence. The eight Martu consultants confirmed the ethnographic values of the entire registered site and agreed to the project proceeding on the area previously approved for geoprobe drilling and manual trenching (i.e. avoiding certain identified areas). In addition, the Martu consultants did not want any mining or other activity on the islands. The Maling report said (among other things) that any further works would require additional consultation and that Martu monitors must be present during any ground disturbing activity.

The Martu elders' affidavit included the following evidence:

- Lake Disappointment 'country', which includes the lake itself and the country around it, 'has long been an area that is special to the Martu. Our song line goes all around and through Lake Disappointment';
- the whole of Lake Disappointment is a sacred site under Martu culture and the lake also contains other sites that are special;

- 'big parts' of Lake Disappointment 'are dangerous and there are areas on and around the lake that must not be disturbed'.

The oral evidence of Martu people at the on-country hearing confirmed the strong connection to the Dreamtime through stories and song lines in and around Lake Disappointment. The Tribunal was satisfied that:

> The whole of the evidence leaves no doubt that the Lake is of spiritual significance to the Martu including the surface of the Lake which traditionally was not visited. ... The evidence also establishes that this spiritual significance extends to areas around the Lake because of the Dreaming stories associated with it and such places as Savory Creek which runs into it—[141].

As to the 'level' of significance, it was found that:

> Although it is not so sacred or dangerous that it needs to be avoided in all circumstances, the evidence overwhelmingly establishes it [the lake] as an important place which is integrated into Martu culture and connection to country generally—at [149].

Relevance of the heritage protection regime to s. 39(1)(a)(v)

Submissions were made in relation to the protective regime found in the *Aboriginal Heritage Act* 1972 (WA) (AHA) which, in summary:

- provides for the protection and preservation of Aboriginal sites and objects;
- makes it an offence to excavate, destroy, damage, conceal or in any way alter any Aboriginal site (registered or not) without ministerial consent granted under s. 18;
- requires a person seeking consent under s. 18 to outline the nature and extent of consultation with Indigenous stakeholders (including native title parties), outline strategies to minimise impacts on sites and declare they have read and understood any heritage survey report tendered in support of their application;
- provides a defence to a prosecution if the person can prove they did not know, and could not reasonably be expected to have known, that the place was a site covered by the AHA.

The Tribunal can (and does) take the operation of the AHA into account when making a future act determination and may leave issues arising under s. 39(1)(a)(v) to the state regime. However, to so in this case would mean 'avoiding the Tribunal's responsibilities' to properly consider the issue:

> The grantee party cannot comply with the AHA by planning its operations in a way that avoids the site, and approval will be needed under s 18 before mining commences. The State regulatory regime cannot be relied on to make a finding that the Project will not affect Lake Disappointment because either it can be avoided or the Minister will not approve interference with it—at [145].

In other words, even the most 'efficient and well resourced' site-protection system could not ensure that the project would go ahead 'without interference with an Aboriginal site of particular significance to the native title party'—at [144].

Disturbance to site would not be minimal

The grantee party argued that the mine would affect only 'a minute fraction' of Lake Disappointment. However, the Tribunal found that:

> [T]he disturbance to the Lake from the proposed mining ... will not be minimal. The evaporation ponds and brine trench with a potential to extend for some 20 kilometres with the accompanying infrastructure and activities in collecting the potash salts means that there will be considerable interference to it—at [151].

Further, the project would last for up to 50 years, which also indicated that 'its impact on the site would not be minimal'—at [152] to [153].

Conclusion on s. 39(1)(a)(v)

The Tribunal concluded that Lake Disappointment:

> [N]ot only formally falls within s 39(1)(a)(v) as a site of particular significance but ... is of very great significance to the Martu despite the contemporary qualification that mining on part of it could be contemplated on acceptable terms—at [149].

Existing non-native title rights and interests and use of the land—s. 39(2)

The area of the proposed mining lease is the subject of exploration licences held by the grantee party and both the grantee party and the public access the Talawana Track and Canning Stock route, which run near to the proposed lease area.

Native title party's interests, proposals, opinions or wishes—s. 39(1)(b)

Under this criterion, what must be taken into account is the native title party's 'interests, proposals, opinions or wishes in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests that will be affected by the act'. In this case, there were registered rights that would be affected (e.g. the right to make decisions about the use and enjoyment of the area).

The native title party contended that the mining lease should not be granted unless the grantee party developed a satisfactory working relationship with the Martu and provided them with reasonable benefits, including some 'ownership' of the project. The grantee party said the native title party had no right of veto and could not rely on the alleged inadequacy of commercial terms or on terms previously negotiated.

The evidence already considered that was relevant to this criterion included the term sheet agreement and the results of the two heritage surveys over Lake Disappointment. Other relevant evidence, found in the Martu elders' affidavit, included the following:

> [T]he Martu ... know that we have to live in a world with white men and white men's law. We know that to protect our land, sometimes we have to give up a little bit even if it affects our culture and law. But the white man cannot have all our land. We give them a little bit but no more. We let go of a fingernail, and it hurts us, but we do this so we do not have to lose an arm. So we agreed to let Holocene to come onto parts of our land, but no more, so we could protect and save all the other parts of our land.

> This is the price we must pay to protect our culture and our Law for the future of the Martu.
>
> Holocene and Reward thought that the payment to the Martu of the money and royalties and other compensation and shares set out in the Term Sheet was fair compensation when they agreed to the Term Sheet. It was very important that we would get royalty payments and shares in Reward as we would own part of the Project and share in its success and we would keep a share of the land. This made it easier to agree to allow Holocene to build the Project on our land and to accept the effect on Martu culture.
>
> Now Holocene and Reward are saying that they will not give us a royalty or shares in Reward and that Holocene and the Government only have to pay very small compensation because they think the land is worth so little. This is a white man's attitude and completely ignores the impact on Martu culture by the mining activities, particularly as this will happen without our approval.
>
> If there is no trust and respect, if there is no Martu involvement and no fair compensation paid to the Martu, then the Martu will not agree to mining on Martu land.
>
> We want jobs for our people, but more than that, we want contracts for our companies, like our trucking company, and we want contracts to build and maintain the roads and track. This will give us independence, experience and a future, so we can develop our communities and offer our young people a future on their country. We want our boys and girls to go to University and learn trades to be able to work for and help their people. We want to use any money that we get from this Project to do these things for our people. We though all this would be discussed as part of the Stage 2 of our negotiations with Holocene and Reward and be part of our agreement.
>
> The Martu need to be consulted about the Lake and the mine because the Martu are responsible for the Lake. It is part of us; it is our culture and our Law. We should be told exactly where Holocene plans to mine, the location of its plant, camp, trenches and ponds. ... In the end Martu need to be told about all aspects of the Project and operations before we can decide whether we are prepared to agree to it going ahead.

It was accepted that opposition to mining was not raised by the native title party until after negotiations dissolved. However, the Tribunal also accepted the Martu elders' reasons for now declining to give their consent, as set out in their affidavit:

> For them it is one thing to enter negotiations in contemplation of mining which involved certain benefits and other terms, but quite another to consent to it when an acceptable and beneficial agreement could not be reached—at [159].

Distinguishing *Australian Manganese*

In *Australian Manganese Pty Ltd v Western Australia* (2008) 218 FLR 387; H[2008] NNTTA 38H at [57], the Tribunal rejected a submission that it should make a determination that a mining lease must not be granted *solely* because no agreement had been reached with the native title party because allowing the grant would adversely affect 'their aspirations to self-determination'. The Tribunal said this was

'tantamount to suggesting' that the native title party had 'a veto over the proposal' which was 'clearly not the law'. The grantee party relied on this finding.

The Tribunal acknowledged there were some elements common to both *Australian Manganese* and the present case, such as:

- negotiations about a comprehensive agreement broke down and the native title party would consent to mining only if a satisfactory agreement was reached; and
- there was a finding that there would be no significant impact on the enjoyment of native title rights or the other criteria in s. 39(1)(a)(i) to (iv)—at [162].

However, the 'major distinguishing feature' was that, in *Australian Manganese*, there was no evidence for the purposes of s. 39(1)(a)(v) that any site of significance would be interfered with: 'The evidence only established the possibility that such a site or sites existed on the mining lease area. In those circumstances, the Tribunal determined that the provisions of the AHA could be relied upon'—at [162].

Further, the fact that a native title party was not opposed to mining, but had not reached a satisfactory agreement in relation to it, did not 'automatically justify a determination that the act may be done'. As was noted:

> In the present case the Tribunal is dealing with a future act which will directly affect a site of particular significance to the Martu and that is an important matter to be weighed in the balance—at [162].

A further point of distinction was the weight to be given to the native title holders' interests, proposals, opinions or wishes etc. under s. 39(1)(b) in the circumstances of this case. The Tribunal was of the view that:

> [T]he fact of a determination of exclusive native title rights ... does increase the weight that can be given to this criterion. It cannot be of such weight applied in a standard way that it would be tantamount to a veto to be applied in all cases. ... [However as] ... a general proposition, there is a difference between making a future act determination over an area of exclusive possession [as in this case] and making a determination over an area where the right to exclusive possession has been extinguished and the capacity to exercise or enjoy other native title rights is seriously attenuated because of the exercise of non-native title rights, such as pastoral interests—at [163].

Economic or other significance—s. 39(1)(c)

Under this criterion, the Tribunal must take into account:

> The economic or other significance of the act to Australia, the state or territory concerned, the area in which the land or waters concerned are located and the Aboriginal peoples and Torres Strait Islanders who live in the area—s. 39(1)(c).

As was noted, it is the significance of the future act itself which must be considered, not its contribution to the maintenance of a viable mining industry overall—at [165].

The evidence accepted by the Tribunal included that:

- as there is no current domestic supply of potash, Australia imports around 500,000 tonnes per year;
- the grantee party's proposal was based on an initial output of 200,000 tonnes per year at an 'ex-gate' value of $100 million, producing royalties to Western Australia in excess of $5 million per annum;
- there should be substantial taxation revenue for the Commonwealth and Western Australia;
- the WA Department of Agriculture and Food supported the project.

The grantee party conceded there were no project design or specification documents yet and no feasibility studies had been commissioned. There was also evidence of a downward trend in potash prices and some potential difficulties in raising finance but the grantee party confirmed at the hearing that it still intended to proceed with the project. The Tribunal rejected the native title party's contention that the project was entirely speculative, finding that there was 'a reasonable prospect' it would go ahead and, if it did, it would potentially benefit the Australian and state economies. The fact that its status was unconfirmed was 'a minor consideration in the difficult task of weighing up the competing considerations'—at [171] to [172].

The Tribunal accepted the native title party's contention that the benefit, economic or otherwise, to the local Aboriginal People (essentially, the Martu) was limited to 'the possibility of some of them being employed and their businesses engaged in work contracts and an upgraded road'—at [178].

It was noted that the native title party's entitlement to compensation: '[C]annot be seen as an economic benefit. Rather, it is a legal entitlement to be recompensed for ... loss or damage suffered'—at [177].

Public interest—s. 39(1)(e)

The Tribunal accepted (as it has previously) that 'there is a public interest in a thriving mining industry' and that the grant of the mining lease in question had the potential to enhance it—at [180].

The Tribunal also acknowledged that, 'in the abstract', it may be in the public interest to refuse the grant of a mining tenement:

> To take an extreme example, it is unlikely that it would be in the public interest for an open cut coal mine to be approved for Kings Park in Perth. ... Specifically in the native title context, there may be public interest considerations against mining over areas of special significance to Aboriginal people—at [182].

In this case, the Tribunal was satisfied that the public interest would be served by the project. However, 'this interest must be balanced against the interests of the native title party and their wishes in relation to the interference with an important traditional site'—at [183].

Any other matter the Tribunal considers relevant—s. 39(1)(f)
The Tribunal took account of the fact that the grantee party had expended approximately $250,000 in payments to the native title party for meetings and heritage surveys, in addition to the high cost of it exploration programs. The grantee party contended it incurred this expenditure because the native title party consistently advised that it did not object, in principle, to the project. The Tribunal was not convinced that the native title party's agreement to exploration constituted an 'in principle' agreement to mining. However, it was accepted that the term sheet agreement indicated 'a readiness to proceed with it, albeit subject to final agreement from stage two of the negotiations'—at [184].

The environmental protection regime was also taken into account. Rehabilitation of the proposed lease area would, in practice, fully restore the native title right to access the area and control persons entering it. However, this would only be done at the end of the project, i.e. some 50 years hence. Therefore, it was not 'a factor that should be given a great deal of weight' because:

> For the whole of this time there would be development on Martu land that would have a considerable impact on the surface of the Lake and on the spiritual relationship of many of the Martu to it—at [187].

The Tribunal decided (over the objections of the grantee party) that, under s. 39(1)(f), it could have regard to the Martu People's current opposition to mining based on the fact that there has been a failure to agree acceptable terms—at [188].

Proposed conditions for payment
The main issue in this case was the scope of the Tribunal's power to impose conditions in relation to monetary payments. Subsection 38(2) provides that the Tribunal 'must not determine' (i.e. impose) a condition on a determination 'that has the effect that' native title parties are entitled to payments worked out by reference to 'the amount of profits made, any income derived or any things produced by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done'. The native title party contended that s. 38(2) did not prevent the Tribunal from 'imposing other conditions requiring the payment of money (or the provision of equity)' by the grantee party to the native title party. However, the Tribunal was of the view that:

> [T]he law relating to the powers of the Tribunal to impose conditions for the payment of monetary amounts is clear. ... [I]t is not within the Tribunal's power to impose conditions of the kind sought by the native title party for the awarding of compensation or payments in the nature of compensation—at [196].

Conclusion
As the Tribunal noted, weighing up the various factors involved in exercising its discretion under s. 38 had not been an easy task in this case. Given that the other factors raised by s. 39 were fairly evenly balanced, the main issue was the effect of the project on a site of particular significance (Lake Disappointment), 'in the context of the interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of the land'—at [200] and [202] to [203].

It was noted that:

> The Martu community along with many Aboriginal communities throughout Australia ... [is] in transition from a traditional society to one which accommodates the reality of living among a dominant culture that has little in common with their traditions. As part of this accommodation, the Martu are prepared to contemplate activity on their land which traditionally they would not have agreed to in return for benefits of an appropriate kind. In my view, negotiations about mining on part of Lake Disappointment fall into this category—at [211].

It was too simplistic to say (as the grantee party did) that there was now no cultural impediment to prevent the lease being granted. The issue was more nuanced:

> It involves the native title party in a compromise which would have seen them give up some of their traditional culture and way of life (including as a result of interference with a place of great importance to them) in return for benefits which would see them and particularly their children involved in the mainstream economy. As a result of the breakdown in negotiations, this compromise is no longer available—at [212].

According to the Tribunal, the 'clear inference' from the evidence was that the native title party would not have agreed to exploration, entered into negotiations (beyond those required as part of its obligation to negotiate in good faith) or continued to negotiate if the only result was going to be an entitlement to compensation and 'not the other benefits that were clearly in contemplation'. According to the Tribunal:

> The expectation of the Martu ... would have been that, in return for mining on a place that is very special to them, benefits of this kind could be negotiated. What they now say is that the substantial interference with one of their important traditional sites is not acceptable in the light of the limited benefits available to them i.e. effectively for the upgrading of a road and the possibility of some employment and business opportunities—at [214].

While native title parties do not have a veto, they are entitled to say 'no' and, if they do, they are entitled 'to have the Tribunal give considerable weight to their view about the use of the land in the context of all the circumstances'—at [215].

In this case, it was found that the interests, proposals, opinions and wishes of the native title party in relation to the use of Lake Disappointment should be given greater weight than the potential economic benefit or public interest in the project proceeding—at [216].

Decision

The Tribunal determined that the act, i.e. the grant of the mining lease, must not be done—at [218].

Negotiation in good faith

FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49

Spender, Sundberg and McKerracher JJ, 30 April 2009

Issue

The questions of law before the Full Court of the Federal Court were whether:

- negotiations in good faith must have reached a certain stage at the end of the prescribed six-month period before an application for a future act determination can be made;
- a negotiation party has negotiated in good faith 'about' or 'over' a particular future act if negotiations conducted on a broader basis include that future act.

The court found a future act determination can be made once the prescribed period expires regardless of the stage negotiations have reached, provided those negotiations were conducted in good faith during that period. In the circumstances of this case, the court was also satisfied that the grantee party could rely on broader, 'whole of project' negotiations to discharge its obligation to negotiate in good faith in relation to the particular future act in question.

Application for special leave to appeal

One of the native title parties (PPKP) filed an application in the High Court for special leave to appeal against the whole of the judgment on 25 May 2009.

Background

The first respondent (PKKP) is the registered native title claimant in relation to the Puutu Kunti Kurrama Pinikura People's claimant application. The second respondent (WGAC) is the registered native title body corporate in relation to the approved determination of native title made in *Hughes v Western Australia* [2007] FCA 365 under the *Native Title Act 1993* (Cwlth) (NTA).

