NATIVE TITLE HOT SPOTS

NATIONAL NATIVE TITLE TRIBUNAL LEGAL NEWSLETTER NOVEMBER 2009, ISSUE 31

Contents

National Native Title Tribunal

Summary dismissal – issue estoppel

Quall v Northern Territory [2009] FCAFC 157

Moore, Lindgren & Stone JJ, 11 November 2009

Issue
Tibby Quall, on behalf Dangalaba and Kulumbiringin People, appealed against the summary dismissal of their claimant application pursuant to O 20 r 4 of the Federal Court Rules (FCR). The appeal was dismissed because it was held that the judge at first instance was correct to dismiss the proceedings because an issue estoppel arose that was fatal to the application.

Background
In May 2001, orders were made to divide proceedings in relation to lands the subject of various native title applications in and around Darwin into Area A and Area B. The proceedings relating to Area A dealt with part of the area subject to Mr Quall's application. A number of other claimant applications made by William Risk on behalf of the Larrakia People were also dealt with (in whole or in part).

Justice Mansfield dismissed the proceedings in relation to Area A and later made a determination under s. 225 of the Native Title Act 1993 (Cwlth) that native title did not exist in Area A. The dismissal (and the determination) only affected Mr Quall's application in so far as it related to Area A, i.e. the part of that related to Area B was not dismissed. It was the application making a claim to Area B that was the subject these appeal proceedings. The Northern Territory applied to strike out the application pursuant to O 20 r 4. At first instance, Reeves J dismissed the application because:

- Mansfield J's decision in relation to Area A in *Risk v Northern Territory* [2006] FCA 404 (*Risk*, summarised in *Native Title Hot Spots* Issue 19) gave rise to an issue estoppel that prevented Mr Quall from pursuing the claim in relation to Area B;
- it would be an abuse of process for the Quall claimants to pursue what was called 'the Top End society case'—see *Quall v Northern Territory* [2009] FCA 18 (*Quall*, summarised in *Native Title Hot Spots* Issue 30).

Mr Quall's appeal from the judgment in *Risk* was dismissed by the Full Court. His application for special leave to appeal to the High Court from that judgment was also dismissed—see *Risk v Northern Territory* [2007] FCAFC 46 (summarised in *Native Title Hot Spots* Issue 24) and *Quall v Northern Territory* [2008] HCATrans 127.

Mr Quall appealed to the Full Court from Reeves J's judgment in *Quall*. The only issue in the appeal was whether Reeves J was correct to conclude that certain findings in *Risk* give rise to an issue estoppel that precluded Mr Quall and those on whose behalf he claimed (referred to collectively as 'the Quall applicants') from proceeding with their application for a determination of native title over Area B.

Preliminary issues on appeal
Justices Moore, Lindgren and Stone were of the view that leave to appeal was not required because the judgment below was final. However, as the Northern Territory did not contend

otherwise, it was not necessary to consider the question further. Mr Quall's application to adjourn the appeal and vacate the hearing date was dismissed but he was granted leave to extend time to file the notice of appeal by one day because it was in the interests of justice to do so. Leave to make an amendment that was essentially a collateral attack on Mansfield J's judgment in *Risk* was refused. Other proposed amendments were found to be unnecessary because they were covered by the existing grounds of appeal. The court declined to allow the reading of an affidavit said to contain evidence that was unavailable at the time of the hearing before Reeves J because the 'reasonable inference to be drawn ... was that the material had been available ... but ... the appellants had not accessed it' until after the hearing—at [21] to [26].

Summary dismissal on grounds of issue estoppel

Order 20 r 4 would apply in this case if the court was satisfied that, 'for the proceeding generally or for a claim for relief in the proceeding ... no reasonable cause of action is disclosed' because an issue estoppel arose from *Risk*. The court noted with approval the applicable principles as set out by Reeves J, which (in summary and relevantly) are:

- the court should only dismiss the application if the case for doing so was very clear;
- therefore, in this case the court must be satisfied to a high degree of certainty that the application is plainly untenable because of an issue estoppel upon the version of the evidence favourable to the applicant;
- generally, no weighing of conflicting evidence or of inferences that might be drawn from it should be undertaken;
- the court must be exceptionally cautious to ensure that the claimants were not deprived of the right to submit for determination a real and genuine controversy that had not yet been fully and finally determined on its merits—at [11].

Further, for the doctrine of issue estoppel to apply, the territory had to prove that the same question or issue has been decided by a judicial decision in earlier proceedings (i.e. in *Risk*) that was final and that the parties to that decision (or their privies) were the same parties (or their privies) in the proceedings where the estoppel is raised (i.e. in *Quall*). It was noted that these well-established principles apply to an application under O 20 r 4 for summary dismissal of a native title determination application made under the NTA—at [11] to [12].

Common parties

In this case, the Quall applicants and the territory were both parties in the proceeding in *Risk*. The court agreed with Reeves J that it was not necessary that the parties in *Risk* and *Quall* be identical. All that was necessary is that 'the parties are common to both sets of proceedings'. The court noted that, while issue estoppel may only be raised against a party who is a party to both of the relevant proceedings (in this case, *Risk* and *Quall*), it did not follow that a plea of issue estoppel would be defeated merely because a new party was added to, or a previous party was removed from, the second proceeding—at [36], referring with approval to (among other cases) *Dale v Western Australia* [2009] FCA 1201 (summarised in *Native Title Hot Spots* Issue 31).

Identical issues

The fact that the proceedings in *Risk* related to a different area of land (Part A) did not mean 'that there cannot be the requisite identity of issue'. The 'precise issue decided in the first

place' (in *Risk*) must be identified 'in order to ascertain whether it is identical with what is sought to be litigated in the second place' (i.e. in *Quall*)—at [38] to [39].

After outlining elements of the submissions made on appeal and the reasons given in *Quall* and *Risk*, the court noted that:

> In relation to both Parts A and B the claim to native title depended on the uninterrupted observance of laws and customs from sovereignty. Those laws and customs were asserted to be those of a particular group of Aboriginal people which includes the appellants—at [43].

Their Honours accepted that certain points made in the territory's submissions provided an 'accurate summary' as to the identity of that Aboriginal group. They included that:

- Mr Quall has always asserted in this application that the land claimed was Larrakia land, although he adopted the term 'Kulumbiringin land' rather than 'Larrakia land' in the current version;
- notwithstanding this change in 'nomenclature', there was no change in 'the underlying identity or character of the land in question';
- the claim group is said to comprise certain named descendants of Kulumbiringin ancestors;
- in Attachment S, which sets out the factual basis for the claim, it is asserted that the native title claim group acknowledge and observe traditional laws and customs because of a connection to land 'in the Darwin region, and subject areas, what we call Kulumbiringin land';
- in the same attachment, it is accepted that 'Larrakia', rather than 'Kulumbiringin', has generally been used in ethnographic and historical material to describe the Aboriginal people of the Darwin region and it is asserted that that the traditional area of Kulumbiringin country is best depicted on the attached map by Norman Tindale called 'Aboriginal Tribes of Australia';
- that map shows the boundaries of lands and waters identified as 'Larakia', which 'coincide generally with the description in Attachment S of Kulumbiringin country';
- the application makes no distinction within the lands identified as Kulumbiringin lands or country about matters of connection or traditional laws and customs;
- therefore, it is 'clear' that the application is founded on an assertion that Area B was held, at sovereignty, by a group of Aboriginal people pursuant to the traditional laws and customs of the same society of Aboriginal people as the land the subject of findings in *Risk*.

Decision

The appeal was dismissed because an issue estoppel 'inevitably' followed from certain findings made in *Risk*, a proceeding to which both the Quall claimants and the territory were parties. The findings were:

- the land in Part B, as in Part A, is Larrakia land;
- the Larrakia peoples are the relevant Aboriginal society for Larrakia lands; and
- the laws and customs acknowledged and observed by the Larrakia peoples at sovereignty have been subject to substantial interruption between that time and the present day—at [45].

Dale v Western Australia [2009] FCA 1201

McKerracher J, 23 October 2009

Issue

This case concerned an application for the summary dismissal pursuant to Order 20 rule 4 of the Federal Court Rules (FCR) of a claimant application made on behalf of the Wong-Goo-TT-OO. The State of Western Australia argued a conclusion reached in earlier related proceedings that the native title claim group in that application was not, and had never been, a 'society' for the purposes of s. 223(1) of the *Native Title Act 1993* (Cwlth) (NTA) raised an issue estoppel. The motion for summary dismissal was allowed and the Wong-Goo-TT-OO application was dismissed.

Appeal filed

On 12 November 2009, the Wong-Goo-TT-OO appealed from the whole of the judgment. The appeal was filed one day after the Full Court handed down judgment in an appeal on a similar issue in *Quall v Northern Territory* [2009] FCAFC 157, summarised in *Native Title Hot Spots* Issue 31. In that case at [36] to [37], aspects of Justice McKerracher's reasoning in this case are referred to with approval.

Background

A determination of native title was sought on behalf of the Wong-Goo-TT-OO in a claimant application made in 1998. It covered a broad area of the Pilbara region in Western Australia, including various town sites. When it was made, parts of areas it covered were subject to other claimant applications, including one made on behalf of the Ngarluma and Yindjibarndi peoples. Subsection 67(1) of the NTA requires the Federal Court:

> [T]o make such orders as it considers appropriate to ensure that to the extent that native title determination applications cover the same area, they are dealt with in the same proceedings.

This meant that, in considering the claim by the Ngarluma and Yindjibarndi to hold native title, the court was required to (and did) deal with (among others) the Wong-Goo-TT-OO application, but only to the extent that the area it covered overlapped with the area covered by the Ngarluma/Yindjibarndi application.

Justice Nicholson delivered the substantive decision on native title in *Daniel v Western Australia* [2003] FCA 666 (*Daniel*, summarised in *Native Title Hot Spots* Issue 6). Final orders were made in 2005, including a determination of native title recognising the Ngarluma People and the Yindjibarndi People as each separately holding native title to certain areas that had been subject to their joint claim—see *Daniel v Western Australia* [2005] FCA 536.

As a result of that determination, the Ngarluma People were recognised as holding native title in relation to the area surrounding the town sites of Wickham, Point Samson, Karratha and south of the Burrup Peninsula. However, the town sites themselves were expressly excluded from the Ngarluma/Yindjibarndi application. (The Ngarluma People have since filed a claimant application over those areas.) Those town sites were covered by the Wong-Goo-TT-OO application.

In *Daniel v Western Australia* [2005] FCA 536, orders were made to dismiss the Wong-Goo-TT-OO application to the extent that it overlapped with area covered by the Ngarluma and Yindjibarndi application. This meant that the Wong-Goo-TT-OO application was *not* dismissed over the town sites because those areas were not subject to the Ngarluma/Yindjibarndi application.

The Wong-Goo-TT-OO appealed from the decision to partially dismiss their application. The Ngarluma People (with the Yindjibarndi People) appealed against aspects of the judgment relating to extinguishment. The appeals were heard together but separate reasons for judgment were given by the Full Court. The key aspects of Nicholson J's findings in *Daniel* relevant to the Wong-Goo-TT-OO were upheld by the Full Court in *Dale v Moses* [2007] FCAFC 82 (*Dale*). The appeal by the Ngarluma People and the cross-appeals by the state and the Commonwealth were determined in *Moses v Western Australia* (2007) 160 FCR 148; [2007] FCAFC 78 (*Moses*). Both of these decisions are summarised in *Native Title Hot Spots* Issue 25.

State's application for dismissal

The state argued that the Wong-Goo-TT-OO application should be dismissed pursuant to O 20 r 4 of the FCR on the basis that no reasonable cause of action was disclosed. It contended that the claim made in that application was bound to fail because Wong-Goo-TT-OO were estopped from asserting that they form a society that has existed continuously since sovereignty because of key 'findings' made in *Daniel*. Therefore, the critical issue in this case was 'whether judicial findings were actually made' in *Daniel* to that effect—at [5] and see [55].

As a secondary argument, the state contended it was 'highly implausible' the Wong-Goo-TT-OO could establish native title over the town sites of Karratha, Wickham and Point Samson when (among other things) Nicholson J held in *Daniel* that the Ngarluma People held native title to the areas surrounding those town sites and that the Wong-Goo-TT-OO did not.