The future act relevant to these proceedings was the proposed grant of a mining lease in the Pilbara region of Western Australia to FMG Pilbara Pty Ltd (FMG). The proposed lease area overlapped part of the PPKP's claim area and part of the WGAC's determination area. FMG and WGAC commenced 'whole of project' negotiations in relation to a draft land access agreement (LAA) in late March 2006. FMG and PKKP started negotiations in relation to a second draft LAA in February 2007. Each draft LAA provided that the native title parties would agree to a range of future acts being done to facilitate FMG's projects in the relevant area in return for (among others things) compensation from FMG. Those future acts could not be specifically identified in advance. However, the breadth of the description of projects in each draft LAA, and the geographic area each was to cover, indicated that the mining lease relevant to these proceedings was embraced by those negotiations.

Notice under s. 29 of the proposal to grant the mining lease was given on 25 April 2007 by the State of Western Australia. If the government party (i.e. the state) gives notice under s. 29 that it proposes to do a future act to which the right to negotiate applies, registered native title claimants and registered native title bodies corporate have the 'benefit' of the 'negotiation procedure' set out in ss. 29 to 35—at [6].

Under that procedure, the 'negotiation parties' (in this case, the state, PKKP, WGAC and FMG) must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the future act covered by the notice, with or without conditions. If no agreement is reached, and at least six months have passed since the 'notification day' specified in the s. 29 notice, any negotiation party may apply to the Tribunal for a future act determination under s. 38— ss. 30A and 31(1)(b), 35(1).

On 23 November 2007, FMG applied to the Tribunal for such a determination. No agreement had been reached and at least six months had passed since the notification day (i.e. 25 April 2007). Therefore, FMG was prima facie entitled to make the application. However, the native title parties argued that FMG had not negotiated in good faith about the grant of the mining lease.

The Tribunal found that productive negotiations on the LAA had taken place with PKKP but it was only on 6 September 2007 that FMG confirmed that it wanted to include negotiations about the lease covered by the s. 29 notice in those negotiations. At the next meeting, held on 24 September 2007, FMG specifically raised various exploration tenements but made no mention of the proposed mining lease. It was not until a meeting on 5 November 2007 that the proposed mining lease was mentioned. Around three weeks later, FMG lodged the s. 35(1) application.

The Tribunal acknowledged that s. 31(1)(b) could be satisfied if the LAA discussions included 'advanced negotiations on the doing of the relevant future act'. However, when PKKP agreed to include negotiations about the proposed mining lease in the LAA discussions, this was 'no more than a sign of common sense and goodwill on its behalf'. It was 'not an abdication of its right to negotiate about the [particular] future act'. FMG had confused 'appropriate negotiating behaviour' by PKKP with 'surrender of rights'. In relation to WGAC, the Tribunal found that, when the LAA negotiations stalled, FMG was obliged to revive negotiations about the proposed mining lease because there had never been any substantive discussions about the mining lease in question. Therefore, the Tribunal determined that FMG had not fulfilled its obligation under s. 31(1)(b) and that it had no jurisdiction to conduct an inquiry and make a future act determination pursuant to ss. 38 and 139(b) of the NTA—see *Cox/Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd* [2008] NNTTA 90 (*Cox/WGAC/WA/FMG* summarised in *Native Title Hot Spots* Issue 28) at [57], [59], [64], [82] and [90] to [92].

FMG filed an appeal in the court against the Tribunal's decision under s. 169 of the NTA, which restricts the appeal to a question of law. The matter was referred to the

Full Court of the Federal Court pursuant to s. 20(1A) of the *Federal Court Act 1976* (Cwlth).

Good faith question goes to power, not jurisdiction

The Tribunal cannot make a future act determination if a negotiation party satisfies it that another negotiation party (other than a native title party) did not negotiate in good faith—see s. 36(2). The court found that negotiation in good faith is not a 'jurisdictional precondition'. The prohibition found in s. 36(2):

> [A]ffects the 'power' of the Tribunal to make an arbitral determination rather than its 'jurisdiction'. The prohibition on exercise of the power only arises when the good faith point is both taken and taken successfully by a negotiation party. If there were no good faith but the point were [sic] not taken, the Tribunal would still have jurisdiction and power. The power to make a determination is a function of the jurisdiction conferred on the Tribunal—at [11].

Tribunal's findings

The Tribunal found (among other things) that:

- FMG had negotiated in good faith throughout the requisite six-month period, diligently advancing negotiations over a draft LAA;
- it was entirely appropriate for FMG to seek to negotiate a broader agreement involving all of its 'projects' in the relevant claim area, as distinct from doing so on a proposed tenement by tenement basis; and
- both PKKP and WGAC had agreed to include negotiations about the mining lease in question in the LAA negotiations.

On appeal, no challenge was made to any of Tribunal's findings on the facts.

Meaning of 'negotiate in good faith' under s. 31(1)(b)

The court accepted that the right to negotiate regime is an element of the protection of native title, one of the main objects found in s. 3 of the NTA and that, given its beneficial nature, it is not to be narrowly construed—at [18].

It was noted that:

- the expression 'negotiate in good faith' is to be construed 'in its natural and ordinary meaning' by identifying what the 'good faith' obligation is intended to achieve;
- that obligation 'is made obvious by the wording of the provision in which it is found within the context of the statutory scheme';
- the requirement for good faith is directed to the quality of a party's conduct, which is to be assessed by reference to what a party has done, or not done, in the course of negotiations;
- that assessment is directed to, and concerned with, a party's state of mind as manifested by its conduct in the negotiations;
- if negotiations reach a standoff, notwithstanding attempts made within the relevant six month period to negotiate in good faith, there are no further obligations placed on any party;

- in those circumstances, any party wishing to make an application under s. 35(1) may do so (e.g. there is no need to 'give further warning of the intention to do so')—at [19] to [20] and [27], referring to various authorities.

According to Spender, Sundberg and McKerracher JJ:

- the statutory scheme recognises Parliament's intention that there must be a 'good faith period' of negotiation before there is any application for a future act determination;
- the six months provided for in s. 35 'ensures that there is reasonable time to enable those negotiations to be conducted';
- at the same time, if the negotiations do not result in agreement, the matter may be 'taken forward at the end of the six month period' by making an application under s. 35(1) for a determination—at [21].

As their Honours saw it, s. 36(2) provided the negotiating parties with 'ongoing protection' because:

> [I]f any such party satisfies the ... Tribunal ... that another negotiation party (other than the native title party) did not negotiate in good faith, the arbitral body must not make the determination on the application—at [21].

Therefore, only two obligations were 'spelt out' by the statutory scheme:

- negotiations directed to reaching an agreement are carried out in good faith; and
- not less than six months has passed since the notification day in the s. 29 notice—at [22].

Negotiations under s. 31(1)(b) do not have to reach any particular stage

The court did not agree with the Tribunal's conclusion that negotiations which had only reached an 'embryonic' stage could not be negotiations for the purpose of s. 31(1)(b). According to the court:

> The interpretation adopted by the Tribunal ... is an additional requirement which is not to be found in the Act. It puts a gloss on the statutory provisions and places a fetter on a negotiation party's entitlement to make an application under s 35 in order to obtain ... [a future act] determination—at [23].

According to the court, the Tribunal found FMG:

- approached the negotiations with an open mind rather than a rigid, non-negotiable position;
- initiated communications, made proposals and punctually responded to communications;
- organised and attended meetings, facilitated and engaged in discussions, made counter-proposals, sent properly authorised negotiators;
- demonstrated a genuine desire to reach accord with the native title parties from the outset;
- discharged its duty fairly and conscientiously—at [24] and [26].

It was significant to the court that these indicia going to show good faith were identified by the Tribunal despite PKKP's contention (which the Tribunal rejected)

that FMG had 'engaged in disingenuous conduct amounting to obfuscation and pettifoggery'—at [25].

While this is correct, it should be pointed out that, shortly before it made that finding, the Tribunal noted that:

> A reasonable and honest grantee party negotiator would, when seeking simultaneously to reach a claim wide accord and expedite the grant of individual tenements, disclose those tenements to, and seek to reach an accord with, the native title party. The grantee party did this with respect to various prospecting and exploration tenements. A reasonable native title party would expect that a similar approach would be adopted in the future unless the grantee party otherwise indicated. ... The contentions ... [FMG made to the Tribunal] to the contrary could lead ... to a view ... that it was engaging in unsatisfactory and potentially misleading behaviour. The Tribunal does not make such a finding, but the contentions of the grantee party paint, *ex post facto*, a less than satisfactory picture about the manner in which the grantee party was approaching negotiations—*Cox/WGAC/WA/FMG* at [70].

However, based upon the Tribunal's findings, the court was of the view that:

> [T]here could only be a conclusion of lack of good faith within the meaning of s 31(1)(b) ... where the fact that the negotiations had not passed an 'embryonic' stage was, in turn, caused by some breach of or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct—at [27].

The difficulty facing PKKP, according to the court, was that the Tribunal 'quite reasonably' concluded that FMG had, in the 'conventional sense', negotiated in good faith during the six month period with a view to reaching the relevant agreement and: 'There is nothing more under the statute that it was required to do'. In these circumstances, the fact that negotiations were at a preliminary stage when FMG made application under s. 35(1) 'could not constitute a failure to negotiate in good faith for the purposes of' s. 31(1)(b)—at [28] and [30].

It was noted that much of the six-month negotiation period was taken up settling a negotiation protocol rather than in substantive negotiations. However, the court saw the development of the protocol as being 'clearly directed' at attempting to reach agreement 'for the purposes of' s. 31(1)(b)—at [28].

Incorporating negotiations about a specific future act in broader discussions

The Tribunal was of the view that FMG could not claim it fulfilled its duty to negotiate in good faith by relying on the failed LAA negotiations because those negotiations never substantially addressed the specific mining lease the subject of the s. 29 notice.

According to the court, there was no suggestion that the native title parties were unaware that:

- the broader negotiations for each LAA contemplated the grant of mining leases;
- the mining lease that was the subject of the s. 29 notice (the proposed future act) was included among those leases—at [36].

Further:

- the evidence was that FMG provided information about the proposed future act and made it clear that negotiations for both the negotiation protocol and the draft LAA with PKKP included negotiations for the proposed future act;
- neither of the native title parties raised any objection to the negotiations proceeding on a whole of claim, or project wide, basis—at [36].

The court noted the Tribunal 'correctly accepted ... the desirability of whole of claim or project negotiations' and concluded that it was 'appropriate' for FMG to negotiate on that basis—at [37], referring to *Western Australia/Thomas/Anaconda Nickel* Ltd [1998] NNTTA 8.

However, the Tribunal's finding that, if those negotiations broke down, the parties must revert to negotiating specifically about the proposed future act imposed 'an additional requirement' under s. 31(1)(b) that was not to be found in the section:

> The Act does not dictate the content and manner of negotiations by compelling parties to negotiate in a particular way or over specified matters. Providing what was discussed and proposed was conducted in good faith ... with a view to obtaining agreement about the doing of the future act, then the requirement under s 31(1)(b) will be satisfied—at [36].

It was noted that the criteria set out in s. 39, upon which a Tribunal future act determination must be based, 'may provide some guidance as to those that may reasonably be expected to form part of the negotiations'—at [35].

ILUA negotiations v negotiation in good faith

It was intended that any agreement reached would take effect as an Indigenous Land Use Agreement (ILUA) under the NTA (which the court characterised as 'a voluntary but binding agreement as an alternative to more formal native title machinery')—at [2] and [40].

The court rejected WGAC's contention that, in this case, ILUA negotiations could not also be relied upon as negotiations conducted in good faith within the meaning of s. 31(1)(b). FMG negotiated in good faith for a period in excess of six months in order to reach an ILUA and those negotiations included the proposed future act. In these circumstances, this 'can only be' conduct within the requirements of s. 31(1)(b)—at [42].

Decision

For the reasons summarised above, the court declared that, on the facts found by the Tribunal, FMG had fulfilled its obligation to negotiate in good faith and so the Tribunal had power to conduct an inquiry and make a future act determination under s. 38. Therefore, the appeal was allowed and the Tribunal's decision set aside. There were no orders as to costs, with the court referring to s. 85A of the NTA.

Comment
In practice, six months is a relatively short period of time for the conduct of such negotiations if the expectation is that they will bear fruit in the form of a concluded agreement. This is compounded by the fact that, if no native title claim has been made to the area in relation to which a s. 29 notice issues, those who wish to exercise the right to negotiate must make a claimant application pursuant to ss. 13(1) and 61(1) within three months of the notification day and have it registered within four months. In practice, this often leaves only two months of the prescribed six-month period available to the native title party to engage in those negotiations before the other parties are empowered to make application to the Tribunal to determine the matter. Further, the fact that a native title party has not negotiated in good faith does not prevent a s. 35(1) application being made by the other parties, provided the other preconditions are met—see ss. 30 and 36(2).

One factor that the court saw as ameliorating the effect of six months being a reasonable time to conclude negotiations is that s. 35(3) provides that the parties may continue to negotiate 'with a view to obtaining an agreement of the kind mentioned' in s. 31(1)(b) after an application for a future act determination has been made pursuant to s. 35(1).

Cosmos/Alexander/Western Australia/Mineralogy Pty Ltd [2009] NNTTA 35

Sosso DP, 17 April 2009

Issue
The issue in this case was whether or not Mineralogy Pty Ltd (the grantee party) had negotiated in good faith with two native title parties before making a future act determination application pursuant to s. 35(1) of the *Native Title Act 1993* (Cwlth) (the NTA). It was found that the grantee party had not done so and, therefore, the National Native Title Tribunal was not empowered to make a determination on the application.

Background
The grantee party lodged a future act determination application in relation the proposed grant of an exploration licence. The area covered by the application for the licence was completely overlapped by the area subject to the Yaburara Mardudhunera People's registered claimant application (the first native title party) and the area of the Kuruma Marthudunera People's registered claimant application (the second native title party).

The second native party lodged an objection to the application of the expedited procedure to the grant of the licence (the future act), which was resolved in October 1998 by consent such that, pursuant to s. 31(1)(b), the negotiation parties were required to negotiate in good faith with a view to obtaining the agreement of the native title parties to the doing of the future act. Negotiations were initiated by the

government party (the State of Western Australia) on 12 December 2006, i.e. almost eight years later. Mediation assistance was provided by the Tribunal until it was terminated on 17 October 2008 because of the grantee party's failure to participate.

Native title parties' contentions

The first native title party contended the grantee party had not made any reasonable effort to negotiate. The second native title party's contentions included that:

- the grantee party attended mediation conferences but failed to put forward any proposals or respond meaningfully to heritage protection proposals;
- the only offer put forward by the grantee party was an undertaking to comply with the *Aboriginal Heritage Act 1972* (WA) and the NTA;
- as these are legal requirements, the grantee party failed to consider offers beyond its legal obligations.
- the grantee party's negotiators had, on two occasions, authority to do no more than listen;
- there was no genuine attempt to reach agreement, exemplified by the grantee party failing to respond to a draft agreement and not presenting any alternative draft.

Legal principles

The Tribunal adopted the analysis of the obligation to negotiate in good faith stated in *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87, the legal principles set out in *Gulliver v Western Australia Aboriginal Corporation* (2005) 196 FLR 52 and the indicia set out in *Western Australia v Taylor* (1996) 134 FLR 221—at [21], [22] and [26].

It was noted (among other things) that:

- the focus of statutorily mandated good faith negotiations is the effect of the proposed future act on the registered native title rights and interests of the native title party;
- the matters set out in s. 39 can logically form the basis of negotiations but the negotiations are not limited to such matters ;
- the question as to whether or not there have been negotiations in good faith cannot be answered in the abstract and each matter has to be dealt with on the particular facts presented;
- when required to determine the good faith of a party, the Tribunal must assess that party's overall conduct in context;
- applying such a contextual evaluation, a negotiation party with considerable resources, access to professional advice and the ability to organise and attend meetings will be required to act reasonably having regard to its ability to negotiate;
- there is a proportionate analysis, in that the greater the possible impact of the proposed future act has on registered native title rights and interests, the greater the obligation on non-native title parties to negotiate about possible impacts—at [28], [31] to [32], referring to *Griffin Coal Mining Co Pty Ltd v Nyungar People* (2005) 196 FLR 319 at [33] to [35] and *Doxford v Barnes* (2008) 218 FLR 414 at [37].

Findings

In relation to the first native title party, the Tribunal found (among other things) that:

- the grantee party made limited efforts to contact and negotiate with the first native title party and no effort after receiving notice of the first native title party's new address for service;
- the grantee party was obliged to make contact after receiving that notice and the failure to do so was 'fatal' to the grantee party's contention that it had negotiated in good faith;
- the grantee party is a substantial organisation with experience in native title negotiations and litigation and it would know from that experience the obligations imposed by s. 31(1)(b)—at [25], [41] to [69] and [71].

The Tribunal also noted there were negotiations between the first native title party and the grantee, or its business associates, in regard to other tenements, which raised further questions as to why there were no negotiations over the licence the subject of these proceedings—at [70].