Principles governing whether no cause of action disclosed

McKerracher J noted that O 20 r 4 provides for the dismissal of a proceeding if the court is satisfied no reasonable cause of action is disclosed. It was noted that this was not an application for summary judgment under s. 31A of the *Federal Court of Australia Act 1976* (Cwlth), a section that 'lowered the bar for summary dismissal'—at [10].

After citing the authorities relevant to whether 'no cause of action' was disclosed (including those in relation to native title), his Honour noted that:

- no proceeding should be summarily dismissed except in a very clear case;
- if there is a real question of fact or law to be determined, and the rights of the parties depend upon it, a proceeding should not be summarily dismissed;
- the fact that detailed argument may be necessary to highlight the contention should not be determinative of the issue;
- the court should have regard to the version of facts most favourable to the applicant but this does not mean that every fact pleaded has to be accepted—at [11] to [16].

Issue estoppel

Reference was made at [24] to *Blair v Currun* (1939) 62 CLR 464, where Dixon J said at 531-532 that:

> A judicial determination directly involving an issue of fact or of law **disposes once and for all of the issue**, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion. (McKerracher J's emphasis)

His Honour rephrased the doctrine as being that 'an issue estoppel is created in relation to any issue of fact or law that is legally indispensable to a prior decision involving the same parties'. It was noted that it only applies if the following requirements are met:

- the same question has been judicially decided in earlier proceedings;
- the judicial decision said to create the estoppel was final; and
- the parties to the judicial decision (or their privies) were the same persons as the parties to the proceedings in which the estoppel is raised—at [24] to [25], referring to *Carl Zeiss Stiftung v Rayner & Keller Ltd [No 2]* [1967] 1 AC 853.

Both the decision and the determination made in *Daniel* were 'quite clearly' final decisions, subject only to a right of appeal (or, which was not noted, revision or revocation of the determination pursuant to s. 13(5) of the NTA). While a decision may be final notwithstanding any right of appeal, in this case Wong-Goo-TT-OO had exhausted all avenues of appeal—at [78] to [79].

It was sufficient that the parties between whom the estoppel was raised (the Wong-Goo-TT-OO and the state) were parties in each of the matters. The fact that the Wong-Goo-TT-OO application had been consolidated with the Ngarluma and Yindjibarndi application (among others) pursuant to s. 67(1) of the NTA did not detract from the commonality as to the identity of parties—at [33] to [38].

Therefore, the only outstanding issue was whether the same question has been decided in the *Daniel* proceedings.

Was determination of Wong-Goo-TT-OO's status in *Daniel* essential to determination of the native title question?

In addressing this question, it was first noted that:

> After exhaustive analysis, Nicholson J in *Daniel* concluded that Wong-Goo-TT-OO was not and had not been a society in the relevant sense. To appreciate the significance of the conclusion (in order to determine whether Wong-Goo-TT-OO is issue estopped), it is necessary to closely consider what it was that Nicholson J necessarily had to determine in *Daniel*. In that regard, there can be no doubt that his Honour had to ascertain whether Wong-Goo-TT-OO was a society in order to ascertain whether it could hold native title. That is evident from the very nature of the concept of native title—at [39].

After noting that the statutory definition in s. 223(1) of the NTA was 'clearly the crucial question and the starting point', reference was made to the relevant case law, in particular *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (summarised in *Native Title Hot Spots* Issue 3). His Honour went on to note that the Wong-Goo-TT-OO:

> [D]id not establish that it was a [single] cognatic [kin] group and did not establish that it was a traditional group in any other sense ... . Without establishing that there had been a society which has had a continuous existence since sovereignty, it was impossible to satisfy the definition of native title in s 223(1) NTA—at [52], referring to *Dale* at [15] and [18] and *Daniel* at [384], [387], [389], [390] and [506].

Therefore, his Honour was of the view that 'there is no scope for contending that the issue determined in *Daniel* will be different in any future proceedings'. However, the 'primary thrust' of the Wong-Goo-TT-OO submissions was that no 'finding' (or indeed no 'solemn finding') was made in *Daniel*. Therefore:

> The most important issue in the present debate is whether Nicholson J relevantly made a 'finding' in terms for which the State contends. If there was no ultimate finding, there can be no issue estoppel. Although issue estoppel can operate as to fact and to law, it must be an **issue** for the doctrine to arise. Simply to discard one aspect of a claim would not raise an issue for the purposes of issue estoppel. Frequently a party may fail or succeed on one aspect of a claim while having a different result on others—at [53] to [55], emphasis in original.

Was there a finding in *Daniel* capable of operating as an issue estoppel?

His Honour considered various cases and noted (among other things) that:

- in finding whether something has been 'solemnly found against a party' or not, 'the form of the first proceeding, particularly the issues joined or admitted on the pleadings will be important';
- the essential task was to distinguish between those matters that were 'fundamental to the decision or necessarily involved in its legal justification or foundation' from matters which were not 'in point of law the essential ground work of the conclusion'—at [63] and [71].

The court rejected the Wong-Goo-TT-OO's argument that there must be a positive finding of a failure to establish, on balance of probabilities, the existence of native title in order to create an estoppel (or, in other words, that a negative conclusion, such as not being satisfied, cannot constitute an ultimate finding for the purposes of an issue estoppel)—at [72].

His Honour was of the view that:

> [C]onclusions reached about ultimate facts as distinct from evidentiary facts must necessarily be findings. That does not necessarily conflict with the observation that a failure to find a matter alleged does not establish the truth of the contrary of that which is alleged. As all the cases indicate, it is a matter of examining the real issues in dispute, the task for the Court, and the basis on which the Court arrived at its conclusion in order to assess whether a determination is, for the purposes of an issue estoppel, in the nature of an ultimate finding, however it may have been expressed—at [73].

When McKerracher J analysed the issues before Nicholson J, 'there was no doubt that positive findings of fact on the critical issue were made against Wong-Goo-TT-OO in *Daniel*' and: 'The Full Court similarly had no doubt on that issue'—at [75].

His Honour went on to note that:

> Importantly the central reasoning behind the decision in *Daniel* was that Wong-Goo-TT-OO did not hold native title over any part of the ... area [dealt with in those proceedings] because Wong-Goo-TT-OO was not a group capable of holding native title. Far from being peripheral in any sense [as had been argued], this was the first and fundamental issue that his Honour had to decide and it was decided clearly against Wong-Goo-TT-OO—at [76].

This 'fundamental finding' also disposed of the suggestion that 'different issues may arise' in relation to the town sites because, according to the court: 'There is no geographical element attached to the central determination in *Daniel'*—at [77].

Policy considerations

His Honour thought it 'doubtful' there was 'room for any discretionary factor' to operate in relation to issue estoppel. However, if there was, then the doctrine underlying issue estoppel was relevant in this case. Wong-Goo-TT-OO's assertion that they formed the requisite society had been 'exhaustively and extensively ventilated' in previous hearings. All that entailed would be 'wasted if the Wong-Goo-TT-OO were permitted to progress the present claim'. As was noted:

- there is 'a real interest in achieving finality of litigation';
- it would be 'an undesirable conflict' if a judge hearing future proceedings reached a different conclusion in relation to the 'society' issue—at [80].

The submission that the state was not acting as a model litigant because it refused to negotiate about the claim was rejected because (among other things) the state was not obliged to continue to negotiate for resolution of a claim if it properly formed the view there was no basis to it and it would 'clearly produce an impractical outcome' to hold otherwise–at [81], referring to *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595.

Registration of the claim irrelevant

His Honour found that registration of the Wong-Goo-TT-OO's claim on the Register of Native Title Claims was irrelevant to the question of issue estoppel because this was an administrative act that involved 'no real assessment of the merits of the claim'—at [82] to [83], although (with respect) it should be noted that s. 190B does involve an administrative assessment of the some of the merits of the claim.

Alternative argument

As the court had concluded the matter on the basis of issue estoppel, it was not necessary for his Honour to rule on the alternative argument that it was 'highly implausible' the Wong-Goo-TT-OO could establish native title over the town sites but did note he would have been less inclined to allow it notwithstanding it had 'a logical appeal'. 'Serious' implausibility or improbability fell 'a little short of the mark' required for the purposes of O 20 r 4 of the FCR on the ground that no cause of action was disclosed—at [86] to [90].

Decision

The state's motion for summary dismissal was allowed and the Wong-Goo-TT-OO application dismissed with no order as to costs.

Holborow v Western Australia [2009] FCA 1200

McKerracher J, 23 October 2009

Issue

The State of Western Australia sought to have the Yaburara/Mardudhunera claimant application dismissed to the extent it related to two town sites pursuant to Order 20 Rule 4 of the Federal Court Rules (FCR) on the basis that no reasonable cause of action was disclosed. It was argued that findings in an earlier related decision gave rise to an issue estoppel. The motion for summary dismissal was allowed on that basis. Given the court's conclusions on the issue estoppel argument, it was not necessary to rule on the alternative arguments the state raised and so they are not summarised here.

Background

The area surrounding the relevant part of the Yaburara/Mardudhunera application had already been subject to a determination recognising the Ngarluma People as the native title holders. There was an overlap between the Yaburara/Mardudhunera application area and that covered by (among others) an application made on behalf of the Ngarluma/Yindjibarndi. Orders were made pursuant to s. 67(1) of the *Native Title Act 1993* (Cwlth) (NTA) to deal with those applications in the same proceeding but only to the extent that the area covered by the former overlapped the area covered by the latter. Justice Nicholson delivered the substantive decision on native title *Daniel v Western Australia* [2003] FCA 666 (*Daniel*, summarised in *Native Title Hot Spots* Issue 6).

Final orders, including a determination recognising the Ngarluma People and the Yindjibarndi People as each separately holding native title to certain areas, were made in *Daniel v Western Australia* [2005] FCA 536. The Yaburara/Mardudhunera application was dismissed to the extent that the area it covered overlapped the area covered by the Ngarluma/Yindjibarndi application. However, there was no overlap between those applications in relation to certain town sites. Therefore, the Yaburara/Mardudhunera claim remained on foot in this respect.

Concession in relation to Dampier

The state sought to have the application dismissed over the town sites of Dampier and Karratha. However, during the hearing of the state's summary dismissal application, the Yaburara/Mardudhunera conceded that the Dampier town site could not be claimed because of prior extinguishment. Despite this 'binding concession', Justice McKerracher thought it was 'desirable' to put the question 'beyond doubt' and so made an order dismissing the claim for native title in that respect. While the reasons summarised below are 'primarily' directed to the claim over Karratha, the court would have reached the same conclusion in respect of Dampier in the absence of the concession—at [19] and [119].

Principles governing summary dismissal

His Honour noted the state's application was made pursuant to O 20 r 4 of the FCR, which applies to proceedings commenced before 1 December 2005 and (relevantly) allows the court to dismiss a proceeding if it is satisfied that no reasonable cause of action is disclosed. It was noted that this was not an application for summary judgment under s. 31A of the *Federal*

Court of Australia Act 1976 (Cwlth), a section that 'lowered the bar for summary dismissal'—at [22].

Principles governing whether no cause of action disclosed

After citing the relevant authorities, the court noted that:

- no proceeding should be summarily dismissed except in a very clear case;
- if there is a real question of fact or law to be determined, and the rights of the parties depend upon it, a proceeding should not be summarily dismissed;
- the fact that detailed argument may be necessary to highlight the contention should not be determinative of the issue;
- the court should have regard to the version of facts most favourable to the applicant but this does not mean that every fact pleaded has to be accepted—at [23] to [29].

Issue estoppel

Reference was made at [30] to *Blair v Currun* (1939) 62 CLR 464, where Dixon J said at 531-532 that:

> A judicial determination directly involving an issue of fact or of law **disposes once and for all of the issue**, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion... (McKerracher J's emphasis).

His Honour rephrased the doctrine as being that 'an issue estoppel is created in relation to any issue of fact or law that is legally indispensable to a prior decision involving the same parties'. It was noted that it only applies if the following requirements are met:

- the same question has been judicially decided in earlier proceedings;
- the judicial decision said to create the estoppel was final; and
- the parties to the judicial decision (or their privies) were the same persons as the parties to the proceedings in which the estoppel is raised—at [30] to [31], referring to *Carl Zeiss Stiftung v Rayner & Keller Ltd [No 2]* [1967] 1 AC 853.

Same parties or their privies

This condition was met. The Yaburara/Mardudhunera and the state were parties to the previous proceedings (i.e. those dealt with in the *Daniel* litigation) and were parties to proceedings before McKerracher J. The Ngarluma People were a party to the previous proceedings because they were part of the claim group in the Ngarluma/Yindjibarndi application and 'received their own determination'. Alternatively, they were 'clearly privies' in the requisite sense because they had 'a key interest in that decision and a benefit from it'. In these proceedings, the Ngarluma People were entitled to party status but his Honour made no order to that effect, given the finding on issue estoppel. It was noted that neither the existence (or addition) of different respondents nor the fact that there were parties to the earlier proceedings who are not parties to the current proceedings made any difference to the question of issue estoppel—at [3] to [10] and [98].

Was a finding made in *Daniel* capable of operating as an issue estoppel?

In order to determine the issue estoppel argument, it was necessary to consider what it was that Nicholson J had to determine in *Daniel*. In this respect, McKerracher J noted the importance of the definition of native title in subsection 223(1) of the NTA—at [39] to [47].

In addition to advancing some additional arguments, the Yaburara/Mardudhunera adopted the submissions made on behalf of the Wong-Goo-TT-OO in *Dale v Western Australia* [2009] FCA 1201 (summarised in *Native Title Hot Spots* Issue 31). An 'important aspect' of that argument was the contention that there was no relevant 'finding'. Therefore:

> The most important issue in the present debate is whether Nicholson J relevantly made a 'finding' in terms for which the State contends. If there was no ultimate finding, there can be no issue estoppel. Although issue estoppel can operate as to fact and to law, it must be an issue for the doctrine to arise. Simply to discard one aspect of a claim would not raise an issue for the purposes of issue estoppel. Frequently a party may fail or succeed on one aspect of a claim while having a different result on others—at [49].

It was central to the issue estoppel argument to determine whether or not Nicholson J made findings on the topic of whether the Yaburara/Mardudhunera had the ability to hold native title. After considering various cases, it was noted (among other things) that the essential task was to distinguish between those matters that were 'fundamental to the decision or necessarily involved in its legal justification or foundation' from matters which were not 'in point of law the essential ground work of the conclusion'—at [61] and [65].

The court rejected the argument that there must be a positive finding that the Yaburara/Mardudhunera failed to establish, on the balance of probabilities, the existence of native title in order to create an estoppel. Negative findings can 'still constitute an estoppel'—at [66] and [90].

It was noted that Nicholson J was of the view that:

- the Yaburara/Mardudhunera who claimed to be Yaburara had not established this was the case;
- the evidence supported the view that the Yaburara/Mardudhunera claimed as Mardudhunera;
- although the Mardudhunera group had held the requisite continuity since sovereignty, the evidence did not establish that the Mardudhunera had exercised the remaining two rights found to be presently observable continuously back to sovereignty;
- on that basis, no requisite connection was established and, even if the Mardudhunera group had connection at the time of sovereignty, it had not survived the passage of time—*Daniel* at [352], [375] and [501].

McKerracher J also referred to *Moses* at [305] and [313], where the Full Court was satisfied that Nicholson J:

- 'made findings' that the evidence established that Ngarluma country 'included the Karratha area' and 'supported an inference that the Ngarluma people have retained a continuous connection with the Karratha area';
- treated the Ngarluma area as a whole because he formed the view on the evidence that it was all part of Ngarluma lands—at [86] to [87].

It was noted that:

> The ... claim ... in *Daniel* was brought on the basis that the areas claimed were the areas where the Yaburara and the Mardudhunera People held native title. ... . Nicholson J rejected and dismissed the claims insofar as they overlapped the Ngarluma/Yindjibarndi claim and found that the areas were areas over which only the Ngarluma or Yindjibarndi People held native title. Accordingly, his Honour's finding was, in effect, that the areas surrounding the townsites were not Yaburara or Mardudhunera country and the Yaburara/Mardudhunera People did not hold any native title rights within it—at [91].

Further, at [93], his Honour cited the extensive passages in *Daniel* from which it was 'apparent' that:

> Evidence given by the Yaburara/Mardudhunera witnesses in *Daniel* as to boundaries of the Yaburara/Mardudhunera country or Yaburara country or Mardudhunera country ... did not draw a distinction between areas surrounding the townsites and the townsites themselves which had been excluded from the hearing—at [92].

Did policy considerations militate against issue estoppel?

The court took the view that the concept of issue estoppel was 'a substantive rule of law' and that, if an issue estoppel is found, there 'does not appear to be any discretionary basis to ignore it'. However, even if there was 'room' for discretion, the doctrine underlying issue estoppel was relevant. In this case:

- the claim by the Yaburara/Mardudhunera People to be the relevant society 'has been exhaustively and extensively ventilated in previous hearings';
- all that entailed would be 'wasted' if they were allowed to progress their claim to the Karratha town site;
- there is a real interest in achieving finality of litigation;
- it would be 'undesirable' if a judge in future proceedings reached a different conclusion than that reached by Nicholson J on the same point—at [102] to [109].

The submission that the state was not acting as a model litigant in refusing to negotiate in this case was rejected because (among other things):

> There is ... no reason to believe that in circumstances where there is a proper foundation for a view that a claim has no basis, the State should continue to negotiate for resolution of it. That would clearly produce an impractical outcome—at [110], referring to *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595.

Was registration of the claim relevant?

McKerracher J found that registration of the claim on the Register of Native Title Claims was irrelevant to the question of issue estoppel because this was an administrative act that involved 'no real assessment of the merits of the claim'—at [111] to [112].

Conclusion on issue estoppel

McKerracher J was satisfied the findings in *Daniel* (supported by *Moses*) were necessarily negative to the native title claim made by the Yaburara/Mardudhunera. To the extent that those findings were based on the failure to be satisfied by their evidence, the Yaburara/Mardudhunera are estopped by the findings that:

- they do not hold native title in the area; and

- any use and enjoyment of resources and protection of important places they engaged in did not have the required continuity back to sovereignty and was thus not traditional—at [90] and [93] to [95].

It would be 'wholly artificial ... to suggest ... that a different conclusion might be reached' as to Yaburara/Mardudhunera's status within the town site of Karratha 'as distinct from the entirety of the surrounding claim area' when no such distinction was made in the evidence. Indeed, such a conclusion would be 'inconceivable'. Therefore, his Honour concluded that the Yaburara/Mardudhunera are estopped from advancing a claim for native title in respect of the town site of Karratha—at [99] to [101] and [118].

Decision
While exceptional caution was required before the power to dismiss on a summary basis was exercised, in this case McKerracher J had 'no doubt that the Yaburara/Mardudhunera are estopped in the manner asserted' by the state and so allowed the motion for dismissal. Pursuant to s. 85A, there was no order as to costs—at [120].

Referral of question of law — Full Court to hear

James v Western Australia [2009] FCA 1262

McKerracher J, 5 November 2009

Issue
The National Native Title Tribunal referred a question of law to the Federal Court, i.e. were the grants of certain mining leases 'past acts'. Answering that question will involve determining whether the decision in *Western Australia v Ward* (2002) 213 CLR 1 (*Ward)* as to the effect of the mining leases on native title can be distinguished. The question was referred to the Full Court.

Background
The Tribunal referred the question to the court pursuant to s. 136D (now s. 94H) of the *Native Title Act 1993* (Cwth) (NTA). It was relevant to the resolution of the Martu People's claimant application. Tribunal mediation of the application commenced in 1996 and no order had been made subsequently under s. 86C that mediation should cease. In September 2002, a determination was made by consent in *James v Western Australia* [2002] FCA 1208 recognising the Martu People as native title holders in relation to a large part of the area covered by their application. The question referred concerned the part of the application that remained unresolved.

The 'referral area' was so much of the area subject to the application that is (or was) subject to the grant of a mining or general purpose lease under the *Mining Act 1978* (WA) on or after the *Racial Discrimination Act 1975* (Cwth) (RDA) commenced but before the NTA commenced, i.e. after 30 October 1975 but before 1 January 1994. The effect of a mining lease issued under the *Western Mining Corporation Limited (Throssell Range) Agreement Act 1985*

(WA) in that period was also in issue. The parties could not reach agreement as to the effect of these grants on native title.

Question referred – special case

Pursuant to s. 136D, the presiding Tribunal member referred a question of law to the court because the member considered that doing so would 'expedite the reaching of an agreement on any matter that is the subject of the mediation' in this case. Order 78 rule 16(1) of the Federal Court Rules requires that the referral be by way of a special case. The question of law posed in relation to each lease was:

- is it a 'past act' as defined in s. 228 for the purposes of Pt 2 of the *Titles (Validation) and the Native Title (Effect of Past Acts) Act 1995* (WA) (TVA)?
- if so, into which of the four categories (A to D) of past act (as defined in ss. 229 to 232 NTA for the purposes of Pt 2 TVA) does it fall?

In the referral (putting to one side the effect of the grant of the leases) the parties agreed:

- the Martu People, as defined in the determination made in *James v Western Australia* [2002] FCA 1208, hold native title to the referral area;
- native title is comprised of the right to possess, occupy, use and enjoy the referral area to the exclusion of all others (i.e. comprised the right to exclusive possession);
- there has been no prior extinguishment of native title;
- any question as to the validity of the leases arises only because of the existence of native title at the time of the relevant grant.

The issue

According the parties, the central issue was whether:

> [T]he conclusion in ... *Ward* ... as to the effect that a mining lease granted under the ... *Mining Act* ... has on native title viz, that the ... *RDA* ... was not engaged to invalidate the grants of mining leases ..., so that the grants were not category C past acts ... , is relevantly distinguishable in respect of pre-1994 [but post-RDA] mining leases.

If *Ward* is distinguishable, and the grants of the leases in this case are category C past acts, then the non-extinguishment principle will apply. If it cannot be distinguished, then the grant of the leases will have extinguished native title, at least to some extent.

Gleeson CJ, Gaudron, Gummow and Hayne JJ (with Kirby J concurring) made the following comments in *Ward* relevant to this issue:

> If the native title *right to control access existed* immediately prior to the grants of the mining leases, then it *was extinguished by those grants*. This *would raise the issue of invalidity* of the grant by operation of the RDA and subsequent validation by the NTA and the State Validation Act [i.e. it would raise the issue of whether the leases were past acts].
>
> ...
>
> [I]t is apparent that the right to control access ... is inconsistent with the rights of access arising under each of the ... grants [of a mining lease], although, ... [in this case], the grant of ... pastoral leases had already extinguished that right [prior to the commencement of the RDA].
>
> It should be emphasised that *a finding that native title rights and interests were extinguished* by the grant of any of the relevant mining interests *may engage the RDA and require consideration* of the

various issues referred to earlier in these reasons—at [309] and [341] to [342], emphasis added, footnotes omitted.

Therefore, the majority decision in *Ward* did not directly address whether the grant of a mining lease that purportedly extinguished the native title right to control access in the period noted above was a past act. There was agreement in this case that the right to control access existed at that time each lease was granted because it was agreed that the native title right to exclusive possession existed prior to the grant of each lease. The right to control access is an integral element of the right to exclusive possession—see *Ward* at [88] and [93] to [95].

Reserving referral to the Full Court

The applicant and the state jointly sought to have the question referred to the Full Court pursuant to s. 25(6) of the *Federal Court of Australia Act 1976* (Cwlth) (FCA). Referral was available in this case the because FCA provided that any decision of a single judge on a question referred under s. 136D of the NTA may be appealed to a Full Court, which was a precondition for referral. The question was whether the discretion to do so should be exercised.

The relevant considerations included:

- whether it was 'convenient' to reserve the question, e.g. having regard to the point at which it arose or because it raised unusual difficulties;
- whether there were similar authorities on the question determined with the benefit of full argument;
- whether the point of law was confined to a specific point of statutory interpretation;
- costs and delay;
- the administration of the court—at [34], referring to *Freehills, in the matter of New Tel Limited (in liq) ACN 009 068 955 (No 2)* [2008] FCA 1006.