In relation to the second native title party, the Tribunal found (among other things) that:

- the grantee party's contentions were focused on considerations relevant to an expedited procedure objection inquiry and the matters set out in s. 237, not to a good faith inquiry;
- the long history of poor relations between the grantee and the second native title party was demonstrated in both the evidence before the Tribunal and in other matters, such as *Minerology Pty Ltd v Kuruma Marthudunera Native Title Claimants* [2008] WAMW 3;
- the evidence indicated the grantee party had made minimum efforts to engage in negotiations, adopted a confrontational attitude in communications with the second native title party and made no serious attempt to reach an accord;
- the grantee party's obligation under s. 31(1)(b) required more than making a power-point presentation on its position and then simply listening to the second native title party's submissions;
- the grantee party was obliged to negotiate, which meant 'communicating, having discussions or conferring with a view to reaching agreement';
- the grantee party failed to negotiate in good faith because it took a rigid non-negotiable position;
- the grantee party had been on notice for a number of years that the second native title party had 'legitimate and long held concerns' about an earlier cultural heritage survey—at [36] to [40], [74] to [78], [84], [86], [88] and [91], referring to *Strickland v Minister for Lands (WA)* (1998) 85 FCR 303 at 312.

Decision

The Tribunal found that grantee party did not discharge its obligation to negotiate in good faith as required by s. 31(1)(b) with either of the native title parties and, therefore, that the Tribunal was not empowered to conduct an inquiry and make a future act determination.

Compensation application by RNTBC dismissed

Walmbaar Aboriginal Corporation v Queensland [2009] FCA 579

Greenwood J, 29 May 2009

Issue

The issue in this case was whether a registered native title body corporate was authorised to make a compensation application under the *Native Title Act 1993* (Cwlth) (NTA). It was found that the decision to make the application was 'taken without authority' under the corporation's rules and 'in contravention' of the NTA. The application was dismissed pursuant to s. 84C.

Background

In November 2006, Walmbaar Aboriginal Corporation (Walmbaar) applied for a determination of compensation in respect of acts said to have extinguished or otherwise affected the native title rights and interests of the Dingaal People, as determined in *Deeral v Charlie* [1997] FCA 1408 (the Hopevale determination). The compensation application indicated that Walmbaar was acting pursuant to ss. 58(c) and 61(1) of the NTA and 'in accordance with its objects and rules'.

The Hopevale determination recognised the native title rights and interests held by 13 clans, including the Dingaal People, in an area on the eastern side of Cape York. In February 2002, an order was made that Walmbaar 'is the prescribed body corporate which, after becoming a registered native title body corporate, will perform the functions mentioned' in s. 57(3) of the NTA 'for the Dingaal Clan'. The court noted that, for the purposes of both the rules and the Hopevale determination:

[T]he Dingaal clan means all persons born of a Dingaal father or Aboriginal children adopted by a Dingaal father and a Dingaal father is a male person of patrilineal descent of the Baru, Yoren or Charlie families. The Dingaal family means the Yoren and/or Baru and/or Charlie families of Hopevale and their patrilineal descendents— at [44].

In May 2007, five people, on their own behalf and on behalf of the Dingaal People, became respondents to the compensation application. A sixth joined on his own behalf and on behalf of the Nguuruumungawarra People (the Indigenous respondents). They were all represented by the Cape York Land Council Aboriginal Corporation (CYLC). The indigenous respondents argued (among other things) that Walmbaar was not authorised to make the compensation application. Two of the Indigenous respondents sought an order pursuant to s. 84D(4)(b), dismissal of the application and an order that Gordon Charlie pay their costs because, as chairman of Walmbaar, he was seen to have caused Walmbaar to institute the application.

Walmbaar argued that it had standing to make the application and that it had done so consistent with the Hopevale determination and the NTA. It said that any issue as to compliance with its objects and rules was a question of internal governance and not a matter for the court.

Walmbaar was incorporated pursuant to the *Aboriginal Councils and Associations Act 1976* (Cwlth) in 1998 for the purposes of being a registered native title body corporate. The objects of the corporation include to:

- act as the prescribed body corporate through which Dingaal people can 'meet their duties and responsibilities for their country';
- act as agent of the common law holders in respect of matters relating to the native title;
- manage the native title rights and interests of the 'common law holders as authorised by the common law holders'; and
- perform any other functions in relation to the native title rights and interests 'as directed by the common law holders'.

Membership of the corporation is open to adult Aboriginal persons who are Dingaal people 'as noted on a genealogical record kept by the Public Officer'. According to his Honour, the list of 'members and adult common law holders' at Schedule A to the rules indicated all but one of the Indigenous respondents were members of Walmbaar—at [17].

The compensation application was supported by an affidavit sworn by Gordon Charlie in which he said (among other things) that the corporation made the application 'for the compensation claim group ... as agent for the Dingaal People as common law holders' and that Walmbaar was authorised by the compensation claim group to make the application:

> [I]n accordance with ... its rules and objects by way of a resolution passed by more than 75% of its member common law holders at an Annual General Meeting which took place at Cooktown on 3 July 2005.

On 11 February 2008, Mr Black (acting for the Charlie family) wrote to the CYLC, enclosing a copy of Mr Charlie's affidavit and stating that Walmbaar relied on 'the matters set out therein'. On 28 May 2008, an affidavit of Mr Black was filed that annexed another letter from Mr Black to CYLC dated 27 May 2008. This second letter, which set out the authorisation process adopted by Walmbaar, stated (among other things) that:

- section 251B does not apply to a compensation application made by a prescribed body corporate;
- the functions of Walmbaar as an agent prescribed body corporate for the Dingaal People are set out in the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cwlth) (PBC Regs), which require Walmbaar to consult with and obtain the consent of the common law holders when making a 'native title decision';
- the decision-making process adopted by the common law holders for Walmbaar when it makes 'decisions regarding native title' is set out in Walmbaar's rules;

- Walmbaar's decision to make an application for a compensation determination was neither a 'decision regarding native title' under the rules nor a 'native title decision' under the PBC Regs;
- therefore, the decision to make the application must be made by the committee of Walmbaar under its powers in rules 7 and 12(1);
- the committee passed a resolution to proceed with a compensation claim at a meeting held on 4 July 2006.

As the court noted, Mr Black's letter seemed to:

> [A]bandon the claim made in the affidavit of Gordon Charlie ... that Walmbaar is authorised to bring the compensation application by reason of a resolution passed by more than 75% of Walmbaar's member common law holders—at [43].

It was now said that the decision to make the compensation application was a matter for the committee exercising its powers under the rules.

Decision to commence proceedings governed by rule 9

The court noted that rule 9 provided as follows:

> In relation to the performance of performing its functions as a Prescribed Body Corporate ... [Walmbaar] shall make decisions regarding native title by notifying all common law holders of decisions to be made and after one week's notice, convene a meeting of common law holders and obtain the consent of 75% of them in relation to the performance of its functions and changing of the Rule.

Consent of 75% of the common law holders, will constitute the consent of the Dingaal clan and this Corporation.

As Greenwood J pointed out:

> There can be no doubt that in performing its functions as a prescribed body corporate for the purposes of the Hopevale determination, [rule 9 requires that] decisions taken by Walmbaar "regarding native title" are to be made by notifying "all common law holders" of decisions to be made and securing, at a duly convened meeting, the consent of 75% of them to the decision—at [44].

The rules did not define 'decisions regarding native title'. According to the court, the rules were to be construed and interpreted to give effect to:

> [T]he important practical consideration that decisions regarding the native title rights and interests of the common law holders as determined by the Hopevale determination are to be taken at all times with the interests of all common law holders kept firmly in mind—at [45].

It was found that the decision to make the compensation application should have been made in accordance with rule 9:

> A decision to commence a proceeding for compensation and engage, on behalf of the native title holders, an analytical process which seeks to identify any loss, diminution, impairment or other effect of an act *on* their native title rights and interests is necessarily a decision *regarding* native title for the purposes of Rule 9(1). The use of the word "regarding" in the context of the Rules and the functions to be

> performed by Walmbaar is necessarily a word of wide application. It is intended to have a wide application, in its context—at [46], emphasis in original.

In this case (among other things):

- there was no evidence as to whether the 'common law members' were given notice of the proposal to make the application, whether they had expressed their views about it or whether they were consulted, formally or informally, about it;
- the members of the Walmbaar committee were not identified and no minutes of the committee meeting were produced;
- neither Mr Charlie (chairman of Walmbaar) nor Ruth Schaefer (its public officer) give evidence as to the process followed 'notwithstanding that each of them might have spoken directly to the events in issue';
- rules 6(1) and 6(2), which set out the objects of the corporation, taken in conjunction with rule 12, which sets out the powers of the committee, did not confer power upon the committee to make decisions regarding native title without complying with rule 9(1)—at [48].

It was also noted that Reg 7(1) of the PBC Regs required Walmbaar:

> [T]o act as the agent of the common law holders in respect of matters relating to the native title rights and interests of the common law holders;
> to manage those rights and interests as authorised by the common law holders—at [49].

Further, 'Walmbaar must do so by operation of s 57(3)(b)' of the NTA which:
[E]ngages an obligation ... to manage decision-making to commence a compensation determination application by ensuring compliance with the decision-making process contained in Rule 9(1), as the source of the authority in Walmbaar to commence the proceeding—at [55].

It was found that the decision to commence the compensation proceeding was 'taken without authority' and was 'in contravention' of the NTA because Walmbaar failed to comply with rule 9(1) and failed to discharge its functions arising under s. 57(3)(b) and Reg 7(1) of the PBC Regs—at [60].

Not a 'native title decision' under Reg 8

Reg (8)(1) of the PBC Regs defines a 'native title decision' to mean a decision:
to surrender native title rights and interests in relation to land or waters; or
to do, or agree to do, any other act that would affect the native title rights or interests of the common law holders. It was found that the decision to make a compensation application is not a 'native title decision' because it did not involve:

- the surrender of native title rights and interests;
- a decision to do 'any other act that would affect the native title rights or interests of the common law holders'—at [52] and [54].

Not necessary to decide whether s. 251B applied

The indigenous respondents also relied on s. 251B of the NTA in relation to 'authorisation' to make a compensation application pursuant to s. 61(1). Under that subsection, a compensation application may be made by:

- a registered native title body corporate (if any); or
- a person or persons authorised by all the persons (the compensation claim group) who claim to be entitled to the compensation, provided the person or persons are also included in the compensation claim group.

The second note to s. 61(1) states that: 'Section 251B states what it means for a person or persons to be authorised by all the persons in the compensation claim group'. Section 251B stipulates how authority is to be given by 'all persons in a compensation claim group'. According to the court:

> section 61 'seems to treat' a registered native title body corporate as 'a person', in which case s. 251B(b) 'would contemplate *authority* being conferred upon Walmbaar as an *applicant person*' in accordance with 'a process of decision-making agreed to and adopted by the persons in the compensation claim group';
> it may be that s. 251B(b) has 'a role to play' in determining whether Walmbaar had authority to make the compensation application—at [60], emphasis in original.

However, it was not necessary to decide that question in this case, given the findings in relation to rule 9(1), s. 57(3)(b) and Reg 7(1) of the PBC Regs—at [60].

Claim could not exceed area covered by determination

Greenwood J also found that: 'To the extent that the compensation application goes beyond the land and waters the subject of the Hopevale determination, it must necessarily fail' because, before the court can make a compensation determination, there must be a determination of native title in relation to the relevant lands and waters—at [61], referring to *Jango v Northern Territory* (2006) 152 FCR 150; [2006] FCA 318; *Jango v Northern Territory* (2007) 159 FCR 531; [2007] FCAFC 101 at [66] to [74] and [83], summarised in *Native Title Hot Spots* Issue 19 and Issue 25 respectively.

Decision

The application was dismissed pursuant to s. 84C of the NTA because the decision to make the compensation application was taken without authority and in contravention of the NTA, i.e. Walmbaar failed to comply with rule 9(1) and failed to discharge its functions arising under s. 57(3)(b) and Reg 7(1) of the PBC Regs. Costs were reserved for determination 'in the light of further submissions'—at [60] and [62] to [63].

Replacement of applicant—s. 66B

Coyne v Western Australia [2009] FCA 533

Siopis J, 22 May 2009

Issue

This case dealt with an application to replace the applicant in the Wagyl Kaip claimant application. The Federal Court had to decide:

- whether there was a traditional decision-making process that must be used for making decisions of this kind;
- whether the fact that persons were elders of their respective families precluded their removal as persons who jointly comprise the applicant;
- whether a resolution at a meeting was effective to revoke the authority of the current applicant and to authorise a proposed replacement applicant; and
- if so, whether that authorisation was affected by the subsequent death of two persons comprising the proposed replacement applicant.

Background

A notice of motion pursuant to s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) was filed on 4 July 2008, seeking an order that the current applicant be replaced. This followed a meeting of the members of the Wagyl Kaip and Southern Noongar native title claim groups held in Albany, Western Australia, on 1 December 2007. Those attending the meeting were asked to decide, on a vote by show of hands, whether to revoke the authority of the current applicant and whether to replace those persons comprising the current applicant with an applicant comprised of different persons. The notice of motion was contested by a number of people who it was proposed to replace.

Decision-making process—s. 251B

Section 251B of the NTA, which deals with how the applicant must be authorised, provides that if there is no mandatory decision-making process:

> [F]or authorising the making and dealing with a native title determination claim under the traditional laws and customs of the people in the Wagyl Kaip claim group, then it was open to the claim group to agree to and adopt a decision-making process for the purpose of granting such authorisation—at [17].

Those seeking the order to replace the applicant submitted that family groups within the Wagyl Kaip/Southern Noongar claim area did meet to make decisions about parts of the application area for which they had a particular right to speak but there had never been a traditional process by which the whole claim group would get together and make decisions about speaking for the country. Those resisting the order submitted that no family group was bound by the decision of any other family group and that each family group was akin to a 'sovereign state'. Justice Siopis held that there was nothing on the evidence to reveal a traditional decision-making process—at [20].

Position of the respondents as elders

The respondents submitted that, as elders of their families, if they were removed, no elder from their family groups would comprise part of the applicant. This would therefore void the status of the applicant as an authorised applicant. Siopis J held that there was no provision in the NTA which provided that the applicant must be comprised of representatives from each of the family groups within the claim group—at [24].

The number of people at the authorisation meeting

The respondents contended that the resolution passed at the meeting on 1 December 2007 was not effective to revoke the authorisation of the current applicant and authorise the proposed replacement applicant because an insufficient number of people attended the meeting for it to be representative of the Wagyl Kaip claim group.

It was held that, in deciding whether a sufficiently representative section of the native title claim group agreed to and adopted the process, what was significant was the extent of the distribution of the notice of the meeting and its terms, not the proportion of those attending compared to the number of potential members of the claim group—at [48], referring to *Anderson v Western Australia* [2007] FCA 1733 (*Anderson*) at [45], French J.

The notice of the meeting was sent direct to 528 people and advertised in three newspapers circulating in the Albany region. Each notice stated that members of the native title claim group were invited to attend and clearly set out the claim group description. What was to be decided at the meeting was also set out in some detail. His Honour found that:

- the notice of the meeting of 1 December 2007 was widely distributed and advertised in the newspapers;
- there was verification on the day as to who was entitled to vote (i.e. who, of those attending, were members of the native title claim group)—at [46] and [50], with the court noting that the representative body used the same notification and verification process in this case, adapted appropriately, as was used in *Anderson*.

Therefore, it was found that there was sufficient notice of the intention to hold the meeting, and of the business to be transacted at it, to infer those who decided not to attend the meeting were content to abide by any decision made by those who did. Accordingly, the decisions made at the meeting were found to be 'the legitimate binding expression of the view of the Wagyl Kaip claim group as a whole' and the resolutions passed at the meeting were effective to revoke the authority of the current applicant and to authorise its replacement with the new applicant—at [51] and [53].

Whether the replacement applicant remained authorised
It was 'significant' that the resolution passed at the meeting authorised the named persons 'or such of them as are eligible to act as an applicant and who remain willing and able to act in respect of the application in the future' to make and deal with matters arising in relation to the application. His Honour followed the decision in *Anderson*, where it was held that each individual person's authorisation was subject to that person continuing to be willing to, and capable of, acting. Therefore, although two of the seven people authorised had since died, the remaining five remained authorised as the replacement applicant—at [53] to [56].

Decision
Siopis J ordered that those who brought the s. 66B application should jointly replace the current applicant.

Summary dismissal – issue estoppel, abuse of process

Quall v Northern Territory [2009] FCA 18

Reeves J, 19 January 2009

Issue
The Federal Court was asked to summarily dismiss a claimant application on the grounds of issue estoppel, abuse of process or because it had no reasonable prospects of success. In this 'exceptional case', Justice Reeves dismissed the application, made by Tibby Quall on behalf Danggalaba and Kulumbiringin People, because:

- the decision in *Risk v Northern Territory* [2006] FCA 404 (*Risk*, summarised in *Native Title Hot Spots* Issue 19) gave rise to an issue estoppel to prevent the Quall claimants pursuing their claim in the application before the court;
- it would be an abuse of process for the Quall claimants to now pursue what was called 'the Top End society case'—at [126] to [127].