Factors weighing against referral included that:

- it would extend, not reduce, the time needed to resolve the matter; and
- the issue involved the 'routine judicial task' of deciding whether a previous authority was analogous and whether it was binding—at [35].

Decision

The question of law referred by the Tribunal was reserved to the Full Court because (among other things):

- there was no dispute on the facts, which were succinctly stated in the referral;
- the point of law to be decided, while complex and important, was confined to a specific point of statutory interpretation;
- the matter was likely to be resolved 'with the greatest expedition and least further delay' if the question was referred and, even if it was resolved in the state's favour, any outstanding issues were, 'in theory', capable of resolution without further court intervention;
- an appeal from a single judge's decision seemed 'most likely' because the referral raised issues that were 'likely to set important precedents'—at [38].

Interests held in DOGIT area

Combined Gunggandji People v Queensland [2009] FCA 979

Dowsett J, 31 August 2009

Issue

The main issue in this case was whether a person who built improvements on part of an area later subject to a deed of grant in trust was entitled to a lease under the repealed *Land Act 1962* (Qld). The person concerned was found to be so entitled.

Background

On 27 October 1986, an area subject to a reserve for the benefit of Aboriginal and Torres Strait Islander people was vested in the Yarrabah Aboriginal Shire Council (the council) under a deed of grant in trust (DOGIT). The area subject to the DOGIT was covered by the Combined Gunggandji People's claimant application, which was made under the *Native Title Act 1993* (Cwlth) (NTA). A block of land known as the Bukki block was included in the DOGIT area. The 'block holder' was Harry Ludwick, an Aboriginal person who did not claim to be either a member of the Combined Gunggandji People's claim group or a traditional owner of any part of the claim area.

Mr Ludwick claimed he was entitled to either a lease of the Bukki block or a licence to occupy it pursuant to ss. 361A or 452A of the now repealed *Land Act 1962* (Qld) (the 1962 Act) respectively. On the evidence, it was found (among other things) that, prior to 27 October 1986 (the date of the DOGIT), Mr Ludwick:

- built two small huts on a concrete slab on the Bukki block (in or around 1974);
- made other improvements to the block, including establishing gardens and building fences and a pit lavatory—at [54].

Justice Dowsett was satisfied that Mr Ludwick's occupation of the block was 'tolerated by the relevant authorities', i.e. the council and the responsible state government department. It was also found on the evidence that Mr Ludwick had lived on the Bukki block from the early 1980s until sometime late in 1986 or 1987, when he left, intending to return. He returned to live permanently in 1990—at [53] to [54].

Entitlement to a lease

Section 361A of the 1962 Act provided (among other things) that:

> (1) If it is shown to the satisfaction of the Minister [for Lands] and the trustees of land granted in trust [the council] that at the date of issue of the ... [DOGIT] evidencing the grant any improvement on the land was owned by any person, that ownership shall not be prejudiced by the grant.
>
> (2) The person shown to own such improvement shall be entitled to the grant by the trustees of a lease that accords with the provisions of this Division of-
>
> (a) the land on which the improvement stands; and
>
> (b) where the improvement is a building or structure used as a residence or for business or in connexion with educational or religious purposes, a reasonable area of land being the immediate environs of the improvement.

Section 5 of the 1962 Act defined 'improvements' as:

> Any building, yard, fence, well, bore, reservoir, artificial water course or watering-place, apparatus for raising, holding or conveying water, garden, orchard, plantation, cultivation, or any erection, construction or appliance being a fixture for the working or management of a holding or of any stock depastured thereon or for maintaining or increasing the natural capabilities of the land.

Ownership of the improvements

The court noted that s. 361A empowered someone other than the Crown to own improvements 'situated on Crown land'. Both the state and the council were satisfied that two sheds stood on the area concerned as at the date of the DOGIT and that Mr Ludwick owned those 'improvements'. Pursuant to s. 361A(1), ownership of such improvements at the time of issue of a DOGIT was preserved, with s. 361A(2) addressing the question of the grant of a lease of the area on which the improvements were located. The owner of those improvements was entitled to a grant of such a lease and the trustee (the council in this case) was empowered to apply to the relevant minister for the grant of that lease—at [57] to [58], [62] and [78].

Effect of repeal of the 1962 Act

Pursuant to s. 520(b) of the *Land Act 1994* (the 1994 Act), the repeal of s. 361A was expressly limited so that it 'continues to apply to deeds of grant in trust granted before' the 1994 Act commenced, including the one considered in this case. However, there was a dispute as to which of the other provisions were relevant i.e. those found in the 1962 Act or those found in the 1994 Act.

Under s. 361A(3) of the 1962 Act, it was not 'competent' for the Minister of Lands to refuse an application by a trustee for a lease if ss. 361A(1) and (2) were satisfied. However, under s. 57 of the 1994 Act, a trustee (the council in this case) 'may' grant a lease only if the trustee first obtained the minister's written 'in principle' approval to do so and the minister's approval 'may include conditions'. The state submitted s. 57 of the 1994 Act applied, so that ministerial approval was required, and that the conditions of any lease were to be regulated by s. 61 of that Act. Mr Ludwick submitted that the relevant provisions of the 1962 Act continued to apply. According to his Honour, it 'may not matter' whether ministerial approval was required under either the 1962 Act or the 1994 Act because s. 361A(3) 'will compel ministerial consent' in both cases. However, there was one 'potentially' important difference the 1962 Act and the 1994 Act; the former provided for a much longer maximum term (i.e. 75 years as opposed to 30 years)—at [60].

Section 361A provided the terms of any lease were to be in accordance with 'the provisions of this Division', i.e. 'prima facie', Division V of Part XI of the 1962 Act. However, as was noted, Division V 'seems not to deal with leases at all' apart from s. 361A and said 'nothing' about the terms of s. 361A lease. Dowsett J decided to construe the legislation such that Division II of Part XI of the 1962 Act regulated the terms of any lease granted pursuant to s 361A 'in order to give effect to the legislative intention to grant leases to the owners of improvements'. Division II (among other things) dealt with the powers of the trustee of a DOGIT—at [62].

Policy behind s. 361A

Dowsett J was of the view:

> It is likely that the enactment of s 361A gave effect to a policy decision to transfer from the Crown the ownership of reserves held for the benefit of Aboriginal and Torres Strait people. Such transfer was to be to Councils, primarily or solely representative of, and constituted by, indigenous people. It was probably intended that s 361A would be a mechanism for regularising regimes of informal occupation existing in such reserves. There is no reason to assume that the informal system of land occupation at Yarrabah was, in any way, unique—at [61].

Later, it was said that, when characterising the rights conferred by s. 361A:

> [O]ne should keep in mind the apparent purpose of its enactment, namely to recognize and preserve the interests of Aboriginal people who have, whilst residing on reserves, expended time, effort and money in constructing improvements thereon. In a broad sense the provision is remedial, designed to deal with an awkward situation created by changes in the non-indigenous community's attitude towards indigenous people—at [74].

As noted earlier, the remedial nature of the provision was instrumental to the court's consideration of the proper construction of s. 361A.

Was Mr Ludwick's entitlement an accrued right?

The parties' arguments as to which of the two Land Acts applied revolved around the nature of Mr Ludwick's entitlement under s. 361A. He claimed it was a right to a lease in accordance with the provisions of the 1962 Act that was preserved by s. 20(2)(c) of the *Acts Interpretation Act 1954* (Qld) (Interpretation Act). The state submitted that Mr Ludwick had no accrued right to a lease, rather, a right to take action in accordance with the law as it stands at the time such action is taken.

After surveying the case law on point, Dowsett J noted that there were three distinct situations that might engage the Interpretation Act in this case:

- if s. 361A created a right which, by force of the 1962 Act, accrued without any qualification or requirement for further action, the right survived repeal;
- if s. 361 conferred a right upon persons 'having certain qualifications', and the 1962 Act contemplated 'an investigation to determine whether a particular person has the relevant qualifications', once the requirements were satisfied, the right conferred would survive repeal; or
- where a particular procedure has been commenced, there may 'be a right to have the procedure completed in accordance with the statute in its unrepealed form'—at [73].

It was found that the effect of s. 361A was to confer a right upon the owner of improvements that was subject only to the satisfactory investigation of the question of ownership. It was held to be a right within either the first or second category identified above. Prior to the repeal of the 1962 Act, the right held by an owner pursuant to s 361A was a right to a lease in accordance with that Act—at [79].

Before coming to this view, Dowsett J noted (among other things) that:

- it would be 'clumsy to try to imply into s. 361A some obligation' to act reasonably on the council or the minister and no criteria were prescribed by guide the decision-making process in any case;
- since s. 361A of the 1962 Act seemed to be directed at 'acknowledging and protecting individual rights', any power to fix a maximum term (whether derived from that Act or the 1994 Act) did not limit 'the actual entitlement of a relevant owner of improvements';
- the effect of s. 361A(1) was that ownership of improvements was 'not to be prejudiced' by a DOGIT i.e. the owner of the improvements continued to own them after the date of the grant and the relevant inquiry as to ownership in order to found an entitlement under s. 361A could be made after that date;
- it was the council, as trustee, that could make 'application' to the Minister pursuant to s. 361A(3), not the owner of the improvements—at [75].

According to the court, making satisfaction of the minister and the council as to ownership of the improvements a 'condition precedent' to any right being conferred upon the owner put 'too much emphasis upon the form of the section and too little upon its clear intention':

> It was necessary for the Council (as trustee) and the Minister ... to be satisfied that a particular person was the person entitled to a lease relating to the improvements in question. However that requirement seems to be ... an investigation necessary in order to give effect to an entitlement, rather than a condition precedent to such entitlement—at [77].

According to his Honour, the owner of the improvements (Mr Ludwick) was not required to 'take any step for the purposes of s. 361A'. Rather, the legislature apparently assumed the council or the minister would make the necessary inquiries to regularise the 'position as to ownership and occupancy' of improvements as at the date of the DOGIT. The likelihood that this was Parliament's intention increased 'when one considers that the legislation was ... designed to remedy some of the disadvantage suffered by a severely disadvantaged group in our society'—at [78].

Entitled for life to more than one lease

It was noted that, if the entitlement was to one lease only, 'for whatever period' the council decided, then that was a right that would survive pursuant to s. 20 of the Interpretation Act. However, Dowsett J concluded that s. 361A should not be construed as authorising the grant of only one lease. It was found that:

- section 361A confers an entitlement upon a person who owns improvements on relevant land at a particular point in time (i.e. the date of the DOGIT) and did not limit the period during which that person held that entitlement;
- a person so entitled as at the date of the DOGIT remained so entitled for life and such an entitlement may be 'addressed many years after' the date of the DOGIT—at [80].

Despite the fact that s. 361A(2) of the 1962 Act only provided for the grant of 'a lease', the singular should be read to include the plural (see s. 32C(a) of the Interpretation Act) because this was 'more in accordance with the intention of the section'. Therefore, it was found that:

- section s. 361A authorised the grant of a lease 'at any time during the life of a relevant person, regardless of whether any such lease had previously been granted, and if the lease expired during the owner's lifetime, another may be granted;

- while the right to the grant of a lease vested in the owner at the date of the DOGIT and could not be transferred (or passed by will or on intestacy), where it was a lease for a fixed term, and the lessee died during that term, the right to the balance of the term was 'an asset of the estate'—at [79] to [80].

Given that the entitlement was to receive a lease from time to time, any such lease should be granted pursuant to the law 'as it stands at the time at which each lease is granted' and s. 361A 'should now be read as referring to the relevant provisions' of the 1994 Act, pursuant to s. 511 of that Act—at [79] to [80].