Mr Quall has appealed against this decision.

Background
In May 2001, with the consent of all the parties, orders were made to divide the proceedings in relation to the area subject of various native title applications around Darwin into Area A and Area B. Area A essentially included the lands within the urban areas of the city and Area B essentially included the areas surrounding Darwin.

Following the making of that order, those parts of the various native title applications relating to Area A were consolidated. The native title application in this case, and a number of similar applications where Mr Quall was the authorised

applicant on behalf of a native title claim group (the Quall applications), became part of the consolidated proceedings, along with a number of native title applications where William Risk was the authorised applicant on behalf of a different native title claim group (the Risk applications).

In *Risk*, Justice Mansfield dismissed the consolidated proceedings, going on to make a determination under s. 225 that native title did not exist in Area A. The dismissal order affected the native title application considered in this case and 18 other native title applications, but only in so far as they related to Area A. Those parts of the native title application considered here (and one other Quall application) that related to Area B were not dismissed.

The Northern Territory was the main respondent to the 19 native title applications in *Risk* and remained so in relation to the claimant application considered in this case (this native title application). The territory applied to strike out this native title application (the strike out application).

The territory relied on three grounds in the strike out application:

- all of the critical issues in this native title application were determined in *Risk* and, therefore, an issue estoppel arose to prevent those same issues being raised again for determination in this native title application;
- in such circumstances, it was an abuse of process to raise the same issues again for determination in this native title application;
- this native title application had no reasonable prospects of success.

The strike out application, therefore, required an identification of the critical issues determined in *Risk*, the critical issues raised for determination in this native title application and a comparison between the two.

After noting that the court should only summarily dismiss the application if the case for dismissal was very clear, Reeves J summarised the position in this case as follows:

> I must be satisfied to a high degree of certainty that because of an issue estoppel, an abuse of process, or no reasonable prospects of success, this native title application is plainly untenable. In the process, I must take "exceptional caution" to ensure that Mr Quall and the Quall applicants are not deprived of the right to submit a real and genuine controversy for determination, which has not yet been fully and finally determined on its merits. Furthermore, I should approach this strike out application on the version of any evidence that is favourable to Mr Quall and the Quall applicants—at [74].

Issue estoppel

Counsel for the territory submitted that the findings in *Risk* related to the ultimate facts which founded any successful native title application and that Mansfield J had made a final decision thereon in that case. Counsel for Mr Quall submitted that:

- the findings and conclusions in *Risk* did not apply to Area B;

- *Risk* had not determined the 'Top End' society case, as submitted in this matter, and so nothing decided in *Risk* could operate as an issue estoppel to prevent counsel raising this case in relation to Area B;
- this case could be put on two alternative bases:
  - the Danggalaba clan and/or Larrakia/Kulumbiringin case;
  - the Top End society case;
- therefore, no issue estoppel arose from the decision in *Risk*.

Reeves J noted that issue estoppel applies to matters of law or fact and is based upon 'public policy in the finality of litigation and private justice considerations that a person should not be "twice vexed for one and the same cause"'—at [75] referring to *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd & Ors (No 2)* (1966) 2 All ER 536 (*Carl-Zeiss-Stiftung*) at 549 to 550 and 564 to 565 and Spencer, Bower and Turner, *Res judicata* (2nd ed) at 10 to 11.

According to the court, issue estoppel applies where:
- the same question or issue has been decided;
- by a final judicial decision;
- between the parties to that judicial decision (or their privies) who are the same parties in the proceedings where the estoppel is raised—at [76], referring to *Carl-Zeiss-Stiftung* at 564, *Ramsay v Pigram* (1968) 181 CLR 271 at 276 and *Kuligowski v Metrobus* (2004) 220 CLR 363 at [21] and [40].

His Honour was of the view that there 'can be no doubt that the second prerequisite for issue estoppel had been met because the decision of Mansfield J in *Risk* was clearly a final judicial decision'. It was also found that the third prerequisite was met because the parties to the native title application in this case were 'relevantly' the same as the parties in *Risk*. In the court's view, the relevant consideration was whether the parties who were opposed on the issues putatively affected by issue estoppel were common to both sets of proceedings, not whether all the parties are identical in both sets of proceedings. In this matter, the same parties who agitated the issues in *Risk* were seeking to agitate similar issues in this native title application. Those parties were Mr Quall (as the authorised applicant bringing the claim) and the territory—at [77] to [78].

That left for consideration the first prerequisite, i.e. whether the same question or issue had been decided. Reeves J summarised the critical issues decided in *Risk* as being:
- the Larrakia peoples comprised the Aboriginal society at sovereignty that, by the traditional laws and customs of that society's normative system, possessed rights and interests in relation to the lands and waters in the Darwin area, including Area A;
- there had been a substantial interruption in the acknowledgement and observance of the traditional laws and customs of the Larrakia peoples since sovereignty such that native title did not now exist for the lands and waters in Area A; and

- there was not a separate, more confined, Aboriginal society at sovereignty that, by its traditional laws and customs, had rights and interests in relation to the lands and waters in the Darwin area, comprising the Danggalaba clan—at [80].

His Honour agreed with the submission by counsel for the territory that, in this context, the terms 'Larrakia' and 'Kulumbiringin' both refer to the Larrakia peoples and Larrakia land—at [80].

Reeves J considered that, following the decision in *Risk*, Mr Quall was estopped from pursuing the following 'critical' issues in this native title application:

- the Aboriginal society at sovereignty that, by the traditional laws and customs of its normative system, possessed rights and interests in relation to the Darwin area, inclusive of Area A, was some Aboriginal society other than the society of the Larrakia/Kulumbiringin peoples;
- there had been no substantial interruption in the acknowledgment and observance of the laws and customs of that society of Larrakia/Kulumbiringin peoples since sovereignty;
- there was a separate, more confined, traditional Aboriginal society at sovereignty comprising the Danggalaba clan that, by the traditional laws and customs of its normative system, possessed rights and interests in relation to the lands and waters in the Darwin area—at [81].

Issue estoppel — the Danggalaba clan case or Larrakia/Kulumbiringin case

The court then considered the first of the alternative cases, i.e. the Danggalaba clan case and/or the Larrakia/Kulumbiringin case.

It was found that the issues in this native title application were 'identical to those that were determined in *Risk*' because:

- the form of this native title application was identical to the form in which it was as part of the consolidated proceedings in *Risk (*and in the other eight Kulumbiringin-type title applications pursued by Mr Quall in *Risk*), no amendments having been made either when it was a part of the proceedings in *Risk* or subsequently;
- it was clear from the outset that the cases being put in the various Quall applications were based upon traditional laws and customs specific to either the Kulumbiringin (or the Larrakia society at sovereignty) or the Danggalaba clan and the description of those traditional laws and customs made no reference to any wider laws and customs or to any broader society;
- the critical question raised in *Risk* (and also raised in identical form by this native title application) was whether the Aboriginal society at sovereignty that, by the traditional laws and customs of its normative system, possessed rights and interests in relation to the lands and waters in the Darwin area was the Larrakia society described by the Risk applicants or the Danggalaba clan (and/or Larrakia/Kulumbiringin) described by the Quall applicants;
- the lands the subject to this native title application and all the other Quall applications in *Risk* were described in the same, or similar, form throughout (i.e.

variously as the Larrakia or Kulumbiringin lands or country, referred to henceforth as 'Larrakia lands');
- the split was done for the parties' convenience rather than to draw any distinction between Area A or B in relation to whether those areas were Larrakia lands;
- therefore, all of the lands in both Areas A and B remained Larrakia lands in relation to which the Quall applicants asserted they held native title rights;
- Mr Quall (or his counsel) referred to these lands as Larrakia lands or country repeatedly in *Risk* and *Risk FC*—at [82] to [87], referring to *Risk v Northern Territory* [2007] FCAFC 46 (*Risk FC*, summarised in *Native Title Hot Spots* Issue 24) at [168].

Reeves J also noted that he did not consider that Mr Quall's change of position from the Larrakia/Kulumbiringin case back to the Danggalaba clan case during the final stages of the hearing in *Risk* affected this conclusion because Mansfield J ultimately found against the Quall claimants on both these cases—at [88].

It was found that:

> [A]ll the prerequisites for an issue estoppel are present in relation to the first of the alternative cases identified by Mr Quall's counsel and together they dictate that the decision in Risk gave rise to an issue estoppel to prevent the Quall applicants raising for determination in this native title application, the Danggalaba clan case and/or the Larrakia/Kulumbiringin case—at [89].

Issue estoppel — Top End society case

It was noted that, while the second of the alternative cases (i.e. the Top End society case) was outlined in submissions made on Mr Quall's behalf before the Full Court, it had not been mentioned 'anywhere in the various iterations of this native title application'. Mr Quall's counsel proposed allowing the Quall claimants an opportunity to properly state the case in this native title application and then consider whether it should be struck out.

Reeves J was of the view that there were some 'obvious problems' with this proposal, 'not the least being one of delay', i.e. these proceedings had been on foot for about 12 years, the Full Court hearing (where the Top End society case was first identified) took place some two years ago and the territory's strike out application had been on foot for about three months when this problem first arose. Yet: '[I]n all that time, no attempt had been made by Mr Quall, or his legal advisors, to include the Top End society case in this native title application'—at [90].

The court considered that, even if Mr Quall were to be given an opportunity to properly describe the Top End society case, it would 'not be difficult to predict that it would be described in much the same [quite detailed] terms as it was ... before the Full Court'—at [91] and [92], referring to *Risk FC* at [120] to [132] and [161] to [162].

Essentially, according to Reeves J, the Top End society case was founded on the proposition that the relevant traditional Aboriginal society possessed of the rights and interests in Larrakia lands was a wider society 'of Top End Aboriginal tribes'—at [93] and see *Risk FC* at [116].

His Honour noted that the Full Court rejected this case because no such case was put in *Risk*. The case that Mr Quall ultimately put in *Risk* was based on the laws and customs of the Danggalaba Larrakia clan, it having fallen away from a case based on the laws and customs of the Larrakia/Kulumbiringin peoples. Mansfield J properly considered and (in the Full Court's opinion rightly) rejected, the case that was ultimately put to him on four bases:

- the current laws and customs of the Danggalaba clan were not 'traditional' in the sense required by s. 223(1)(a) of the NTA;
- there was uncertainty, or inconsistency, about the composition of the Danggalaba clan and the rules governing its structure;
- there was no satisfactory foundation for finding that the Quall claimants practiced and enjoyed certain rights and interests which arose under laws and customs which only they had inherited from, or had been passed on to them by, their predecessors back to sovereignty; and
- there was no satisfactory foundation for concluding that the Danggalaba laws and customs reflected, or were derived from, the normative system of the Aboriginal society which existed at sovereignty—at [94], referring the *Risk* FC at [176] to [177].

It was obvious to Reeves J that the Full Court would not have been willing to allow Mr Quall to raise the Top End society case for the first time on appeal. Not daunted by that failure, he noted Mr Quall now wished to adopt the Top End society case in this native title application—at [95].

His Honour found that the submission by Mr Quall's counsel that the Top End society case was not determined in *Risk* 'stated the matter at too high a level of generality'. In a native title determination application made under the NTA, 'the ultimate object or goal is to obtain a determination of native title in favour of the claimant group'. Therefore, the claimant group in this case would have to persuade the court that the Top End society met the various components of the definition of native title in s. 223 of the NTA, as explained by the High Court in *Yorta Yorta Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422:

> Stated in this way, it can be seen that the object or goal the Quall applicants hope to achieve by pursuing the Top End society case in this native title application, is to answer the question ... what was the relevant Aboriginal society at sovereignty that possessed rights and interests in Larrakia lands in Area B ... with the answer: the Top End society—at [96].

In the court's view, while the Top End society case was self-evidently different in itself, and the components of that society were not considered or determined in *Risk*, the critical issue raised by that case was the same as that raised and determined in *Risk*. Accordingly, his Honour found that:

- the first prerequisite for issue estoppel was met in relation to the Top End society case;
- therefore, based in the earlier findings in relation to the other two, all of the prerequisites for an issue estoppel were present in relation to Top End society case;

- together, they dictated that the decision in *Risk* gave rise to an issue estoppel to prevent the Quall claimants pursuing the Top End society case in this native title application—at [97] and [99].

Abuse of process

In the event that the decision on issue estoppel was wrong, Reeves J considered whether it would constitute an abuse of process for the Quall applicants to now pursue the Top End society case in this native title application. Order 20 rule 4 of the Federal Court Rules empowers the court to stay or dismiss a proceeding where it is considered to be an abuse of process. His Honour noted that the underlying concerns are the same as for *res judicata* and issue estoppel, i.e. 'a person should not be troubled twice for the same cause and public policy concerns in the finality of litigation'. The court drew an analogy between the abuse of process powers and the exercise of court's powers of summary dismissal, noting the power to dismiss was to be exercised very sparingly and only in exceptional circumstances—at [100] and [101] referring to *Spalla v St George Motor Finance Ltd (No 6)* [2004] FCA 1699 (*Spalla*) at [64] and [67].

The court identified a non-exhaustive list of matters relevant to the determination of whether an abuse of process was occurring:

- the importance of the issue in, and to, the earlier proceedings;
- the opportunity available, and taken, to fully litigate the issue;
- the terms and finality of the finding as to the issue;
- the identity between the relevant issues in the two proceedings;
- any plea of fresh evidence and the reason why it was not part of the earlier proceedings;
- the extent of the oppression and unfairness to the other party if the issue is re-litigated;
- the impact of re-litigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and
- an overall balancing of justice to the alleged abuser against the matters supportive of abuse of process—at [102] referring to *State Bank of NSW v Stenhouse* (1997) ATR 81-423 at 64,098 and *Spalla* at [70].

His Honour was of the view that:

- the Quall claimants were seeking to raise in these native title proceedings that the Top End society was the relevant Aboriginal society at sovereignty and possessed rights and interests in Larrakia lands in Area B;
- the issue of the Top End society was being added as an alternative society to the three Aboriginal societies that were proffered in *Risk*—at [103].

It was found that it would be an abuse of process to allow the Top End society case to be pursued in this application for, among others, the following reasons:

- the issue as to what was the relevant Aboriginal society at sovereignty possessing rights and interests in Larrakia lands was one of the ultimate issues in *Risk* and an issue of paramount importance in that case;

- the Quall claimants had an ample opportunity, of which they availed themselves, to fully litigate that issue in *Risk* and the findings on that issue in *Risk* were clear, directly apposite and final;
- the critical issue raised by the Top End society case is the same or, at least, very similar to the critical issue that was raised and determined in *Risk*;
- it would be contrary to the public policy concerns for the finality of litigation, and in maintaining public confidence in the administration of justice, to allow the Quall claimants to pursue the Top End society case;
- they have already put forward, as a real and genuine controversy, the question whether the Danggalaba clan (and/or the Larrakia/Kulumbiringin) was the relevant Aboriginal society at sovereignty, a question which was determined on the merits against them in relation to Area A;
- they now want to put forward that the Top End society was the relevant Aboriginal society at sovereignty but there was much to suggest that this did not raise a real and genuine controversy, 'not the least being the decision ... in *Risk* that the relevant Aboriginal society at sovereignty possessing rights and interests in Larrakia lands was the Larrakia peoples';
- the balance between the principle of providing free access to the courts and the principle of not vexing a person twice for the same cause tipped in favour of the territory—at [104] to [123].

Reeves J noted that: 'Thus far, Mr Quall has ... used every level of the federal courts system to pursue his case. At some point, there must be an end to litigation and I consider it has now been reached'—at [118].

His Honour also took into account the fact that:

> [T]here are many other native title applicant groups waiting ... to have their native title determination applications determined. ... [I]t is in the interest of the administration of justice ... that I ensure that the Court's resources are devoted to the resolution of real and genuine native title determination applications that have not yet been provided with a determination on their merits. Finally, ... it would not be in the interests of promoting public confidence in the administration of justice to create a situation where this Court could make conflicting determinations as to what the relevant Aboriginal society at sovereignty was for Larrakia lands, between the Larrakia peoples as found in *Risk* and the Top End society as now sought to be proffered by the Quall applicants in this native title application—at [119].

His Honour held it was not necessary to consider whether Mr Quall's native title application had any reasonable prospects of success because of his conclusion that Mr Quall's application based on a Top End society was an abuse of process—at [124].

Conclusion – application dismissed

Reeves J dismissed the native title application because he was satisfied:

- that the decision in *Risk* gave rise to an issue estoppel to prevent the Quall claimants pursuing the Danggalaba clan case, the Larrakia/Kulumbiringin case or the Top End society case in this native title application;

- it would be an abuse of process for the Quall claimants to now pursue the Top End society case in this native title application—at [126] to [127].

In making this decision, his Honour appreciated:

> [T]he extreme caution, or high degree of certainty, that ... should be applied when deciding whether to summarily dismiss an application such as this. I also take into account that at various times during the long history of these proceedings Mr Quall has not been legally represented. Notwithstanding these matters, ... this is one of those exceptional cases where this Court should intervene to summarily dismiss this native title application—at [128].

Strike out under s. 84C—claim group and authorisation

Brown v South Australia [2009] FCA 206

Besanko J, 12 March 2009

Issue

The main issue before the Federal Court was whether a claimant application should be struck out under s. 84C(1) of the *Native Title Act 1993* (NTA) on the grounds that:

- the native title claim group was not properly constituted;
- the applicant was not authorised to make the application.

The application was struck out because the State of South Australia succeeded on both grounds.

Background

On 27 March 2008, a claimant application was filed by Dawn Brown (the applicant) in which she claimed she was a member of the Brown Family Group and was authorised to speak for it. The claim group was made up of 22 named individuals. On 30 June 2008, the applicant filed an amended application in which the claim group was also said to be made up of 22 named individuals and their descendants. However, four of the 22 named in the original application had been removed and replaced with four others.

Native title claim group

The state contended that the Brown Family Group, as defined in the amended application, was not a 'native title claim group' under the NTA but a sub-group. The second respondent, the applicant for the Antakirinja Matu-Yankunytjatjara claimant application (AM-Y claim), an earlier overlapping claim, supported this contention. Among other things, the state relied upon s. 84C(1), which provides that the court may strike out an application that does not comply with ss. 61, 61A or 62 of the NTA.

The court noted that applications under s. 84C(1) are approached 'in the same cautious way' as applications for summary dismissal under O 20 r 2 and so:

- the power should be exercised only where 'the claim as expressed is untenable and upon the version of the evidence favourable to the respondents to the strike out' and a 'clear case has to be made out';
- extensive argument may be required and it may be necessary to adduce evidence to establish the futility of a case—at [11], referring (among others) to *McKenzie v South Australia* [2005] FCA 22 at [26] (summarised in *Native Title Hot Spots* Issue 14), *Landers v South Australia* (2003) 128 FCR 495; [2003] FCA 264 at [7] (summarised in *Native Title Hot Spots* Issue 5), *Williams v Grant* [2004] FCAFC 178 at [48] and [49] and *Bodney v Bropho* (2004) 140 FCR 77; [2004] FCAFC 226 at [51] to [52] (both summarised in *Native Title Hot Spots* Issue 11).

Justice Besanko held that a claimant application does not comply with s. 61(1) if it is clearly established that it is not made by a 'native title claim group', i.e. all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed—at [19], referring both to ss. 61(1), 61(4), 251B and 253 and to the numerous authorities on point.

His Honour found that the evidence as a whole established that the Brown Family Group was a sub-group of the AM-Y claim group or, at least, of a larger group of the Brown Family Group. That finding was supported by the following:

- thirteen of the 22 members of the Brown Family Group, as defined in the amended application, were members of the AM-Y claim group;
- two of the people who were in the claim group in the original application, but removed in the amended application, were members of the AM-Y group;
- the evidence from the applicant suggested that she considered membership of the Brown Family Group was dependent upon whether or not the relevant person agreed to be a member;
- the applicant was dissatisfied with the way in which the AM-Y claim was proceeding and asked that the Brown Family Group be withdrawn from the AM-Y claim; and
- the applicant stated that the Brown Family Group knew that there were other families with native title interests in the claim area—at [36].

The court found that the amended application did not comply with s. 61 of the NTA—at [37].

Authorisation

The state also contended that not all the persons in the Brown Family Group had authorised the applicant to make the application and to deal with matters arising in relation to it. The court noted that: 'The importance of proper authorisation to the native title determination claim process has been emphasised many times', going on to cite the relevant case law—at [22] to [24].

In this case, Besanko J held that the applicant had not established that she was authorised by all the persons in the Brown Family Group even assuming (for the purposes of the argument) that it was a native title claim group as defined in the NTA, holding that:

- claims by the applicant that she was authorised by the elder men and women of the Anangu Pitjantjatjara-Yankunytjatjara Lands, and that they had stated that the applicant was responsible for the women's dreaming in the claim area and had to speak for her grandfathers country, were not enough to establish valid authorisation;
- this was not sufficient as it was far from clear that the statement by the elder men and women constituted an authorisation to make the claimant application and deal with matters arising in relation to it;
- further, it did not establish that the elder men and women had the power to grant the relevant authorisation and there was no evidence of a traditional decision-making process conferring power on elder men and women to confer the relevant authority—at [39] and [44].

It was also found that a meeting held on 30 May 2008, after the original application was made and before the amended application was filed, did not give rise to a valid and effective authorisation because:

- there was a failure to give notice of the meeting to a number of people who appeared to be part of the Brown Family Group, which was fatal to the applicant's claim to be authorised as required by s. 251B;
- there was no evidence that any advertisement or notice was given in respect of the meeting;
- the connection between those who attended the meeting and the native title claim group was not established in respect of attendance—at [40].

Finally, the advertisement giving notice of a subsequent meeting (held on 8 November 2008) was found to be deficient because it did not sufficiently identify the alleged native title claim group, such that a person reading the advertisement could determine if he or she was, or may be, a member of the Brown Family Group. Therefore, it was found that this meeting did not result in a valid authorisation for the same reasons as given in relation to the meeting of 30 May 2008—at [42] to [43].

Decision

The claimant application was struck out pursuant s. 84C of the NTA because:

- the applicant did not establish she was authorised by all the persons in the Brown Family Group (even if it was assumed for the purposes of argument that it was a 'native title claim group'); and
- the Brown Family Group was sub-group of a larger group and so did not comply with s. 61—at [36] to [37] and [44] to [45].

Extension of time to comply & costs

McLennan v Queensland [2009] FCA 236

Rares J, 18 March 2009

Issue

The issue in this case was whether to extend the time allowed for the Jangga People to provide particulars in relation to s. 223(1) of the *Native Title Act 1993* (Cwlth) (the NTA). Orders were made to extend time but the applicant was ordered to pay the respondents' costs and the representative body was ordered to show cause why it should not be ordered to pay those costs on a party/party basis.

Background

The Jangga People's claimant application was made in 1998. In December 2002, the court was advised that it would take about three years to complete the anthropological research to support the application. In February 2004, the court was told that 'connection' material was 12 to 18 months away but a summary of a connection report was provided in June 2004. The court was later advised that an anthropologist had been commissioned but his report had not been completed. In March 2007, the court was told that Dr Paul Gorecki had been engaged to prepare a report but five months later, he told the claimants' representative, Central Queensland Land Council (CQLC) that he was no longer available. In November 2007, other anthropologists were engaged but, by early 2008, they were no longer available. According to Justice Rares, the Jangga People had 'persistently' been in default of providing anthropological or other connection material in relation to their application—at [3].

The State of Queensland sought an order to bring 'this lamentable state of affairs to a head'. At the hearing, CQLC represented the Jangga People but, because of a proposed hand-over of CQLC's representative body responsibilities to Northern Queensland Land Council (NQLC), the principal legal officer (PLO) of NQLC appeared as amicus—at [4].

On 7 March 2008, the court made orders that:

- the Jangga People provide the state (and any respondent who so requested) with historical and anthropological material on which they sought to rely to support their claim by 9 March 2009 (order 2);
- if they did not comply with order 2, the application would stand dismissed unless the court otherwise ordered (order 3);
- the Jangga People file and serve an affidavit by 30 September 2008 as to their ability to comply with order 2 and, if it was not likely they would comply, have the matter relisted.

On 29 September 2008, a solicitor for the NQLC swore an affidavit stating that the Jangga People were unlikely to comply with order 2. The matter came before the court on 17 October 2008 and an order was made that, if the Jangga People wished to vary orders 2 and 3, they should file and serve a notice of motion and any affidavits in support. Four months later, on 17 February 2009, the Jangga People filed a motion seeking a variation of orders 2 and 3 to have time for compliance extended to 26 June 2009. On 5 March 2009, when the application for an extension of time was heard, the oral evidence was that:

- a consultant anthropologist (Dr Taylor) would deliver an initial report by 23 March 2009, which would be submitted to the state by 27 March 2009;
- Dr Taylor had committed to reporting on the balance of the material required by 31 July 2009;
- all the materials necessary to satisfy the orders would be filed by 17 August 2009.

The state and the pastoralists represented by AgForce did not support the application for an extension.

According to Rares J:

> It is a tragedy that ... a claim first made in 1998 has not appeared to progress at all since it was first filed ... This native title litigation is being conducted in a manner that does not regard compliance with court orders, or the advancement of the claim in a coherent and articulated way, as being the normal course of litigation. At the moment, I have no idea whether the Jangga People have a claim or not, although since September 2006, I have been seeking to manage the proceedings to a position where they can be heard and determined, or at least all the parties can be seized of sufficient information to be able to find a means of resolving the matter for themselves. Regrettably, I have failed in that objective because, at every stage, the Jangga People have defaulted—at [16].

While the court did not infer these defaults meant there was no case to be brought:

> [T]he position is rapidly approaching where such an inference could be drawn because of the Jangga People's persistent failure to bring forward some form of coherent and satisfactory articulation of how they propose to make out their claim for native title in a way that complies with s 223—at [17].

It was noted that:

- persistent default in compliance with directions was a well recognised basis for dismissing a claim;
- the person in default will be seen to have failed to comply with the court's orders to enable the matter to be brought to hearing and determination;
- Order 35A of the Federal Court Rules provides a framework within which the court can 'bring about a summary result';
- ultimately, the role of the court is to do justice between the parties—at [18].

Decision

Rares J decided (with 'considerable reluctance') that Jangga People should have 'one last and final chance to get their litigious house in order'. However, because NQLC

presented 'an entirely unsatisfactory state of affairs for the future conduct of the litigation', the Jangga People were ordered to:

- file Dr Taylor's 'limited material' or something similar by 27 March 2009;
- on that date, identify 'definite bases on which the matter will be progressed, failing which, the matter will be dismissed'—at [19] to [20].

Costs

The Jangga People were ordered to pay the costs of the state and Mount Isa Mines Limited. NQLC was ordered to show cause why it should not be ordered to meet those costs 'on an indemnity or some other basis'. Subsequently, it was submitted for the Jangga People that s. 85A of the NTA applied and so there should be no order as to costs.

The court noted that the Jangga People sought to have time to file the particulars they were supposed to supply by 9 March 2009 extended to 26 June 2009 'in the context of the evidence that Dr Taylor had only been required to produce a report as to the position up to white sovereignty' not, as the court ordered, historical and anthropological material on which they sought to rely to support their claim. Further, even this 'limited' material would not be provided before 26 June 2009 and there was no evidence that the balance of the material due on 9 March 2009 would be provided by 26 June 2009. In his Honour's view: 'This was unsatisfactory for a party in default of the order made one year before'—at [22].

Further, at the hearing the Jangga People initially resisted providing any time frames for compliance with the earlier order and then finally sought an extension from 26 June 2009 to 17 August 2009. According to his Honour:

> A properly prepared and presented application for an extension of time would have addressed a concrete and realistic proposed timetable made after proper enquiries of Dr Taylor to cure the default, particularly having regard to the consequence of the application failing. The respondents would then have been able to assess whether the Jangga People and the... [NQLC] had taken appropriate steps to ensure compliance, albeit late, with their obligation to identify the basis for the claim. The State and Mount Isa Mines, who resisted the application, were entitled to do so because the relief sought in the motion and the evidence in its support ... did not disclose a proper basis to vacate the orders which would have resulted in the proceedings being dismissed on 9 March 2009. And the hearing was protracted by the Jangga People's unreasonable failure for a considerable period to propose an appropriate timetable—at [25].

It was found that:

- the notice of motion was filed far later than it should have been, since NQLC knew, at least by late September 2008, that they would not comply with the order to file by 9 March 2009 and had not, at that stage, even engaged an anthropologist to begin work on that material;
- the scope of work given to Dr Taylor (i.e. the position up to white sovereignty) 'was clearly inadequate for the Jangga People to comply with the order' that the

provide historical and anthropological material on which they sought to rely in support of their claim;
- there was then no prospect that the Jangga People would file the requisite material in time and, while an extension to 26 June 2009 was sought, 'even that date had been given no proper consideration';
- instructions as to when Dr Taylor could prepare a final report were only obtained after the court suggested that the solicitor for NQLC should do so, which led NQLC to seek a longer timetable than the court proposed—at [26].

In Rares J's view:

> This was not a satisfactory way to conduct this litigation, particularly given the nature of the orders made on 7 March 2008. Having regard to the circumstances above, I am of opinion that in the exercise of my discretion under s 85A(1) of the Act and s 43 of the *Federal Court of Australia Act 1976* (Cth) I should order the Jangga People to pay the costs of the State and Mount Isa Mines in respect of the notice of motion ... And, I consider that it is appropriate to require the ...[NQLC] to show cause why it should not be ordered to pay those costs on party/party basis having regard to its apparent (on the material before me) responsibility for the costs I have ordered the Jangga People to pay—at [27].

NQLC is seeking leave to appeal against the costs orders.

Dismissal under s. 190F(6) — failed merit conditions of registration test

Hogan v Western Australia [2009] FCA 579

McKerracher J, 2 June 2009

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss the Nullarbor People's claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). It was decided the application should be dismissed.

Background

The application concerned was on 30 September 1998. It was amended twice in 1999. The application covers about 78,000 square kilometres in south-eastern Western Australia. On 19 October 2001, pursuant to s. 190A of the NTA, the Native Title Registrar's delegate decided the application must not be accepted for registration because it did not satisfy all of the condition found in ss. 190B and 190C, in particular ss. 190B(2), 190B(5) to 190B(7) and 190C(2). Section 190B contains the 'merit' conditions of the test.

When the *Native Title Amendment Act 2007* (Cwlth) (the Amendment Act) commenced, the application had to be tested again because it was made after 30 September 1998 but before 15 April 2007 and was not on the Register of Native Title Claims when the Amendment Act commenced—see Item 89 of Part 2, Schedule 2 of the Amendment Act. On 19 July 2007, the Registrar told the applicant that the registration test was to be re-applied. On 13 November 2007, the Registrar's delegate decided the application must not be accepted for registration because it did not satisfy ss. 190B(2), 190B(5) to 190B(7) and 190C(4). On 29 November 2007, the parties were ordered to file any motions or submissions in relation to failing to pass the registration test by 19 May 2008. When the matter came before the court on 2 June 2009, nothing had been filed and the applicant's legal representative had been unable to take any instructions.

Operation of s. 190F(6)

Justice McKerracher noted that s. 190F(6) gives the court power to dismiss a claimant application on its own motion or on the application of a party if:

the court is satisfied that the application has not been amended since consideration by the Registrar and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and

in the opinion of the court, there is no other reason why the application should not be dismissed.

Pursuant to s. 190F(5), the power to dismiss is available if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

McKerracher J referred to and adopted Logan J's analysis of the principles applying to the application of s. 190F(6) in *George v Queensland* [2008] FCA 1518, summarised in *Native Title Hot Spots* Issue 29—at [7] to [11].

Decision

The application was dismissed because the court was satisfied it had not been amended since it was rejected by the delegate, there was no evidence 'or indication' that it was likely to be amended in a way that would lead to the Registrar reaching any different conclusion and there was no other reason why it should not be dismissed. It was noted that there was nothing to prevent the applicant from filing 'a properly constituted claim' in the future—at [19] to [20].

Hunter v Queensland [2009] FCA 325

Logan J, 27 March 2009

Issue

The issue in this case was whether the court, of its own motion, should dismiss the Wiri People No 2 claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (the NTA).

Background

A delegate of the native title registrar found that the claim made in the application did not meet all of the conditions of the registration test. An application for review of that decision was dismissed. On 26 May 2008, the court ordered the applicant show cause why the application should not be dismissed pursuant to s. 190F(6). The applicant's solicitors had withdrawn prior to the directions hearing and there was no appearance by, or on behalf of, the applicant at that hearing. Justice Logan then ordered (among other things) that the applicant show cause why the application should not be dismissed pursuant to s. 84D for want of authorisation—at [2].

Dismissal under s. 190F(6)

Subject to the conditions in s. 190F(5) being met, s. 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

His Honour referred to his exposition of the background to s. 190F(6) in *George v Queensland* [2008] FCA 1518 (summarised in *Native Title Hot Spots* Issue 29)—at [4].

In Logan J's view:

> The long and the short of it is, the application is one which has failed a registration test. Every opportunity has been given for the Applicants to amend the application or at least provide some hope, in a meaningful way, that an amendment is likely which would provide a basis for retention of the case in the Court's list. There is no basis for

> forming an opinion that this is anything other than a case which does not warrant the further expenditure of public funds in terms of judicial time and also in terms of the investment of public funds in a Respondent State considering the case and attending. There are bases then upon which the application may be dismissed and should be dismissed under s 190F(6)—at [4].

Comment

It should be noted that the Wiri People No 2 claim satisfied *all* of the conditions found in s. 190B. (It failed only on the condition found in s. 190C relating to authorisation.) Therefore, it would seem (with respect) that the court was not empowered the dismiss the application under s. 190F(6) because one of the pre-conditions for the exercise that power was not satisfied, i.e. s. 190F(5)(a)(i), which provides that s. 190F(6) only applies if the claim 'does not satisfy all of the conditions of s. 190B'. However, in this case, it is of no moment because the court also relied upon default as a ground for dismissal.