Effect of removal of improvements

His Honour rejected the state's submission that s. 361A required that the improvements exist both at the date of the DOGIT and the date of the grant of the lease:

> In my view s 361A should be construed as creating an entitlement to a lease as at the date of the deed of grant, and that subsequent removal of the improvements is irrelevant. The huts were still on the Bukki block as at date of the deed of grant. The foundation slab was, and remains, on the block, having been extended and incorporated into the larger hut. It is probable that there were also gardens, fences and a lavatory on the land at the date of the deed of grant. At least some of the fencing and gardens presently on the block probably pre-date the deed of grant. There is no doubt that there were improvements on the land on 27 October 1986, and that the slabs and, probably, some remnants of earlier fencing and gardens remain at the present time—at [81].

Use as a residence and effect of temporary vacancy

In relation to whether the land was used as a residence for the purposes of s. 361A(2)(b), the relevant time was the date of the DOGIT. It was found that it was 'more probable than not' that either Mr Ludwick or his niece 'was so residing, or about to commence doing so' at that time and that it was 'reasonable to infer' that, as at that date (i.e. 27 October 1986), the land was being 'used as a residence'. His Honour was also satisfied that:

> [A] period of temporary vacancy [as alleged in this case] would not detract from the fact that the improvements were being used as a residence. This is particularly so, given that when he left, Mr Ludwick apparently intended to return to the Bukki block after his sojourn at Bilma. His plans changed when he met Ms Yeatman in 1987, but it seems that he (and perhaps they) always intended to move to the Bukki block eventually—at [81].

Reasonable area

In relation to improvements used as a residence, s. 361A(2) provides that the leased area is to be a 'reasonable area of land, being the immediate environs of the improvement'. Dowsett J gave the following non-exhaustive list of some 'relevant considerations':

- the size of other blocks in the area;
- access to the creek by Mr Ludwick and others (including traditional owners);
- the area actually occupied and cleared by Mr Ludwick;
- other community needs;
- the value of the improvements; and
- the area needed for use for residential purposes, including conditions peculiar to the local community.

Statutory licence to occupy

Among other things, s. 452A(1) of the 1994 Act provides that a person who occupied 'any building or structure as the person's residence, as an authorised resident on the land' 'at the time' the DOGIT was granted under the 1962 Act was 'entitled to continue' in occupation 'upon the same terms and conditions' until:

- the trustee of the land determined otherwise and terminated the person's right to occupy the building or structure; or
- the trustee of the land and that person agree to new terms and conditions for the person's occupation of the building or structure.

It was clear Mr Ludwick was residing lawfully on the Bukki block prior to the grant of the DOGIT with at least tacit acceptance by the relevant authorities, including the council. Dowsett J was prepared infer Mr Ludwick was occupying the Bukki block as his residence in October 1986. However, s. 452A contemplated the continuation of such occupation. In this case, there was a three year break but the question as to its effect 'was not really ventilated in argument'. Since Mr Ludwick was entitled to a lease, Dowsett J was of the view that it was 'probably not necessary' to reach any conclusion as to any entitlement to a licence—at [86].

Decision

While submissions were made as to the effect of Mr Ludwick's entitlement to a lease (or a licence) on native title, his Honour thought it best to leave that question until the parties had considered the reasons given in this case. Therefore, the matter was listed for further directions to determine (among other things) whether the court should consider the effect of his entitlement 'in connection with the operation of the NTA'.

On 3 November, the court made declaratory orders to the effect that Mr Ludwick is (and had been since 27 October 1986):

- the owner of 'improvements', within the meaning of the 1962 Act, located on the Bukki block;
- entitled to the grant by the council of a lease of the area on which the improvements stand and, in relation to the improvements used as a residence, a reasonable area in the 'immediate environs', with the precise area to be determined by the council.

The court also declared that:

- pursuant to s. 452A of the 1994 Act, Mr Ludwick is entitled to continue to occupy the Bukki block on the same terms and conditions as he occupied it at 27 October 1986 until the council decides to terminate his right to occupy or Mr Ludwick and the council agree to new terms and conditions for his occupation pursuant to the lease;
- this 'statutory licence' is a category D past act for the purposes of the NTA;
- any application to oppose the issue of a lease to Mr Ludwick pursuant to s. 57 of the 1994 Act it was to made by the applicant for native title on or before 24 November 2009.

The matter was then adjourned to a date to be fixed with liberty to apply.

Future act determination — s. 116 of Constitution

FMG Pilbara Pty Ltd/Cheedy/Western Australia [2009] NNTTA 91

Daniel O'Dea, 13 August 2009

Issue
FMG Pilbara Pty applied to the National Native Title Tribunal for two future act determinations under s. 38 of the *Native Title Act 1993* (Cwlth) (NTA) in relation to three mining leases. Among other things, the native title party argued that the Tribunal should construe s. 39 of the NTA so as to 'avoid the possibility of invalidity' by reason of s. 116 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution). The Tribunal's consideration of this point is summarised here.

Background
The native title party argued that a determination under s. 38 that the leases may be granted without the imposition of any conditions would prevent the Yindjibarndi People (the native title claimants) from exercising their registered native title rights, including the exercise of their religion.

Decision
The Tribunal held that:

- the central issue was whether or not ss. 38 or 39 of the NTA were passed with the intention, design, purpose or effect of prohibiting the free exercise of religion of the native title party;
- section 116 of the Constitution applied to an administrative decision of the Tribunal;
- a future act determination made under s. 38 that the future act may be done with no conditions, or with conditions that did not require the native title party's agreement, was not a decision that would have the intention, design, purpose or effect of interference with the free exercise of the native title party's religious beliefs—at [21] and [24].

The native title party has appealed to the Federal Court pursuant to s. 169 of the NTA on, among others, the ground that Tribunal erred in law in its findings in relation to s. 116 of the Constitution.

Future act agreement terminated following Wongatha decision

Jabiru Metals Pty Ltd v Lynch [2009] WASC 238

Hasluck J, 2 September 2009

Issue
Jabiru Metals Pty Ltd (the plaintiff) sought a declaration that commercial agreements between the plaintiff and those named as the applicants in the Wongatha, Wutha and Koara native title determination applications (the defendants) were terminated as at, and from, 5

February 2007. The termination date is the date the native title applications were dismissed, in whole or in part by the judgment given in by the Federal Court in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (*Wongatha*).

Background

In 2004, the plaintiff entered into an agreement with each of the Wongatha and Wutha claim groups as represented by the registered native title claimant as entered on the Register of Native Title Claims. The Koara application was not registered at the time of execution of the agreement. The purpose of the agreements was to provide (among other things) for payments from the plaintiff to the defendants to progress reaching certain milestones in relation to the plaintiff's mining project (Jaguar developments) and an annual $10,000 payment. Pursuant to the agreements, if there had not been a final determination of native title in respect of the mining area, the payments should be paid into trust accounts established by any native title claim group in equal proportions of the total amount. The $10,000 annual payment was to be paid to an educational trust fund nominated in writing by the native title parties established for the benefit of the Wongi people.

On 5 February 2007, the Federal Court dismissed the Wongatha native title determination application in its entirety and those parts of the Wutha and Koara applications which overlapped the Wongatha application. The remainder of the Wutha application is pending and the remainder of the Koara application has been dismissed. The result is that there are no registered native title claimants in relation to the area subject of the agreements. On 27 May 2007, the plaintiff commenced producing ore and its obligations to make milestone payments and annual payments took effect. However, there were no final determinations of native title, nor any registered native title claim groups to whom payments could be made. No trust fund had been nominated. No payments had been made.

Termination of the agreements

On or about 23 October 2007, the plaintiff gave notice to the defendants terminating the agreements pursuant to a provision that provided for termination if the relevant native title claim was withdrawn or ceased to affect a mining area. The plaintiff wrote to each of the defendants' representatives proposing to seek declaratory relief to confirm that each of the agreements had been terminated by frustration as a result of the dismissal of the native title applications affecting the plaintiff's mining area in the *Wongatha* decision. Following the making of declaratory orders, it was proposed that voluntary payments would be made to the defendants. None of the defendants opposed the plaintiff's originating summons.

The plaintiff's submissions were that:

- the agreements were lawfully terminated by the legal principles of frustration.
- the plaintiff undertook to make voluntary payments to the defendants but, as a listed company, was unable to make voluntary payments if there was risk of claims under a contract pursuant to s. 11(2) of the *Property Law Act 1969* (WA);
- the discretion to give declaratory relief should be exercised because the payments are to be made to persons with an interest in the agreements.

Justice Hasluck referred to *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, the leading case on the doctrine of frustration. The cases relevant to the exercise of declaratory relief under s. 25(6) of the *Supreme Court Act 1935* (WA) and Order 18 rule 16 of

the *Rules of the Supreme Court 1971* (WA) were *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421and *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286—at [35] to [43].

The court identified the critical issue as being whether the situation that has arisen was fundamentally different from the situation contemplated at the time of making of the contracts. It was clear that, at the time of making each of the agreements, the parties contemplated there would be either a registered native title claim or a final determination of native title. The parties did not contemplate a situation where there would be no native title claims in relation to the area of the mining agreements. Hasluck J noted that performance of the contract was not possible because there were no relevant persons under the agreements and it was not possible to identify anyone to whom payments could be made to discharge the plaintiff's obligations under the agreements. Further, the issues raised were not hypothetical or theoretical:

> The evidentiary materials point to an underlying reality that the processing of ore in the manner contemplated by the agreements has commenced and the mining company recognises that in the modern era negotiations with native title claimants are necessary, notwithstanding differences of opinion as to the merits of a particular plea—at [46].

It was found that:

- the proposed payments reflected the question of possible accrued entitlements prior to the termination of the agreements;
- the commitment by the plaintiff to fulfil its obligations weighed strongly in favour of the exercise of the court's discretion;
- no defendant opposed the orders sought.

Decision

Orders were made terminating each agreement as at 5 February 2009. There was no order as to costs—at [51].

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

Champion v Western Australia [2009] FCA 941

McKerracher, 24 August 2009

Issue

The issue in this case was whether the Federal Court should, of its own motion, dismiss a claimant application in the Goldfields region (the Gubrun application) pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The application was dismissed.

Background

In 2007, the Native Title Registrar's delegate decided pursuant to s. 190A that a claimant application made by Brian Champion and others must not be registered. The delegate was unable to determine whether the claim satisfied the merit conditions in s. 190B because of a

failure to satisfy s. 190C. Pursuant to s. 190F(6), the court may dismiss a claimant application (on the application of a party or on its own motion) 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
- is of the opinion that there is no other reason why the application should not be dismissed.

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

- the Registrar does not accept the claim for registration because it does not satisfy all the merit conditions of the registration test found in s. 190B or 'it was so procedurally defective as to render it impossible' to determine whether the claim satisfies those conditions (as in this case); and
- the court is satisfied that 'any avenues for reconsideration and review have been exhausted without registration of the claim'—at [2] to [3].

On 9 December 2008, the applicant was ordered to file submissions in relation to the s. 190F(6) by 28 February 2009 but none were filed.

Decision

The application was dismissed on 22 June 2009 and Justice McKerracher subsequently gave reasons for doing so which were, in summary, that:

- there had been no amendment since the decision of the Registrar's delegate;
- notwithstanding opportunities provided, there was no evidence or indication that the application was likely to be amended in any way that would lead to any different conclusion by the Registrar; and
- there was no other reason why the application should not be dismissed—at [12] to [13].

Sambo v Western Australia [2009] FCA 940

McKerracher J, 24 August 2009

Issue

The Federal Court considered whether it should dismiss a claimant application ostensibly brought on behalf of the Central West Goldfields People pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The application was not dismissed because the court was satisfied there was a reasonable possibility that it would be amended in the near future in such a way as to be accepted for registration.

Background

In May 2009, the applicant filed submissions on behalf of the all persons, bar two, who constituted the applicant. One respondent filed submissions in reply. The application had been accepted for registration under s. 190A in October 1999 but was not accepted when re-tested in September 2006 and again in September 2008. Subsection 190F(5) provides that s. 190F(6) applies if:

- the Registrar does not accept the claim for registration because it does not satisfy all the merit conditions of the registration test found in s. 190B or 'it was so procedurally

defective as to render it impossible' to determine whether the claim satisfies those conditions (as in this case); and
- the court is satisfied that all avenues for reconsideration or review of the registration test decision have been exhausted.