Dismissal for default of appearance

It was found that there was another basis 'which ought not be forgotten' upon which this application should be dismissed, i.e. default of appearance. In this case, there had been multiple defaults—at [5].

While finding it 'understandable' that the State of Queensland may have reasons for not moving for dismissal under s. 190F(6), his Honour was of the view that this did not apply where the practice and procedure of the court had not been observed:

> In the ordinary course of events, one might expect a respondent, particularly a public respondent, acting responsibly to move for dismissal in a case where there is an event of default in the ordinary practice and procedure of a court, as a model litigant would move in other cases involving the wider interests of the public. Be that as it may, there is then a basis in terms of default under the practice of the court as well as under Hs. 190F(6)H, for the dismissal of this application—at [6].

Decision

The application was dismissed for default under the practice of the court as well as under s. 190F(6).

Reinstatement of dismissed application refused – Southern Barada & Kabalbara People

Smith v Queensland [2009] FCA 285

Dowsett J, 20 February 2009

Issue

The question in this case was whether a claimant application that had been dismissed for failure to comply with court orders should be reinstated. It was decided that it would be inappropriate to do so in this case.

Background

The applicant for the Southern Barada & Kabalbara People's application was ordered amend the application and file an affidavit stating that the applicant intended to prosecute any amended application to determination on or before 30 September 2008 (later extended to 13 February 2009). If there was no compliance, the applicant was to show cause as to why the application should not be dismissed. The applicant was also ordered to file and serve a certificate by a legal practitioner stating that the practitioner was of opinion that the amended application was in proper form. There was no compliance with these orders and the application was dismissed. The applicant then applied for an order extending time until 15 May 2009 (supporting the application with an affidavit of the principal legal officer of Queensland South Native Title Services) saying (among other things) that there was to be a meeting of the claim group to authorise the proposed amendment before the end of April so that an amended application could be filed by 15 May 2009.

Justice Dowsett noted that the applicant accepted at least as far back as April 2007 that the claim group description in the application was inadequate and that the court had made various orders since then designed to resolve that problem. According to his Honour:

> It has become part of folklore in this area of the law that there is a chronic lack of funds available ... . Nonetheless, the litigation must proceed. ... There is a tendency ... to pretend that all problems can be sorted out by mediation and similar extra-curial procedures. The experience of the law is that those procedures work best when the claims and responses to them are clearly identified—at [4].

Power to reinstate discretionary

Dowsett J was of the view that the deficiency in the application was 'of a fundamental kind' in that it went to 'the very identification of those who are entitled to claim'—at [5].

The application to set aside the dismissal order was brought under O 35 r 7(2)(c) of the Federal Court Rules, which gives the court power to set aside a judgment after it has been entered where the order is interlocutory. Although it was not clear, Dowsett J thought the reference to 'interlocutory orders' should not be read to include an order that proceedings be dismissed because to 'treat such an order in that way would completely undermine its effect'. It was noted that the authorities suggested that the discretion conferred by O 35 r 7 to vary an order 'should be exercised sparingly'—at [6], referring Kullilli People # 2 and Kullilli People #3 v Queensland **[2007] FCA 512** (summarised in ***Native Title Hot Spots* Issue 24**) at [16].

The explanation given in this case was 'hardly adequate' because the court had been told things that did not appear in the material before it. Therefore, it was 'inappropriate' to act on those things. In this Honour's opinion:

> Even if there be jurisdiction to set aside an order of this kind other than on appeal, I would not do so because I do not think, given the history of the matter, that an appropriate basis has been demonstrated for a favourable exercise of the discretion—at [6].

Dowsett J was aware that dismissal meant the loss of procedural rights, such as the right to negotiate, that arose because claim was registered but said that:

> This seems to me to be an appropriate result. Once it is established that a claim group is incorrectly constituted, there can be little justification for allowing it to enjoy the benefits of registration. I do not understand the purpose of the legislation to be to guarantee to people, who have no valid claim, the right to negotiate—at [7].

Decision

The notice of motion seeking reinstatement of the application was dismissed. In so doing, Dowsett J was careful to point out that:

> I do not criticize the applicant's present legal advisers ... . However the history of the management of this matter is not good. This is an extreme case, and should not be taken as an indication that, in all cases where delay has been caused by absence of funding, or by neglect of the legal advisers, an application will necessarily be struck out. Each case must be decided on its merits—at [8].

Judicial disqualification—native title proceedings

Margarula v Northern Territory [2009] FCA 290

Reeves J, 5 March 2009

Issue

The issue before the Federal Court was whether Justice Reeves should disqualify himself from further hearing or determining a claimant application made under ss. 13 and 61(1) of the *Native Title Act 1993* (Cwlth).

Background

Approximately ten years ago, when he was a barrister in Darwin, Reeves J provided an advice to the Aboriginal and Torres Strait Islander Commercial Development Corporation (the ACD Corporation) as to whether native title had been extinguished over the land on which the Crocodile Hotel stands. That area is claimed by the applicant, Yvonne Margarula, made on behalf of the Mirrar People in a claimant application that was before the court. On becoming aware of the advice he had previously given, Reeves J informed the parties. A notice of motion seeking to have his Honour disqualify himself was then brought by the applicant.

Test for disqualification on the basis of apprehended bias

Reeves J outlined the test in relation to the apprehension of bias principle as stated by the High Court in *Ebner v Official Trustee* (2000) 205 CLR 337. That test provides that a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. This involves a two-step process:

- the identification of what it is said might lead the judge or juror to decide a case other than on its legal and factual merits; and
- the logical connection between that matter and the feared deviation from the course of deciding the case on its merits—at [39].

The advice to ACD Corporation was the matter which the applicant said might lead Reeves J to decide the Mirrar application other than on its legal and factual merits—at [40].

His Honour considered a number of factors that strongly suggested that no logical connection existed, namely:

- that no issue of fact or credibility was likely to arise in the determination of the application and all underlying facts were matters of public record and almost certain to be agreed by the parties;
- the issues in the application were likely to be exclusively legal, involving the construction of the NTA and its application to the underlying facts; and

- since the provision of the advice, there had been a number of significant decisions of the High Court bearing on the issue of extinguishment, all of which would be binding on any determination in this matter—at [52].

Reeves J also considered a number of facts that strongly suggested that there was a logical connection:

- the legal issues in the advice were the same as one of the critical legal issues to be raised at the determination and concerned an area of land which was part of the claim area;
- the correctness of the advice would therefore be a live issue, albeit a legal one; and
- the client for the advice was not a party to the proceedings but was indirectly connected to one of the main respondents because it is a statutory authority of the Commonwealth–at [53].

While his Honour was not convinced that it had been firmly established that he should disqualify himself, he considered it prudent to do so on the basis that:

- the objection had been raised at an early state in the proceeding;
- it would be a relatively simple matter to arrange for another judge of the court to hear the application; and
- if the Full Court were later to rule that his Honour should have disqualified himself, a great deal of public resources would have been wasted and a significant amount of time would be lost—at [55] and [56].

Procedural issues

Reeves J considered a number of questions related to the appropriate procedure when applying to have a judge disqualify themselves from hearing a matter, such as whether a formal notice of motion was always necessary or appropriate. It was concluded that a formal notice of motion was appropriate course in this matter. Consideration was also given to whether it was sound for a judge to make an order disqualifying himself or herself. After considering a number of authorities, his Honour considered it appropriate that he make the order disqualifying himself but characterised it as declaratory and self-operative—at [32] and [38].

Decision

Reeves J made an order disqualifying himself from further hearing or determining the proceeding. The costs of the motion will be costs in the proceeding.

Determination of native title—consideration of s. 87A

Adnyamathanha No 1 Native Title Claim Group v South Australia [2009] FCA 358

Mansfield J, 19 March 2009

Issue

The issue before the Federal Court was whether it was appropriate to make several native title determinations by consent in relation to a single application pursuant to s. 87A of the *Native Title Act 1993* (Cwlth) (NTA). In the circumstances of this case, the court decided it was appropriate to do so.

Background

The Adnyamathanha No 1 claimant application covered a substantial area of South Australia. Two consent determinations under s. 87A were sought in relation to Adnyamathanha No 1. The first was to cover a single pastoral lease (Angepena station). It was anticipated that an Indigenous Land Use Agreement and management plan would be executed in relation to it. The second determination would cover a much larger part of the area covered by the claimant application but there would still be an undetermined part, consisting of an area of overlap with a claim made by the Dieri People and other areas where negotiations were ongoing. The parties informed the court they were confident that the balance of Adnyamathanha No 1 would proceed to consent determination in the coming months. A third consent determination was sought under s. 87 in relation to the area covered by the Adnyamathanha No 2 native title claim, which covered the Flinders Ranges National Park.

The State of South Australia supported the applicant and no other respondent party opposed them. In these reasons, Justice Mansfield explained why he was willing to:

- make the determinations in Adnyamathanha No 1, notwithstanding a consent determination was likely over the whole of the claim area in the next few months;
- make a separate determination over Angepena station—at [5].

Section 87A

Section s. 87A was introduced by the *Native Title Amendment Act 2007* (Cwlth) and then amended by the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth), both of which commenced some time after Adnyamathanha No 1 was filed. However, as was noted, this was of no significance because s. 87A applies regardless of when an application was made—at [7], referring to the relevant schedule to each amendment Act.

His Honour was of the view that s. 87A was intended to:

> [F]acilitate resolution of part of a claim by agreement, where those whose interests are directly affected by part of a claim have agreed upon a determination being made. Those whose interests are in other parts of the claim area are ... entitled to be notified of the proposed consent determination over part of the claim area ... and may object to the Court ... . That notification has been undertaken, and no objections ... received—at [8].

The benefits of s. 87A according to Mansfield J, were that:

- pursuant to s. 64(1B), the area subject to the claim was automatically amended so that the unresolved area remained as the claim area; and
- the claim as amended, if it was registered at that time, did not have to through the registration test again and remained on the Register of Native Title Claims—at [10], referring to ss. 190(3)(a)(iii) and 190A(1A).

In this case, the court had 'no hesitation' in deciding that (subject to the other requirements of the NTA) it was appropriate to make the determination over the larger area because this would 'result in a mutually satisfactory outcome to that portion of the claim', from the point of view of both the applicant and the respondents, 'in as timely and efficient a manner as possible'. His Honour also saw there were 'good reasons' why the balance of the application area was not able to be the subject of a consent determination at this time, e.g. the overlapping claim—at [11].

As to the separate determination over the station, Mansfield J was of the view that it was 'not routinely desirable' that an agreement to resolve the whole or part of a claim should be 'splintered' into a series of separate determinations because (among other things) there were 'obvious efficiencies' in having only one consent determination that reflected the agreement. However, his Honour emphasised that his observations were not 'intended to inhibit the full use of s. 87A' but were made to indicate that 'once a proposed determination in respect of an area included in the wider claim area is proposed, there should be a sound reason for any further "subdivision" of the area'—at [12] to [13].

Decision

In this case, the parties sought a separate determination over the station because discussions about complex and varying proposed land uses over that area were the subject of ongoing discussions and the agreements and management plans being negotiated were unlikely to be in a form that would apply beyond that area. For these reasons, Mansfield J was satisfied that it was appropriate to make a separate consent determination over Angepena station—at [14] to [15].

Determinations of native title

Adnyamathanha No 1 Native Title Claim Group v South Australia (No 2) [2009] FCA 359

Mansfield J, 30 March 2009,

Issue
The issue before the court was whether to make three consent determinations in the terms proposed: one determination under s. 87 of the H*Native Title Act 1993*H (Cth) (the NT A) fully determining the Adnyamathanha No 2 application and two part determinations under s. 87A relating to the Adnyamathanha No 1 application.

Background
Two separate applications for a determination of native title under s. 61 were made on behalf of the Adnyamathanha people over areas in and around the Flinders Ranges National Park. The claims were described in *Adnyamathanha No 1 Native Title Claim v South Australia* [2009] FCA 358 (summarised in *Native Title Hot Spots* Issue 30) at [2], where Justice Mansfield ruled that the court could make the three consent determinations as requested by the parties.

Determination 1
This determination covers the whole of the land within the outer boundary of the Angepena pastoral lease, subject to the areas over which native title had been extinguished by specified acts— at [3] and see schedule 2 of the determination.

Determination 2
This determination relates to a much larger part of Adnyamathanha No 1. Schedule 2, Part 1 of the determination outlines the areas where native title was not determined to exist either because it had been extinguished or because the parties required further time to assess whether s. 47B of the NTA applied. The determination area includes Lake Frome Regional Reserve, proclaimed under the *National Parks and Wildlife Act 1972* (SA) (NPW Act). Although native title rights and interests are declared to exist over the area, they are subject to the non-extinguishment principle found in s. 238 of the NTA.

The State of South Australia asserted that the vesting in the Crown of parts of the determination area meant that all native title rights and interests in relation to those areas were suppressed at the date of vesting and remained suppressed for as long as the area remains vested under the NPW Act or other relevant state legislation. The applicants asserted that some native title rights were not suppressed by the vesting but acknowledged that the non-extinguishment principle applies. The orders reflect the compromise reached in relation to this issue—see recitals D to G to the determination.

The parties agreed that s. 47A applied to certain areas (listed in Schedule 4), including land held by the Aboriginal Lands Trust and the Mount Serle Pastoral Lease—at [5].

Determination 3

This determination relates to the whole of Adnyamathanha No 2 and is comprised the whole of the Flinders Ranges National Park. It includes areas of extinguishment, areas of non-exclusive native title and areas where native title rights and interests continued to exist but were subject to the non-extinguishment principle by reason of the NPW Act.

Pastoralist objected but did not join

There was one outstanding matter. On 27 March 2009, a pastoralist whose lease appeared to be within the larger determination area of Adnyamathanha No 1 advised the court that he did not consent to the proposed determination. At no stage did that pastoralist apply to become a party to the proceedings. His Honour decided to proceed with the determinations for two reasons. First, the notification procedures prescribed in the NTA are 'widespread' and there 'for an obvious and very good reason':

> A person so notified [as the pastoralist was] may elect not to become a party to the proceeding. But such a person cannot then whimsically or capriciously choose to assert their claimed interests at any time and without regard to the structure provided by the ... [NTA]—at [14], referring to s. 87A(1)(c)(v).

Second, the pastoralist had been aware of Adnyamathanha No 1 for many months but gave no explanation as to why he had not raised his concerns earlier. The court found that:

> It is entirely inconsistent with the orderly management of any proceeding ... that a person who has been aware of the process for some time should, by an informal side wind, be in a position to frustrate the outcome of that process—at [15].

Evidence before the court

The evidence before the court in support of the determination included:

- a report by Bob Ellis, an anthropologist who had worked with the Adnyamathanha people for 30 years (the Ellis Report), a work he published called Adnyamathanha Genealogy and the results of interviews Mr Ellis conducted with six claimants on topics identified by the state as requiring clarification;
- the transcript of preservation of evidence hearings where two senior Adnyamathanha men gave evidence over three days;
- thirteen witness statements from Adnyamathanha claimants addressing outstanding issues following the anthropological report and the preservation of evidence hearings; and
- extensive written submissions on behalf of the state and the claimants filed by the state—at [19] to [24].

Native title claim group and relevant society

The court was satisfied that the level of detail provided by the applicants to identify the native title claim group and its society satisfied the requirements of the NTA, including s. 223 of the NTA—at [26].

The term 'Adnyamathanha' now refers to a much larger group than the term originally described and there was some difference of views regarding the composition of the group. However:

> Despite this, the interviews and witness statements substantiate contemporary custom of claimants to identify as Adnyamathanha whilst acknowledging they are also, for example, Kuyani, Pirlatapa, Wailpi or Yadliyawara. ... The Ellis Report shows that the contemporary Adnyamathanha society is comprised of those traditionally closely related groups, and that the ethnographic records suggest those groups have a long history of inter-marriage, co-residence and joint ceremonial activities allowing them to be characterised as an appropriate traditional society for native title purposes—at [25].

The evidence also traced the earliest recorded ancestors for the contemporary Adnyamathanha society back to the mid-19th century and showed they were living in the area and observing traditional laws and customs at that time. Therefore, it was: '[E]asy to infer that ancestors of those persons occupied the proposed determination area at sovereignty and that the current claim group [is] directly linked to them'—at [27].

Substantially uninterrupted observance of traditional law and custom

According to Mansfield J, the evidence showed a substantially uninterrupted observance of traditional laws and customs since sovereignty, albeit not necessarily homogenous in the level of its observation and notwithstanding varying levels of knowledge and enforcement among the Adnyamathanha people—at [28].

The court was of the view that the evidence provided adequately addressed requirements of ss. 223 and 225. Mansfield J was also satisfied that:

- the parties likely to be affected by the proposed consent determination had sufficient access to independent legal representation; and
- the state had given appropriate consideration to the evidence and to the interests of the community generally and, in particular, had assessed that material as part of the process outlined in *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports*—at [35] to [36].