In this case, s. 190F(5) was satisfied. Therefore, the court was empowered to dismiss the application if the court:
- was satisfied that it had not been amended since consideration by the Registrar and was not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- was of the opinion that there was no other reason why the application should not be dismissed.

In resisting dismissal, the applicant's solicitor submitted (among other things) that:
the claim had been in deadlock for some years because of disagreements about the handling of future act matters and the strength of the connection of some members of the native title claim group;
- the relevant representative body, Goldfields Land and Sea Council, had ceased to act for (or fund) the claim, which had led to a difficulty in obtaining legal representation;
- the claimants had entered into numerous heritage and land use agreements, particularly with mining companies, and had been involved in proceedings in the Supreme Court of Western Australia as to funds accruing and related disputes;
- these disputes were the primary reason why no active steps had been taken in relation to the application;
- that said, as considerable resources had been put into the preparation of the claim, including the filing of several expert reports, there was weight behind the notion it was deserving of further attention by the court and the respondents.

According to the applicant, attempts were being made to fund a claim group meeting in order to change the composition of the applicant and resolve issues such as the membership of the claim group. It was submitted that if this was done the claim was likely to be re-registered and that the applicant would take all necessary steps to achieve this in a timely manner.

Reasoning
Justice McKerracher:
- repeated his analysis of the terms of s. 190F(6) and the relevant provisions of the Explanatory Memorandum to the *Native Title Amendment Bill 2006*, as outlined in *Champion v Western Australia* [2009] FCA 941 (summarised in Native Title Hot Spots Issue 31); and
- respectfully adopted the analysis in *George v Queensland* [2008] FCA 1518 (summarised in Native Title Hot Spots Issue 29) regarding the proper application of s 190F(6)—at [2] to [9].

His Honour concluded that, while it was difficult to be satisfied that the outcome of the proposed claim group meeting would be the making of an amended application that was capable of being registered pursuant to s. 190A:

> [T]he extensive submissions filed and the assurances given by the solicitors for the applicant, at least, lead to an inference that there is a reasonable and imminent possibility of that event occurring—at [20].

Decision
In the circumstances of this case, the court was not prepared to dismiss the application of its own motion—at [21].

Banks v Western Australia [2009] FCA 703

Gilmour J, 15 June 2009

Issue
The issue was whether the Federal Court, of its own motion, should dismiss the Jiddngarri claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (the NTA). The application was dismissed.

Background
The Jiddngarri application, which covered an area in the Kimberly region of Western Australia, was made in 1997. In August 1999, a delegate of the Native Title Registrar found the claim made in the application did not meet all of the conditions of the registration test and so must not be registered (see s. 190A). As a result of the commencement of the *Native Title Amendment Act 2007* (Cwlth), the Jiddngarri application had to be tested again. In November 2007, the Registrar's delegate again found the claim must not be registered. Notice of that decision was given to the applicant and the court pursuant to s. 190D indicating (as required) that it was not possible for the delegate to determine whether the claim satisfied the conditions in s. 190B because of a failure to satisfy s. 190C. This meant the court's power to dismiss pursuant to s. 190F(6) was enlivened because s. 190F(5) was satisfied. Justice Gilmour subsequently ordered the applicant to file submissions on this issue but the applicant could not be reached. There was no appearance for the applicant at the hearing.

Decision
Gilmour J dismissed the application pursuant to s. 190F(6), noting (among other things) that:

- the applicant had not applied for judicial review of the delegate's decision pursuant to s. 190F(1);
- there was nothing to suggest the applicant intended to seek to amend the application or that the application was likely to be amended in such a way as to lead to any different conclusion being reached on registration by the Registrar;
- there did not appear to be any other reason why the application should not be dismissed—at [12] to [13].

Amendment to reduce claim area — authorisation, effect on s. 190F(6)

Champion v Western Australia [2009] FCA 1141

McKerracher J, 7 October 2009.

Issue

The issues in this case included whether the applicant was authorised to exercise the right available under s. 64(1A) of the *Native Title Act 1993* (Cwlth) (NTA) to substantially reduce the area covered by a claimant application and, in any case, whether the application should be dismissed pursuant to s. 190F(6) of the NTA.

Background

Under s. 64(1A) of the NTA, a claimant application can be amended at any time to reduce the area of land or waters it covers. By notice of motion, the applicant sought leave to exercise this right in relation to the Kalamaia Kabu(d)n People's application (which relates to an area of the central Goldfields region in Western Australia) by filing a Form 19. (This form can be used to make 'simple' amendments in accordance with O 13 r 8 of the Federal Court Rules. If leave was granted, the requirements for amending a claimant application found in O 78 r 7 of the FCR, which include filing re-engrossed copies of application, would not apply.) The only proposed amendment would result in a reduction of the area covered by application by around 90%. Justice McKerracher sought written submissions to clarify that the applicant was authorised by the native title claim group to make the amendment.

Authority was not qualified or limited

The court noted (among other things) that the extent of an applicant's authority pursuant to s. 62A was considered in *Drury v Western Australia* (2000) 97 FCR 169; [2000] FCA 132 where, at [12], French J said:

> Section 62A expressly provides that in the case of a claimant application, the applicant may deal with all matters arising under the ... [NTA] in relation to the application. In my opinion such matters include the amendment of the application from time to time.

The evidence in this case was that the applicant was authorised at a meeting of the adult members of the claim group in November 2000 without any qualification or limitation. Authorisation was said to be given via a process of decision-making that, under the traditional laws and customs of the claim group, must be complied with when making decisions of this kind, i.e. pursuant to s. 251B(a). There was no evidence to suggest any departure from the mode of decision-making described in the application, which was that 'senior members meet to discuss issues affecting the group and communicate decisions reached to each of their respective families or sub-families'—at [8] to [9].

His Honour inferred that 'the persons comprising the applicant would be receiving ongoing guidance from the elders of the claim group in their conduct of the application'. However:

> If all of this were wrong ..., there would still be recourse for the members of the native title claim group ... to replace the current applicant pursuant to the provisions of s 66B ... and to instruct a new applicant to apply to restore the proposed excised portion of the claimed land and waters to the application—at [12]. (On reinstating an area originally claimed, see *Kogolo v Western Australia* (2000) 102 FCR 38; [2000] FCA 1036.)

Therefore, it was found there was no impediment on the applicant's authority to amend the application as proposed.

Coyne and _Daniel_ distinguished

This case was contrasted with *Coyne v Western Australia* [2009] FCA 533 (*Coyne*, summarised in *Native Title Hot Spots* Issue 30), where authority was given subject to specific conditions. In that case, it was also specifically stated when authorisation was given that those constituting the applicant were eligible only while they remained 'willing and able'. The present case was also contrasted with *Daniel v Western Australia* [2002] FCA 1147 (summarised in *Native Title Hot Spots* Issue 2), i.e. there was no evidence here that a 'convention' had developed 'whereby significant decisions regarding the conduct of the application' were expected to be made at meetings of the claim group—at [10].

Should the amendment be deferred?

The applicant for an overlapping claimant application (Ngadju) sought to have the amendment deferred because mediation was underway. His Honour declined to do so, noting that: 'The amendment is a ... considerable geographic reduction. ... . Viewed from the perspective of other interests, the making of the proposed amendment would reduce the number of overlapping applications in the Central West area'–at [17] to [18].

The claim made in the application was not on the Register of Native Title Claims. Therefore, if the amendment to reduce the application was made, the amended application would have to go through the registration test following referral by the court to the Native Title Registrar under s. 64(4)—see ss. 190A(1) and 190A(6A)(b). In these circumstances, the court was of the view that the amendment would not prejudice any other party and it was better that 'the claim move forward without more delay'—at [20].

Subsection 190F(6)

As the application was unregistered, the most recent application of the registration test (in August 2007) was triggered when item 90 of the transitional provisions to the *Native Title Amendment Act 2007* (Cwlth) commenced. It resulted in the Registrar's delegate determining the application did not meet the requirements of test. In particular, it did not meet all of the conditions found in s. 190B. No application for review of the delegate's decision by the court had been made—see s. 190F(5).

In these circumstances, s. 190F(6) provides that the court may dismiss the application (on its own motion or on the application of a party) if:

- the court is satisfied the application 'has not been amended' since it was considered 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 court's opinion, there is no other reason why the application should not be dismissed.

As the court was considering doing so, pursuant to orders made in December 2008, submissions and evidence were filed in relation to s. 190F(6). However, the applicant subsequently filed the notice of motion seeking leave to amend by filing a Form 19. If leave was given to do so, the 'question of dismissal' under s. 190F(6) would 'fall away' because one of the conditions for the exercise of the power to dismiss is that 'the application in issue *has not* been amended' since the registration test decision. However, at the time the court was

considering the application, it had not been amended and so s. 190F(6) still applied. McKerracher J took the view that there was no evidence before the court as to whether the proposed amendment was likely to lead to a different outcome.

Decision
His Honour gave leave for application to be amended pursuant to s. 64(1A) by the filing a Form 19.

Comment
As noted, the court took the view there was no evidence as to whether or not the application was 'likely to be amended in a way that would lead to a different outcome once considered by the Registrar'. However:

- evidence and submissions had been filed in relation to s. 190F(6);
- the court had been given a copy of the delegate's reasons for not accepting the claim for registration as required by s. 190D(1)(b);
- the court had before it the proposed amendments and so was aware that the only amendment proposed was one that would be to reduce the area claimed, i.e. in all other respects, the claim made in the application would be the same was that which was considered by the delegate.

In the circumstances of this case, it is not clear why the court took the view that it could not form an opinion as to whether or not the proposed amendment was likely to lead to a different conclusion. This approach also indicates that, if an application is about to be considered for dismissal under s. 190F(6), the applicant can deflect that possibility by simply exercising the right under s. 64(1A) to amend to reduce the application area.

In this case, the amendment was made via the filing of a Form 19, which indicates the court took the view that:

- O 13 r 8 of the FCR is not inconsistent with O78 r 7, because O78 r 3(2) provides that the other FCR apply 'so far as they are relevant and not inconsistent with' O78;
- the amendment to reduce the area covered by the application was 'not ... of such a nature as to render the document [i.e. application form] difficult or inconvenient to read' because it is only in these circumstances the O 13 r 8 applies.

Whether a Form 19 is used or the amendments are made in accordance with O 78 r 3, pursuant to s. 64(4) of the NTA, the Federal Court Registrar must give 'a copy of the amended application' to the Native Title Registrar, who requires it for notification purposes and in order to consider whether the registration test must be applied to the amended application—see ss. 66A and 190A(1) respectively.

Replacing the applicant, claim group amendment

Martin (dec'd) v Western Australia (No 2) [2009] FCA 635

Barker J, 12 June 2009

Issue

The issues before the Federal Court in this case were whether to make an order to replace the current applicant (who had died) and, if so, whether the new applicant should be allowed to amend the relevant claimant application. The court made the orders sought. The amendment allowed to the claim group description, which was made for the purposes of meeting one of the conditions of the registration test, is of particular note.

Background

The application in question was made in 1998 and subsequently amended. In October 2008, the sole applicant passed away. Seven members of the claim group subsequently sought an order under s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA) that they, jointly, replace the current (deceased) applicant.

In Schedule A of the application, it was said that: 'The claim is brought on behalf of [certain named individuals] ... and their biological descendants'. If the s. 66B application was successful, then those who replaced the current applicant proposed that the application be further amended, including by the addition of the following proviso to the claim group description in Schedule A:

> [T]hat any person who is within the description contained in Section 190C(3) [one of the conditions of the registration test] of the ... [NTA] ... whether specifically named in this Schedule or a descendant of a person named in this Schedule is excluded from those persons on whose behalf the claim is brought.

Schedule O, relevant to s. 190C(3), requires the applicant to provide:

> Details of the membership of the applicant or any member of the native title claim group in a native title claim group for any other application that has been made in relation to the whole or part of the area covered by this application.

It was proposed to amend Schedule O so that it read:

> The amended ... description of the claim group (Schedule A) by which any person caught by Section 190C(3) is excluded from the claim group means that by definition of the claim group there can be no person within the group that falls within those to be described under this Schedule.

Yamatji Marlpa Aboriginal Corporation (YMAC, the fourth respondents) opposed the making of the orders.