The proposed determinations were 'carefully worded' and:

- defined the native title holders in a satisfactory way;
- were specific about the native title rights and interests that could be recognised by the laws of Australia;
- spelled out the nature and significance of other interests; and
- adequately addressed extinguishment issues—at [37].

The court was satisfied, therefore, that it was within its power and appropriate in the circumstances to give effect to the proposed determinations without a full hearing of the native title applications—at [39].

Native title holders

In all three determinations, the native title holders are those 'living' Aboriginal people who:

- are the descendants (whether biologically or by adoption) of certain apical ancestors; and
- identify as Adnyamathanha; and
- are recognised by other native title holders under the relevant Adnyamathanha traditional laws and customs as having maintained an affiliation with, and continuing to hold native title rights and interests in, the determination area.

Native title rights and interests

Identical non-exclusive rights and interests were determined in the relevant areas of all three determinations as being rights to:

- access and move about the area
- live, camp and erect shelters, cook and light fires for cooking and camping;
- hunt, fish, gather and use natural resources such as food, water plants, timber, resin, ochre and soil;
- distribute, trade or exchange the natural resources;
- conduct ceremonies and hold meetings, engage and participate in cultural activities including those relating to births and deaths, carry out and maintain burials of deceased native title holders and of their ancestors;
- teach the physical and spiritual attributes of locations and sites, visit, maintain and preserve sites and places of cultural or spiritual significance;
- speak for, and make decisions about, the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders;
- be accompanied by those people who, though not native title holders, are spouses of native title holders or are required by traditional law and custom for the performance of ceremonies or cultural activities or have rights in relation to the determination area according to the traditional laws and customs acknowledged by the native title holders; or
- people invited by native title holders to assist in, observe, or record traditional activities.

The native title rights and interests confer a right to exclusive possession in parts of determination area 2 where s. 47A applies. Otherwise, they do not confer exclusive possession. They are for personal, domestic and non-commercial communal use only and are subject to, and exercisable in accordance with, the traditional laws and customs of the native title holders and the valid laws of the state and Commonwealth, including the common law. Native title rights and interests do not exist in:

- minerals as defined in section 6 of the Mining Act 1971 (SA) or petroleum;

- a naturally occurring underground accumulation of a regulated substance, other than petroleum; or
- a natural reservoir.

In relation to this, the determination states that, to avoid doubt:
- a geological structure on or at the earth's surface or a natural cavity which can be accessed or entered by a person through a natural opening in the earth's surface is not a natural reservoir;
- 'geothermal energy', petroleum, 'regulated substance' and 'natural reservoir' have the same meaning as in section 4 of the Petroleum Act 2000 (SA);
- the absence of any reference to a source of geothermal energy is not, of itself, to be taken as an indication of the existence, or otherwise, of native title rights and interests in a source of geothermal energy.

Liberty to apply re public works, improvements extinguishment and water
The parties have liberty to apply in relation to several matters, including:
- the location of any public works and adjacent are for the purposes of s. 251D and to establish the effect of works created after 23 December 1996;
- whether any 'improvements' constructed pursuant to a pastoral lease have been undertaken, thereby extinguishing native title;

whether any proposed act relating to underground water, as defined in the *Natural Resources Management Act 2004* (SA), may affect native title rights and interests in natural water.

Prescribed body corporate
The native title is not to be held in trust. Within six months (or later if the court allows), a representative of the native title holders must nominate a prescribed body corporate. When that occurs there will, without the need for a further order, be a determination that there is a prescribed body corporate for the purposes of s. 57(2) and perform the functions referred to in s. 57(3) of the NTA.

Comment on exclusions
Schedule 2 of the determination sets out areas that are excluded from the determination area by reference various categories of acts, e.g. subject to Schedule 4, areas where a category A past act has been done are excluded. Further, save for those areas listed in Schedule 4, any areas where native title is otherwise extinguished are excluded. While it is understandable that the parties wished to resolve this matter in an expedited fashion, the use of formulaic exclusions does not finally resolve where native title exists and where it does not. It will not be possible to map the actual determination area. The prescribed body corporate for the area where native title was found to exist will not have certainty in relation to identification of the area for which it is determined. The state will not have certainty in relation to the areas where the relevant future act regime applies and where it does not. While this issue may not be significant where the tenure history is simple, it is likely to be more problematic in relation to those areas where it is not.

Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v Queensland [2008] FCA 1855

Spender J, 9 December 2008

Issue

The issue in this case was whether the Federal Court should make a determination of native title under the *Native Title Act 1993* (Cwlth)(NTA) in terms of proposed consent orders. The court decided the determination should be made.

Background

The claimant application in this case covered land and waters above the high water mark on the Wellesley Islands and South Wellesley Islands in the Gulf of Carpentaria (the determination area). This area is bounded by the area where a determination of native title was made in *The Lardil Peoples v Queensland* [2004] FCA 298 (*Lardil*, summarised in *Native Title Hot Spots* Issue 9). The application dealt with in this case was filed on 12 January 2006. Agreement was reached between the parties on the terms of a draft determination, which was filed on 17 November 2008. The court noted that the draft agreement was reached 'within a very commendable timeframe'—at [38].

Applicant's submissions

The applicant submitted (among other things) that:

- eleven descent groups of the Gangalidda People, 20 descent groups of the Lardil People, 5 descent groups of the Yangkaal People and 10 descent groups of the Kaiadilt People had been identified;
- the 'most significant evidence of occupation' of the proposed determination area prior to sovereignty was the evidence of the present day claimants themselves, who gave evidence before Justice Cooper in *Lardil* which demonstrated the pre-contact connection with the determination area in this case;
- a number of significant individuals within the claim group identified their ancestors as Lardil, Yangkaal, Gangalidda or Kaiadilt People, were spoken to in the traditional languages of those peoples, grew up on the proposed determination area and were shown its places and told the names of those places by their ancestors, all of whom asserted they were the traditional owners of the area and were, in many instances, alive before contact with white people;
- there was little reason to doubt the oral tradition of the claim group that it was comprised of the descendants of the people in occupation of the proposed determination area at sovereignty—at [17] to [19].

Power of court to make the determination

In considering the proposed determination, Justice Spender had the 'great benefit' of the decision in *Lardil*, including a body of evidence in the form of expert reports and affidavits, very significant portions of which were relevant to this application given that the claim groups were the same. In those circumstances, Spender J considered it appropriate to have regard to that evidence pursuant to s. 86, which (among other

things) gives the court power to take into account evidence in other proceedings. His Honour noted that it was found in *Lardil* that, at and since sovereignty, the Lardil, Yangkaal, Kaiadilt and Gangalidda people had existed as culturally separate groups of Indigenous people who were direct descendants of the original people who had inhabited the determination area—at [12] to [16].

Having regard to both the evidence provided by the 'eminent' anthropological experts and the findings of Cooper J in *Lardil*, the court was satisfied that the Lardil, Yangkaal, Gangalidda and Kaiadilt People:

- were descended from indigenous people who were in occupation of the determination area at sovereignty;
- had maintained a connection with the proposed determination area; and
- had a body of traditional laws and customs that supported the rights and interests recognised in the proposed determination;
- had maintained a system of laws and customs over the proposed determination area sufficient to satisfy the requirements of the NTA—at [20] to [25].

His Honour was, therefore, satisfied that native title exists in the proposed determination area and went on to find that all of the matters in s. 225 of the NTA had been appropriately addressed—at [25] and [28] to [33].

Decision

Spender J decided that a determination in the terms sought should be made and commented that:

> This is a day of great significance for the Lardil, Yangkaal, Gangalidda and Kaiadilt People. Today, the ongoing relationship of the people with their country is recognised by Australia and its laws, although this is a relationship that has been known and acknowledged by the people long before European settlement. It gives me great pleasure to be able to make these orders, and in particular to be able to make them by consent following the successful negotiations between all of the parties—at [39].

Determination

The court ordered, declared and determined that native title existed in relation to the determination area. Native title is held by:

- Lardil people in that part of the determination area in Schedule 4(a);
- Yangkaal people in that part of the determination area in Schedule 4(b);
- Yangkaal and Gangalidda peoples in that part of the Determination Area in Schedule 4(c);
- Kaiadilt people in that part of the determination area in Schedule 4(d);
- Kaiadilt, Yangkaal and Gangalidda peoples in that part of the determination area in Schedule 4(e).

The Lardil, Yangkaal, Gangalidda and Kaiadilt peoples (the native title holders) are those people described in Schedule 5(a)–(d) of the determination. The Gulf Region Aboriginal Corporation is to be the prescribed body corporate. It will not hold the native title in trust.

The right to possession, occupation, use and enjoyment to the exclusion of all others was recognised in the part of the determination area described in Schedule 1, Schedule 1A and Schedule 1B, other than in relation to water and subject to paragraphs [12], [14] and [15] of the determination. Non-exclusive rights and interests in relation to that part of the determination area described in Schedule 2, other than in relation to water and subject to paragraphs [12], [14] and [15] of the determination, being the right to:

- access, be present on and traverse the area;
- hunt, fish and gather on the area for personal, domestic, and non commercial communal purposes;
- camp on the area, but not to reside permanently or erect permanent structures or fixtures;
- light fires on the area for domestic purposes (including cooking) but not for the purposes of hunting or clearing vegetation;
- conduct religious, spiritual, and ceremonial activities on the area;
- maintain, in the area, places and areas of importance or significance to the native title holders under their traditional laws and customs and protect those places and areas, by lawful means, from physical harm; and
- take and use natural resources (as defined in the determination) from the area for personal, domestic, and non-commercial, communal purposes;
- share or exchange natural resources from the area for personal, domestic and non-commercial, communal purposes.

Subject to paragraphs [12], [14] and [15] of the determination, rights in relation to water are non-exclusive rights to:

- hunt and fish in and on and gather from the Water for personal, domestic,
- and non-commercial, communal purposes; and
- take, use and enjoy the water for personal, domestic and non-commercial, communal purposes.

The native title rights and interests are subject to, and exercisable in accordance with, the laws of the state and the Commonwealth and the traditional laws acknowledged and traditional customs observed by the native title holders.

Other interests in the determination area recognised in the determination include those of Ergon Energy Corporation Limited, the Mornington Shire Council, the Ngaarrkinaba/Mildiji Land Trust and the Kaiadilt Aboriginal Land Trust. The relationship between native title and other rights and interests is that:

- other rights and interests continue to have effect;
- in areas where ss. 47A or 47B of the NTA applies, the non-extinguishment principle found in s. 238 applies in accordance with ss. 47A(3)(b) and 47B(3)(b); and
- all other interests, and any activity that is required or permitted by or under and done in accordance with the other interests, prevails over the native title rights

and interests and any exercise of those rights and interests but does not extinguish them except in accordance with law.

Determination of native title—non-claimant application

Worimi Local Aboriginal Land Council v Minister for Lands (NSW) (No 2) [2008] FCA 1929

Bennett J, 18 December 2008

Issue

This was the first case where a non-claimant application was actively opposed. The court had to decide whether to make a determination that native title did not exist over an area in Port Stephens, New South Wales. The determination was made. An important feature of the decision is the consideration given to the onus of proof in a case where a non-claimant application is opposed.

Gary Dates (also known as Worimi), who opposed the application, has appealed against the decision.

Background

The Worimi Local Aboriginal Land Council (the land council) is the body corporate established under s. 50 of the *Aboriginal Land Rights Act 1983* (NSW) (the NSW Act) for the relevant area. Its non-native title interest arose from the transfer of land in Port Stephens (including Lot 576, the area this case concerns) by the Minister for Lands for New South Wales (the minister) pursuant to s. 36 of the NSW Act in 1998.

The land council held 'an estate in fee simple ... subject to any native title rights and interests existing in relation to the land immediately before the transfer' (s. 36(9) of the NSW Act). Section 40AA of the NSW Act prevented the land council from dealing with the transferred land unless it was the subject of an approved determination of native title. Subsections 13(1) and 61(1) of the *Native Title Act 1993* (Cwlth) (the NTA) permitted the making of a non-claimant application for a determination that native title does not exist over the area concerned.

In October 2004, the land council resolved that Lot 576 was not of cultural significance and then resolved to dispose of the land. It made a non-claimant application over Lot 576 in December 2004. The minister was automatically a party to the proceeding pursuant to s. 84(4) of the NTA. The application was notified in accordance with s. 66 of the NTA.

As a non-claimant application is a 'native title determination application', stringent requirements are placed the applicant. According to her Honour, if the court was not

satisfied in this case that native title did not exist, the land council's application should be dismissed—at [43], referring to *Commonwealth v Clifton* (2007) 164 FCR 355 (*Commonwealth v Clifton*, summarised in *Native Title Hots Spots* Issue 27) at [40] to [57].

Worimi did not give notice of his intention to become a party within the notification period specified in s. 66(10)(c) but was joined as a party in March 2007, having made application pursuant to s. 84(5) of the NTA (see *Worimi 2007)*. No other Aboriginal person sought to become a party or opposed the determination sought by the land council. The only Aboriginal people, other than Worimi, to give evidence in this case did so as witnesses for the land council. There was no dispute that the land council wished to sell Lot 576 to pay off debts and to provide housing. The land council's witnesses generally, but not universally, supported the sale. The court acknowledged that Worimi thought he had been badly treated by the land council and was upset that it wished to sell Lot 576 to pay debts and provide housing (which he felt was the government's responsibility) without considering its cultural significance—at [127].

The history of this matter is set out in *Worimi Local Aboriginal Land Council v Minister for Lands (NSW)* [2007] FCA 1357 (*Worimi 2007*, summarised in *Native Title Hot Spots* Issue 26). It includes the striking out of two claimant applications filed by Mr Dates (Worimi) pursuant to s. 84C of the NTA for failure to comply with s. 61—see *Hillig v Minister for Lands (NSW) (No 2*) [2006] FCA 1115 (summarised in *Native Title Hot Spots* Issue 21) and *Worimi v Minister for Lands (NSW)* [2006] FCA 1770 (*Worimi 2006*, summarised in *Native Title Hot Spots* Issue 23).

The burden of proof

The parties agreed that:

- the land council carried the burden of proof to satisfy the court that no native title existed in Lot 576 and the applicable standard was the balance of probabilities;
- the court was not required to, and could not, make a determination that native title existed under the NTA on a non-claimant application;
- the court could only grant the declaratory relief sought by the land council if satisfied that Lot 576 was not subject to native title—at [24] to [29]. See also [88].

According to her Honour, 'The real difference between the parties relates to their submissions regarding what evidence is sufficient to establish the negative proposition'—at [42].

Bennett J found (among other things) that:

- the beneficial nature of the NTA does not mean that a different standard applies to the evidentiary burden and the onus of proof;
- a non-applicant claimant (i.e. a respondent) can, by establishing the elements of native title, prevent a determination that native title does not exist but cannot secure a positive determination of native title under the NTA;

- Worimi's evidence might raise a doubt as to the non-existence of native title without amounting to proof necessary for a finding that native title exists;
- after assessing the totality of the evidence, the court must determine whether the land council had established, on the balance of probabilities, that native title did not exist;
- if the land council established sufficient evidence from which an absence of native title might be inferred, Worimi carried an evidential burden to advance evidence of any particular matters going to the existence of native title; and
- the land council was then required to deal with that evidence in the discharge of its overall burden of proof—at [45] to [55], referring to , referring to (among others) *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561 (*Apollo*), *Derschaw v Sutton* (1996) 17 WAR 419, *Kokatha People v South Australia* [2007] FCA 1057 (*Kokatha*, summarised in *Native Title Hot Spots* Issue 25). See also [88].

Worimi asserted that he and his immediate family may be the only Worimi people who were given native title rights and interests in Lot 576 (and, additionally, in the area from Birubi Beach to Boat Harbour) under traditional laws and customs.

In considering the evidence adduced, Bennett J noted (among other things) that:
- it was relevant that Worimi was able to give evidence of the laws and customs he asserted but he had insufficient resources to present the expert historical and anthropological evidence to substantiate his claims;
- Worimi was not in a position to adduce the historical and anthropological evidence to establish the existence of the Garuahgal clan (of which he claimed to be a member) and the existence of traditional laws and customs over Lot 576;
- while there was an absence of detailed expert evidence, the court must consider such evidence as has been adduced, i.e. the existence (or not) of native title over Lot 576 could only be assessed on the available evidence;
- the land council was not obliged to establish the nature and content of any native title rights and interests at the time of sovereignty and then 'deconstruct' this via admissible evidence, i.e. it was 'contrary to logic to say that a person who wishes to establish that there is no native title must first positively prove that there were laws and customs at any stage'—at [59] to [62] and [88], referring to (among others) *Apollo* and *Ho v Powell* (2001) 51 NSWLR 572.