As the court noted, there was 'little doubt' that the proposed amendments were 'designed to facilitate the registration of the claimant application'—at [84].

Were those proposed as the new applicant duly authorised?

In this case, s. 66B(1)(a)(ii) was satisfied, i.e. the current applicant had died and seven members of the native title claim group had made application to the court that they jointly replace the current applicant. The questions considered by the court were:

- whether s. 66B(1)(b) was met, i.e. were those claim group members authorised by the claim group to make the application and to deal with matters arising in relation to it; and
- whether it should exercise its discretion to make the order sought.

Section 251B relevantly provides that all the persons in a native title claim group authorise a person or persons to make a native title determination application and to deal with matters arising in relation to it if:

- where there is a process of decision-making that must be complied with under the traditional laws and customs of the persons in the native title claim group in relation to authorising 'things of that kind'—the persons in that group authorise the person or persons to do so in accordance with that process; or
- where there is no such process—the persons in the native title claim group authorise the other person or persons to do so in accordance with a process of decision-making agreed to and adopted by the persons in that group 'in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind'.

The second limb was relied upon in this case. YMAC (supported by the State of Western Australia) submitted (among other things) that the evidence showed that a 'smaller claim group than that described in the ... application has authorised the application to replace the current applicant and that an informed authorisation has not been conveyed'—at [73] and [75].

According to the court, the principles underlying this submission were 'clear enough' and could be exemplified as follows:

> [I]f the original claim group in the claimant application were described as groups "A plus B" and the evidence discloses that only the "A" group has authorised an application to replace the current applicant, then the requirements of s 66B(1)(b) are not met. Similarly, if group A makes a claim to vindicate the native title rights and interests held by groups A and B, without having the authority of both groups, then the requirements of s 66B(1)(b) are not met. This simply involves an application of the principles to which the above authorities relate—at [76].

Justice Barker rejected the submission that s. 66B(1)(b) was not met, finding that:

> On the proper construction of the authorisation process undertaken, the claim group as originally described in the claimant application, in its unamended form ... were identified with reasonable precision, reasonably notified and had the proper opportunity to meaningfully participate in the meeting to consider the motion to replace the current applicant. The manner in which the meeting was conducted ... shows that it was an orderly meeting and that the persons properly entitled to participate as members of the claim group did participate and that persons not entitled to participate did not participate. ... Those in attendance at the meeting had explained to them the importance and significance of the authorisation they were being asked to consider. Moreover the members of the claim group that participated in that meeting were properly advised concerning the requirements of s 251B and then determined that there was no traditional decision-making process that applied in a case such as that before them. Accordingly, they reasonably resolved to adopt a majority voting position. In the event there was no dissent from any of the propositions put—at [78].

His Honour was 'quite satisfied' that 'on a plain reading and proper understanding of the evidence' this was a case where:

> [T]he claim group as described in the claimant application, focussed on the relevant issues, provided the relevant authorisation to the proposed applicants to pursue the native title rights and interests that they, and they alone claim—at [80].

Should the proposed amendments be allowed?

The court decided to exercise its discretion under s. 66B(2) and make the order to replace the current applicant. Therefore, those who now constituted the applicant 'were entitled to proceed with their application to amend the claimant application'. The question was whether the amendments should be allowed—at [83].

At various points in the proposed amended application, reference was made to the 'Widi Mob', e.g. in Schedule E, it was said that the 'Widi Mob' claimed the native title rights and interests set out in the application and there were references to 'Widi laws and customs' in Schedule M. YMAC submitted that:

- the terms of the application to amend were, effectively, that the applicant (on behalf of the claim group) was claiming as a subgroup in respect of, or on behalf of, a wider 'Widi Mob' than themselves;
- therefore, the proposed amended application was defective, relying on *Landers v South Australia* (2003) 128 FCR 495; [2003] FCA 264 (*Landers*) and *Dieri People v South Australia* (2003) 127 FCR 364; [2003] FCA 187 (*Dieri People*). (Each is summarised in *Native Title Hot Spots* Issue 5.)

This submission was rejected because YMAC had wrongly construed the proposed amendments and *Dieri People* could be distinguished. According to Barker J:

> [T]he reference to the "Widi Mob" [in the proposed amended application] is merely a reference to the claim group and not to any wider group. The expression "Widi Mob" is therefore simply a convenient way in which the claim group refers to itself and itself alone. The applicants do not purport to be a subgroup of some larger group, and the material currently before the Court does not suggest they are. In those circumstances there is no question, as was the case in *Dieri People* ... , that the proposed application is put forward on behalf of some other, larger group, who have not, as a larger group, authorised the making of the amended application—at [99] to [100].

The argument that there was a lack of certainty as to who fell within the claim group and who did not, given the way in which it was proposed to exclude those caught by s. 190C, was found to be 'without substance'. According to the court:

> What is of key importance in a case such as this, is that the claim group has been defined with sufficient particularity. This is not a case where the claim group is described by reference to the descendents of some long ago apical ancestor. ... [I]t is a case where named living (or recently deceased) persons and their biological descendants constitute the claim group. The exception is in respect of any persons who may fall within the description of persons to whom s 190C ... applies—at [110].

Decision

For the reasons given, the court made orders to replace the current applicant and to amend the application in the proposed manner— at [111] to [113].

Comment on the exclusion clause

In this case, it was apparent to the court that the proposed amendments were made in an attempt to facilitate registration of the application. At [108], Barker J expressed the view that the proviso in Schedule A was merely 'a clarifying and incidental provision'. However, according to *Landers* at [37], nothing can be discerned from the context of ss. 190A, 190B and 190C (aka the registration test) 'or from their words' to suggest that 'the clear words' of ss.

61(1) and 61(4) 'do not mean what they say'. Further, s. 84C provides that a failure to meet these conditions may be grounds for striking out a claimant application.

At [59], Barker J noted that authorisation 'must be by all the persons who constitute the native title claim group in respect of the common or group rights or interests comprising the particular native title **claim**'(emphasis added), referring to Justice Lindgren in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (*Harrington-Smith*, summarised in *Native Title Hotspots* Issue 24) at [1172]. However, Lindgren J actually referred to 'the common or group rights and interests comprising the particular native title **claimed**' (emphasis added), a reference to the definition of the native title claim group in s. 61(1), 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'. In *Harrington-Smith* at [1216], it was found that:

> [T]here must be a coincidence between (a) the native title claim group as defined in ss 61(1) and 253 ... (the actual holders of the particular native title claimed); (b) the claim group as defined in the Form 1; and (c) all of the persons who authorised the making of the application, and who must be named or otherwise defined in the Form 1 as required by s 61(4).

At [280] to [281] in *Harrington-Smith*, Lindgren J appears to be critical of applicants who 'redefined' the native title claim group by amending the relevant application to 'exclude problematical ... members', including people who were otherwise members of the claim group but were excluded simply in order to pass the condition found in s. 190C. His Honour was apparently of the view that such exclusions are only permissible for the purposes of s. 61(1) if:

- there is evidence before the court that there were traditional laws and traditional customs providing for the exclusion of those people on that basis;
- the evidence supports an inference that 'by a process of variation or adaptation, rooted in pre-sovereignty laws and customs', the applicant had the right to exclude those people on that basis—see *Harrington-Smith* at [1305]. See also at [1222].

These findings in *Harrington-Smith* appear to accord with what was said in *Landers* at [39] to [40]. There, the application was amended to exclude certain people 'not because the excluded persons are not members of the Dieri People'. It was done 'to secure registration of the application'. Mansfield J found that ss. 61(1) and 61(4) 'do not permit such an exclusion whether for that reason or otherwise'. However, the reasons for judgment in this case do not indicate that the issue was put to the court on the basis of these findings in *Landers* and *Harrington-Smith*.

One further issue arises in relation to the findings at [109] that there was 'no uncertainty about the description of the claim group' in the amended application and that the applicant was not required to 'undertake a task' that the Native Title Registrar may be required to perform, i.e. the task under s. 190C(3), in order to 'definitively identify every person who is not included within the claim group'. Paragraph s. 61(4)(b), which was relied upon in this case, states that:

> A native title determination application ... that **persons in a native title claim group** ... authorised the applicant to make **must** ... describe the persons **sufficiently clearly** so that it **can be ascertained** whether **any particular person is one of those persons** (emphasis added).

There is no doubt that his Honour was right to find that this condition was met in relation to the application as it stood prior to amendment. It is, with respect, less clear that the application **as amended** meets this requirement. It should also be noted that, pursuant to s. 190B(3)(b), the Registrar must be satisfied that the persons in the native title claim group are 'described sufficiently clearly so that it can be ascertained whether any particular person is in that group'.

Dodd v Queensland [2009] FCA 793

Dowsett J, 11 June 2009

Issue
The Federal Court was asked to make orders to replace the current applicant and amend the description of the native title claim group in claimant application made under the *Native Title Act 1993* (Cwlth) (NTA). The application to amend was opposed on the grounds that the decision-making process used was not valid. The court adjourned the proceedings. Subsequent orders to replace the applicant were made in *Dodd v Queensland (No 2)* [2009] FCA 1180, summarised in *Native Title Hot Spots* Issue 31.

Background
At a meeting in February 2009, resolutions were made to alter the constitution of 'the applicant' (resolution 11) and the native title claim group (resolution 6) in an application brought on behalf of the Wulli Wulli People. A motion to amend was brought to give effect those resolutions. Ms and Mr Lea opposed the motion, arguing that both the resolutions and the meeting at which they were made were invalid because:

- the anthropological evidence upon which the resolutions were based was inadequate;
- the meeting could not be called without the approval of all the persons who comprised 'the applicant' (see s. 61(2) of the NTA);
- the resolutions were complex and required more consideration than could be given in the time available and the voting was a 'shemozzle' or 'dog's breakfast';
- nominations for membership of 'the applicant' by Mr and Ms Lea's family were not accepted.

It was found that:

- concerns about the anthropological evidence should have been addressed by seeking an adjournment of the meeting;
- there was no basis for restricting the capacity of any member of the claim group to call a meeting;
- it was a matter for the meeting as to whether more time should be made available for consideration of the resolutions;
- the court was unable to act upon the Leas' contentions because there was no evidence to support them—at [3] to [6].

Decision
Justice Dowsett adjourned the application because it seemed members of the claim group as then constituted, as well as those who were to become members of the claim group as a

result of the adoption of resolution 6, had voted. The adjournment was given to allow an investigation into whether 'the outcome was affected by the inclusion of votes by people who were not, themselves, members of the claim group'—at [7].

Dodd v Queensland (No 2) [2009] FCA 1180

Dowsett J, 10 August 2009

Issue

The issues before the Federal Court were whether to make an order to replace the applicant for the Wulli Wulli People's claimant application and whether an earlier decision to allow an amendment to the native title claim group description should be affirmed.

Background

This proceeding arises out of the same facts as that described in *Dodd v Queensland* [2009] FCA 793 (*Dodd No 1*), summarised in *Native Title Hot Spots* Issue 31. In short, at a meeting of the claim group in February 2009, resolutions to make changes to the claim group description and the group of persons constituting the applicant were proposed and purportedly passed. When application to amend in this way was made, the court's District Registrar allowed the first but declined to make the second. When the matter first came before Justice Dowsett:

> It was not clear ... that the amendment to the claim group description [allowed by the registrar] had been voted on separately by the claim group, as previously constituted, and by the claim group, as it was to be constituted. I have previously held that such procedure is necessary. Proceedings were adjourned ... to enable the applicant to clarify that matter. ... . This possible irregularity had not been raised before the registrar ... , and there had been no formal application for review of that decision, or for me to reconsider it—at [3].

Rejection of specific nominations to join applicant group

This issue was considered in *Dodd No 1*, where the court had been unable to act because no evidence was provided to support the contentions made. Dowsett J had entertained the provision of further evidence to support these contentions but, since he was not persuaded by it, was satisfied there was no substantial irregularity in connection with the conduct of the meeting insofar as concerned nominations to be a member of the group constituting the applicant—at [13] and see s. 61(2) of the *Native Title Act 1993* (Cwlth), which provides that if more than one person is authorised by the claim group to make the application, then they are jointly 'the applicant'.