No presumption of the existence of native title

In rejecting Worimi's submissions, Bennett J found (among other things) that:
- there is no presumption of the existence of native title under the NTA, either for a claimant seeking a determination of the existence of native title or for a non-claimant seeking a determination of the absence of native title;
- if it was necessary to prove each of a number of elements to establish native title, and it could be shown that one of those elements was missing, that was sufficient to demonstrate that, presently, there was no native title over particular land;
- the fact that no expert evidence was available in these proceedings did not prevent a decision being reached as to whether the land council had satisfied the

burden of establishing the absence of native title on the basis of the evidence adduced;
- there are requirements associated with the concept of native title under the NTA that go beyond identification of land as 'traditional land' or as land associated with the Worimi people;
- the land council was not obliged to demonstrate an absence of native title throughout the Port Stephens area but evidence that relates to an area that goes beyond a recently subdivided lot such as Lot 576 was likely to be relevant;
- the question remained whether there were native title rights and interests over Lot 576—at [69] and [71] to [79] and [88].

Evidence not required in relation broader Worimi territory

It was accepted that Lot 576 fell within traditional Worimi country. However, the subject matter of the application was a single lot. Bennett J found that:

- the land council had no obligation to demonstrate the presence or absence of native title throughout the whole of traditional Worimi country;
- moreover, a description of people as 'Worimi' and land as 'traditional Worimi country' was not evidence of a continued association with an identified area of land by an identified Aboriginal society or group from before the acquisition of sovereignty as required under the NTA—at [80] to [88] and [180].

Admissibility of evidence related to associated claims

The court admitted material associated with other claims as relevant to the issue of whether the witnesses believed that native title existed in the area and whether there were other Worimi persons who may hold native title but did not accept that the fact of earlier native title applications meant that witnesses were untruthful in their evidence or that they tailored their evidence to suit the present wish to sell Lot 576—at [102], [106] to [107] and [116] to [123].

Evidence given

Her Honour set out in some detail the evidence of each witness, noting consistencies and inconsistencies both their testimony, cross-examination and any relevant affidavits. That evidence is not summarised here and is referred to only in so far as it was relevant to the findings of the court. Readers are referred to [90] to [133].

In relation to the land council's evidence, it was found that:

- it established that no Aboriginal person other than Worimi (and some of his immediate family) asserted that native title existed in relation to Lot 576;
- all of the Aboriginal witnesses called by the land council identified as Worimi people, all were aware of the assertions made by Worimi concerning the existence of native title in Lot 576 and all gave evidence generally rejecting those assertions;
- some of those witnesses were parties to claimant applications in respect of land in the Port Stephens area but none had filed a claimant application in relation to, or in the immediate vicinity of, Lot 576;

- the land council called a number of witnesses from different Worimi families, including women who have taken a particular interest in Worimi matters and traditions;
- no other person was called to give evidence in support of Worimi's contentions, despite (among others) the fact that he asserted he held native title as a Worimi man—at [137] to [138].

Worimi's daughter Priscilla gave evidence for the land council that was contrary to her father's case. In accepting her evidence, Bennett J noted that Pricilla:

- was in an advanced state of pregnancy with her tenth child when she gave her evidence and it was clear that doing so caused her 'great personal distress';
- explained that, while she had previously affirmed two affidavits supporting her father's assertions as to the significance of Lot 576 as a woman's site, she expressly recanted those statements, had given them when she was intoxicated and did so because she loved her father;
- gave clear evidence that she has never been taught about Aboriginal law or custom and knew nothing about Lot 576 or Boat Harbour until a few years ago, when her father first told her that women had their babies there;
- said her upbringing did not involve the passing on to her of any traditional knowledge, laws or customs associated with the Boat Harbour area or Lot 576;
- 'remained consistent' on the key questions of her knowledge of traditional laws and customs and her knowledge of Lot 576—at [139] to [140].

Her Honour found the evidence of the other land council witnesses was 'persuasive', going on to say that:

- while they were under the pressure of the debts owed by the land council, this did not derogate from their sworn evidence but did explain why they may be more ready to sell Lot 576;
- while they might be 'loath to part with any part of the land that has been granted to them under the NSW Act, they were ready to sell land' that did not otherwise have 'importance in terms of traditional laws and customs' to ensure the debts of the land council were paid;
- the issue of the debts, and the provision of housing, did not 'of themselves impact on the question' of whether there was native title in Lot 576—at [141] to [142].

Relevance of other claimant applications

Some of the land council's witnesses were claimants in applications made over Bagnalls Beach and Stockton Bight. Worimi asserted that both areas were Garuahgal land but did seek to be joined to those applications or make an independent claim over either area. However, he contended that the existence of those claims was inconsistent with the denial of native title over Lot 576 (and the adjacent area at Kingsley Beach), arguing that:

- the phrase 'in relation to' in s. 36(9) of the NSW Act necessitated a consideration of native title rights and interests over the whole of the land held by the land council under the NSW Act;

- it was relevant that the land council witnesses asserted that they were descendants of people from Port Stephens whom they considered were native title holders.

The court disagreed, concluding that:
- the issue was native title under the NTA, the evidence must be looked at as a whole and an assertion of native title was not sufficient;
- there must be some evidence of connection with Lot 576 and the laws acknowledged and customs observed in connection with it;
- there was no inconsistency between the assertions of native title over other areas by land council witnesses and denial of its existence over Lot 576—at [126].

Worimi also asserted that Lot 576 was the traditional country of the Garuahgal clan of the Worimi people and that more than one clan could have guardianship of a particular area. All the land council's witnesses gave evidence:
- either that they had never heard of such a clan or that there was no such a clan;
- that Lot 576 fell within the Maaiangal clan area and there could be only one clan claiming any particular land.

On the evidence, her Honour was not satisfied that there was no such thing as the Garuahgal clan or that only one clan could claim a particular area. However, Worimi argued it was not the Maaiangal clan, but the Garuahgal clan, that exercised the relevant native title rights over Lot 576, which meant that the asserted existence of traditional laws and customs observed by the Maaiangal clan over other areas (i.e. Stockton Bight and Bagnalls Beach) was not relevant to Worimi's claim of a Garuahgal women's site on Lot 576.

Significance of the area

There was no dispute that Worimi was a Worimi person, or that his ancestors were Worimi. His father was Leonard Dates, son of Ellen and Freddie Dates and his mother was Yorta Yorta. However, the other Aboriginal witnesses knew him as Gary Dates. He, like most of the land council witnesses, grew up on the Karauh Mission and had lived in the area most of his life. What was in dispute was the extent to which he had done so at any time following any form of traditional lifestyle. The land council witnesses agreed Lot 576 was within Worimi country but said it did not have any particular significance. Many had visited the area but did not use it for traditional purposes—at [90], [102], [106] to [108] and [156]

Worimi's testimony that he was taught by his grandmother, father and father's brothers was not directly disputed. He said his father followed Worimi law and custom and told him he was the custodian of all Worimi land. He said that only he could bring a claim over Lot 576 because of his knowledge as an elder. However, in cross examination, he accepted that he was not old enough to be an elder saying, rather, he was the custodian of the land—at [128], [132] and [148].

His younger brother, Kelvin Dates, and his sister, Jaye Quinlan, gave evidence that their father and mother did not live a traditional lifestyle or pass on any knowledge of traditional laws and customs to them. In the court's view, this did not necessarily contradict Worimi's evidence that such information was passed to him as the eldest son. However, all the land council witnesses denied that a person became a traditional elder merely because they were the eldest son. In any event, Worimi conceded that land did not pass to particular people as custodians and that it was contrary to traditional law and custom for Worimi's father to give him the Boat Harbour area as he initially asserted because all the Worimi people were traditional owners—at [106] to [109], [128], [156] and [160].

Worimi gave evidence that his father, uncles and grandmother spoke 'Worimi lingo'. He knew a little and was teaching his children. His daughter denied ever hearing him speak or being taught it. Other witnesses gave evidence that only English was spoken at the Karauh mission—at [97], [107], [110] and [128].

His sister denied being taught any traditional laws and customs by her grandmother, with whom she lived, or her father. Her grandmother, Ellen Dates, was a devout Christian who did not live according to any traditional law and custom. She had not been to Lot 576 and had no knowledge of it as a women's site. The court concluded that it would be expected that information concerning a women's site would have been passed to Ms Quinlan if Ellen Dates had been aware of such a site and continued to observe law and custom—at [161].

Worimi gave evidence that Big Bill Ridgeway told him about Aboriginal ways but Mr Ridgeway's son described his father as more or less living in a white society. The court found it unlikely that Mr Ridgeway was a major source of Aboriginal custom for Worimi, who (in any case) changed his evidence in this regard during cross-examination—at [107], [128] and [150].

No other witness was called to corroborate Worimi's evidence. All of the land council witnesses contradicted his evidence that:

- there was a guardian tree or a rock formation in the shape of a goanna on Bulahdelah mountain;
- Kooragang Island was a sacred site;
- it was Worimi law to be buried in trees, near your mother, to return to your country to die or to visit graves; and
- the Hunter River was formed by the rainbow Serpent—at [93] to [98] and [106] to [108].

Individual witnesses disputed Worimi's evidence that:

- Worimi people are all spirits of their totems but take on human form;
- when a woman married she took on the law and custom of her husband's clan but lost all rights if he pre-deceased her;
- Worimi would have had so much information passed to him by 12 years of age when his grandmother died—at [94] to [95], [107], [131] and [148].

The court found that fact that Worimi's description of practices such as hunting and fishing differed from that of other witnesses did not necessarily derogate from his evidence, since there could be different ways of observing traditions. However, Worimi had not adduced sufficient evidence in relation to such activities said to have been carried out on or near Lot 576—at [97], [106] to [108] and [157].

The court made particular mention of the fact that Worimi had not brought any evidence to support his claim of a women's site on or near Lot 576 and that, while he expected other Worimi women to know of the relevant laws and customs, he accepted that they did not. No other Aboriginal witness gave evidence of a women's site on or near Lot 576 or between Birubi Beach and Boat Harbour. The court concluded there was no evidence to support:

- the existence of a site at Kingsley Beach or of any practice associated with birth or baptism in the area between Birubi Beach and Boat Harbour or on Lot 576;
- the existence of a 'billabong' or 'namby' on, or in the vicinity of, Lot 576 or that it was used for washing saltwater off babies after they had been baptised;
- the giving of totems to babies on or near Kingsley Beach or the burying of afterbirth on or near Lot 576;
- the existence of an avoidance obligation on men relating to Lot 576 or Kingsley Beach or any other land in the vicinity of Boat Harbour—at [106] to [108] and [158] to [159].

Who held native title rights and interests?

The court found Worimi's evidence on this question inconsistent. He varyingly asserted that he was bringing the claim on behalf of himself, the Garuahgal women, his family and all Worimi people. It was noted that:

- native title may be held communally, by a sub-group or by an individual, depending on the nature of the society said to be the repository of the traditional laws and customs that give rise to the native title claimed;
- individual native title rights arise out of, and depend upon, the traditional laws and customs of the community in question;
- in the present case, if native title rights existed over a women's site, they would be held by Worimi women, who denied that such rights existed—at [117].

Worimi's asserted individual rights appeared to be based on information he received as the eldest son. In affidavits in 2005 and 2007, he claimed they were held by his immediate family and possibly only he and his children. However, in cross-examination (and in a later affidavit), he claimed that all Worimi people held native title in the area. While his brother, sister and daughter did not support his assertions, other family members did—[132], [175] to [178] and [185].

It was found that irrespective of the group said to hold native title over Lot 576, the requirements of s. 223 were not satisfied—see [31] to [44], [175] to [179] and [185].

Worimi's evidence

The court noted (among other things) that:

- Worimi had called no other person to support his contentions and it was particularly telling that no women supported his evidence about women's site;
- the only other evidence in support of his claims was from his mother, who was Yorta Yorta, and his wife, sister and daughters, who said little more than that they took their information from Worimi and supported his assertions;
- the failure on Worimi's part to call corroborative evidence lessened the burden of proof on the land council to establish the negative proposition;
- Worimi's case was that, apart from family members to whom he had passed it on, only he had the requisite knowledge and, accordingly, it was hard to see what further evidence the land council could have called;
- the land council witnesses included representatives of families long associated with the area and they gave evidence not only of their own understanding but they also that of their parents and, indeed, Worimi's grandmother and father—[102], [139], [175] to [178] and [187] to [188].

Continuity of law and custom

Bennett J noted that:

- deciding whether claimants have a present connection with land, some interruption to enjoyment of native title rights and interests is allowed;
- however, the assertion of native title rights and interests requires more than a 'vague claim' to membership of a group of people and of 'custodianship' of land;
- Worimi had comprehensively failed to establish the elements of native title in that he had not identified either the content of the normative body of laws and customs acknowledged and observed by the pre-sovereignty society or how those laws and customs had continued to be acknowledged and observed substantially uninterrupted;
- while he was not required positively to establish native title in order to resist the land council's application, he was required to present evidence which was sufficiently cogent with respect to those elements that it casted doubt on the assertion that native title did not exist—at [151] to [154] and [167].

Worimi asserted that the laws and customs he acknowledged were not observed by other Worimi people and this was consistent with their evidence. However, it was found that:

- Worimi, and those of his family who supported his claims, did not constitute a society that observed traditional laws and customs in respect of Lot 576;
- even if the area was associated with the birth of children of the Garuahgal people, the present observance by Worimi and one of his daughters was 'at best an attempted re-creation of a society which may well have had native title rights and interests';
- even assuming that information had been passed down from father to the eldest son since pre-sovereignty, the evidence from all witnesses (including Worimi) was that any laws and customs with respect to the birth of children had ceased to be observed until Worimi recently sought to reinvigorate them;

- even accepting the existence of a normative system of laws acknowledged and customs observed in connection with the area, there was no evidence relating to the period of the between 1788 and the time the stories were said to have been told to Worimi, who seemed to rely on a presumption of continuity;
- the evidence was that Aboriginal people lived as part of the non-Aboriginal community around Port Stephens or on the Karuah Mission but there was no basis on which to infer the continuity of the observance of laws and customs, the use and enjoyment of rights and interests in connection with Lot 576—at [168], [172] to [173] and [181].

Her Honour held that:
- if native title existed pre-sovereignty, it had ceased to exist for the purposes of the NTA when the society (whether the Worimi people, the Maaiangal clan or the Garuahgal clan) ceased to acknowledge and observe their laws and customs;
- therefore, the rights and interests to which those laws and customs gave rise were no longer possessed under traditional laws acknowledged and traditional customs observed and so they ceased to exist;
- the later adoption of the laws and customs does not give rise to rights and interests rooted in pre-sovereignty traditional law and custom—at [184]

The court concluded that:
- there was not the requisite continuous connection with the people, whether Worimi, Maaiangal or Garuahgal, with Lot 576 or the observance of traditional laws and customs since sovereignty as required by s. 223(1) because the practices Worimi said were associated with it had not been observed at least from the time of his grandmother until his daughter in 2006;
- there was no evidence (other than Worimi's) of a birthing site or use of a waterhole for Garuahgal, Maaiangal or Worimi women generally on or near Lot 576 and, if there ever had been a site, it had long since ceased to be used;
- while Worimi claimed that the site was sacred to all Worimi women, no woman supported this claim, apart from some members of his immediate family;
- while Worimi felt strongly about his Aboriginal heritage, he acknowledged he had taken some of the Dunghutti customs observed by his wife in practising with his daughter the customs connected with birth and baptism that he said were carried out on Lot 576;
- Worimi had made some effort to revive observation of traditional use in the area but there had been no such connection for at least two generations;
- even accepting that there were laws acknowledged and customs observed in connection with the area pre-sovereignty, there had been no continuity of that observance;
- the evidence was not of adaptation of traditional laws and customs but of substantial interruption, amounting to cessation observance;
- the lack of continuity in the laws acknowledged and customs observed in connection with the area was sufficient to establish a prima facie case of no native title—at [129], [162] to [164], [182] to [189] and [193].

Decision
It was found that:

- the land council had presented sufficient evidence from which the absence of native title over the area could be inferred;
- Worimi's evidence was insufficient to cast doubt on the council's case;
- therefore, the land council was entitled to a determination that there was no native title over Lot 576—at [194].

Eden Local Aboriginal Land Council v Minister for Lands (NSW) [2008] FCA 1934

Jacobson J, 17 December 2008

Issue
The issue before the court was whether to make a determination under the *Native Title Act 1993* (Cwlth) (NTA) on a non-claimant application that native title did not exist in relation to three lots in Bega, New South Wales. The court made the determination.

Background
The three lots concerned were transferred to the Eden Local Aboriginal Land Council by the Minister for Lands for New South Wales. The non-claimant application was made cooperatively with the minister to cure certain conveyancing errors made at an earlier stage in relation access. Justice Jacobson noted that the application involved two steps:

- the applicant's consent to the grant of easements over a part of each lot covered by the non-claimant application;
- a land swap whereby a small area of land (comprised of a part of a driveway and a carport) would transferred to the applicant and certain other lands (identified in the application) would be transferred to the Crown—at [6].

The purpose of this was to adjust the boundaries in order to bring them into line with existing use—at [6].

His Honour was satisfied that he had the power to make the orders sought. Although the court was not presented with a formal minute of consent orders, the provisions of s. 86G(2) sufficiently covered an application made co-operatively as was done in this instance.

Decision
Orders were made in terms agreed by the parties, i.e. a determination that native title did not exist over the three lots concerned. By consent, the minister was ordered to pay the applicant's costs—at [7] and [8].