Invalidation of meeting

The main question here was whether the meeting should be 'invalidated by virtue of the failure to have separate meetings of the claim group as previously constituted, and as it is proposed that it be constituted'. Dowsett J considered the evidence provided as to the numbers of people attending the meeting from both the current claim group and the proposed claim group, as well as the number of abstentions from the vote. His Honour concluded that, even if all the abstentions were from the original claim group, the resolution was still passed by 55 valid votes to four. Under these circumstances, the resolution passed at the meeting was valid. In reaching this conclusion, his Honour effectively reviewed and

affirmed the earlier decision to allow the amendment to the claim group made by the court's Registrar—at [14].

Decision
In the circumstances, Dowsett J decided to make an order to replace the applicant as sought, presumably pursuant to s. 66B of the NTA, although there is no reference to that provision in the reasons for judgment or the subsequent orders.

Party status

Connelly v Queensland [2009] FCA 1181

Dowsett J, 11 August 2009

Issue
In this case, the court joined Queensland South Native Title Services Ltd (QSNTS), which had formerly represented the applicant in the Mitakoodi and Mayi People #1 claimant application, as a respondent to that claim pursuant to s. 85(4) of the *Native Title Act 1993* (Cwlth) (the NTA). The applicant unsuccessfully opposed the motion for joinder.

Background
Subsection 84(5) provides that:

> The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.

While the court referred to QSNTS as a 'representative body', it is actually a body funded under s. 203FE(1) to perform the functions of representative body, colloquially known as a 'native title service provider' (NTSP).

The applicant for the Mitakoodi and Mayi People resisted joinder on the grounds that QSNTS had no immediately apparent role to perform and there was a risk of a conflict because QSNTS previously acted for the applicant and may have confidential information in its possession.

Justice Dowsett took the view that, while it was unlikely that there was 'any significant amount of confidential information' given the limited progress of the matter, the court was in any case 'willing to rely upon the professionalism of the relevant legal advisers and employees' of QSNTS 'in order to avoid any problem in that regard'. As to its role in the proceedings, the court was satisfied this would be 'determined by its responsibilities' under the NTA and that there was 'no doubt' that QSNTS would 'participate in the proceedings only in a constructive way, and in a way designed to serve the public interest and the interests of indigenous people generally'—at [2] to [3].

Decision
Dowsett J decided to join QSNTS because:

> [G]iven the close involvement which ... [QSNTS] has in the claims in the [relevant] ... area ... it will be of assistance to the Court, and in the interests of justice if it becomes a party to these proceedings. It will also assist in other respects, having regard to the various functions which are conferred upon it by the Act—at [1].

Comment

The court's justification for joining QSNTS is of interest for at least two reasons.

Firstly (with respect), whether or not it would assist the court is not relevant to s. 84(5). The question is whether the court is satisfied 'the person's interests may be affected by a determination in the proceedings'. On the unusual nature of this requirement, see *Woodridge v Minister for Land and Water Conservation (NSW)* (2002) 122 FCR 190. In this case, the court gave no express consideration as to whether QSNTS had interests that may be so affected. It may be implicit in the decision that the discharge of responsibilities under the NTA satisfies s. 84(5), a conclusion reached reluctantly in *Brierley v Minister for Land & Water Conservation* (NSW) [2002] FCA 1209 (*Brierley*). However, the case law on s. 84(5) and representative bodies (or NTSPs) is not clear. Such bodies have a statutory right to party status 'by force of' ss. 66(3)(a)(ii) and 84(3)(a)(i) only if they notify the court within the prescribed period. If not, they must satisfy the requirements of s. 84(5). This is seen as engendering ambiguity as to the proper exercise of the court's discretion under s. 84(5), an ambiguity usually resolved on policy grounds or the particular facts of the case. In addition to *Brierley*, see *Munn v Queensland* [2002] FCA 78, *Woodridge v Minister for Land and Water Conservation (NSW)* [2002] FCA 1109, *Simms v Minister for Land and Water Conservation* [2002] FCA 15 and *Gale v NSW Minister for Land and Water Conservation* [2002] FCA 972.

Secondly (again, with respect), whether 'it is in the interests of justice' to join QSNTS is a reference to s. 84(5) as it now stands i.e. following an amendment made by item 5 of Schedule 2, Part 1 of *Native Title Amendment Act 2007* (Cwlth). However, item 78 of Schedule 2, Part 2 of that Act states the amendment applies 'in relation to a proceeding that commences on or after' 15 April 2007, apparently to ensure that:

> The amended provisions ... do not apply to persons who apply to become a party after the commencing date where the proceedings were instituted before the commencement date ... [because] it would be unjust to apply different tests for joinder—Explanatory Memorandum to the Native Title Amendment Bill 2006 at [4.340].

Since the proceedings to which QSNTS sought to be joined commenced in 1998, it seems its application should have been determined in the light of s. 84(5) as it stood prior to amendment, when the interests of justice were not specifically mentioned.

Jinibara People v Queensland [2009] FCA 816

Spender J, 17 July 2009

Issue

The issue was whether the Federal Court should join people who were claimants on a previously overlapping claimant application as respondents to another claimant application made under the *Native Title Act* 1993 (Cwlth) (NTA). Joinder was refused.

Background

In February 2009, Mr Serico and Dr Fesl applied for orders that they become respondents to a claimant application made on behalf of the Jinibara People. Mr Serico and Dr Fesl were claimants in an application made on behalf of the Gubbi Gubbi claim that had overlapped the Jinibara but had since been withdrawn.

Decision

Justice Spender dismissed application for joinder because:

- the material provided did not establish the requirements for joinder as provided by s. 84(5) of the NTA;
- neither Dr Fesl nor Mr Serico claimed that they held native title over the area but merely asserted that they had certain rights and interests;
- Mr Serico had neither demonstrated how his interests might be affected by a determination in the Jinibara proceedings (see s. 84(5) of the NTA) nor provided evidence of the traditional laws and customs that gave rise to the rights and interests he claimed to hold—at [4], [6] and [10] to [11].

His Honour was careful to point out that:

> I am ... not in the slightest doubting the important and distinguished contribution ... [Mr Serico and Dr Fesl] have made, nor do I doubt that somewhere in the background there is an assertion that somehow they have a claim to at least part of the Jinibara People's area. There is just no material to demonstrate a proper basis for joinder and, unfortunately, in those circumstances each application for joinder is dismissed—at [12].

Comment - one determination in respect of a particular area

In encouraging further discussions to resolve native title issues, Spender J said at [13] that: '[U]nder the Act, there can only be one determination in respect of a particular area. There cannot be overlaps'. While s. 68 provides that there can only be one determination of native title in relation to a particular area (other than one made on appeal or pursuant to a successful application under s. 13 to revoke or revise a determination), a number of determinations have recognised 'shared country' i.e. native title rights and interests being held in the same area by different or 'overlapping' groups. See, e.g. *James v Western Australia* [2002] FCA 1208; *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR; [2003] FCAFC 283; *Daniel v Western Australia* [2003] FCA 666; and *Lardil Peoples v Queensland* [2004] FCA 298.

Reinstatement — claim dismissed for default

Nucoorilma Clan of the Gamilaaroy Aboriginal People v NSW Minister for Land & Water Conservation [2009] FCA 1043

Buchanan J, 17 September 2009

Issue

The court was asked to extend time to comply with orders to file certain documents. However, the claimant application concerned stood dismissed because conditional orders for its dismissal had become effective. As it was found that it was not in the interests of justice to extend time or interfere with those orders, the notice of motion for an extension of time was dismissed.

Background

The claimant application concerned covered land surrounding Inverell in NSW. It was made in 1998 by Matthew Munro and Suzanne Blacklock under the *Native Title Act 1993* (Cwlth) (NTA) on behalf of the 'Ncoorilma Tribe' (also described as the 'Ncoorilma Munros'). The native title claim group as described in the application (as amended in 1999) was:

> The Nucoorilma clan of the Gamilaaroy/Gomilroi/Gumilaroi Aboriginal People who are the direct Descendants of John Munro and Sarah Harrison who were married in the 1850s and were traditional owners of the claim area.

Justice Buchanan noted that:

> It might be thought that identification of the claiming group in this way, namely the descendants of a single couple united in a European ceremony of marriage at a time when the area in question was significantly affected by European settlement, might raise unusual features for claims of this kind. At the very least, close attention would be needed to identification and establishment of the elements of a claim for native title by these particular claimants in this particular area—at [3].

The matter moved 'at a leisurely pace' until April 2002 when the court directed the applicant to provide an outline of lay evidence by 1 July 2002. That was later extended to 30 September 2002. On 1 October 2002, the applicant filed a statement that did not comply with those orders but eight witnesses were identified as capable of addressing the relevant matters e.g. the claim group's connection to the claim area under traditional law and custom and the sites and spiritual places within the claim area, including the significance of the sites and any associated stories. It was 'important' to bear in mind the representation as to the availability of this evidence when 'consideration is given to the course of events thereafter'—at [4] to [5].

In March 2003, a listing for a preservation of evidence hearing in June 2003 was vacated. A year later, the applicant was directed to provide the respondents with a list of lay witnesses, a short statement of the substance of the evidence they would give and an 'outline genealogy' on or before 19 November 2004. The applicant did not comply with those orders. On 7 March 2005, seven brief outlines of evidence that dealt with matters in 'only the most summary way', and not with the matters foreshadowed earlier, were filed. On 27 November 2007, a statement of facts and contentions was eventually filed. After reviewing its, his Honour commented that:

> [T]he assertions .... made, more than eight years after the proceeding ... commenced, had no apparent specific connection with the group identified in the ... application, namely the descendants of John Munro and Sarah Harrison, any explanation why they should ... be regarded as the traditional owners of the claim area or any statements ... specifically concerning their descendants which might have supported a claim for a determination of native title ... . The statement of facts and contentions bore no apparent relationship either to the matters which, it had been said in 2002, would be the subject of evidence—at [9].

At 'on country' hearings conducted by Buchanan J over three days in December 2006:

> [E]vidence was called only from ... two of the grandchildren of John Munro and Sarah Harrison. ... . Self-evidently, it was only the beginning of an evidentiary process which, if the claim was to be seriously maintained, would require much greater attention and development—at [10].

Subsequently, Buchanan J was unable to make the matter progress any more rapidly and so a court registrar held case management conferences to prepare for a hearing before the end of 2008. The applicant was directed to file documents addressing (among other things) a detailed schedule of matters. In September 2008, the applicant filed points of claim that 'articulated ... in a general way, the factual foundation' of the application. Time for compliance with some of the earlier orders was extended and orders were made for the filing of the substance of the lay witnesses' evidence by 27 February 2009. The applicant did not comply with any of these orders within time. On 13 March 2009, time was extended to 31 March 2009 and hearing dates in November 2009 and February 2010 fixed. His Honour also 'included a further buffer of one month ... before the proceedings would stand dismissed'. As was noted: 'It must have been apparent that the time had come for the applicants to put their case forward, if they had a case which was capable of being advanced'—at [11] to [13] and [16].

The applicant filed further documents that were 'nominally outlines of evidence' but 'even then, not all the orders ... were complied with'. As a result, the matter stood dismissed and the hearing dates were vacated on 30 April 2009. On 9 July 2009, the applicant sought reinstatement of the proceedings and an extension of time in which to file outstanding documents. There was no doubt the court had power to extend time (notwithstanding that the order for dismissal had taken effect) and that it should be used to relieve against injustice. The question was whether to exercise the discretion to do so. The State of New South Wales and NTSCORP Ltd opposed the grant of an extension of time—at [17] to [19] and [21] to [24].

Strike-out for default — Order 35 rule 3

As was noted, the discretion conferred by O 35 r 3 of the Federal Court Rules is unconfined. This case fell within two of the situations identified in the authorities as 'obvious candidates for the exercise of the power', namely cases where:

- there was a history of non-compliance by an applicant that indicated an inability or unwillingness to co-operate in having the matter ready for trial within an acceptable period; and
- whatever the applicant's state of mind or resources, the non-compliance was continuing and causing unnecessary delay, expense or other prejudice to the respondents—at [29].

A conclusion that the applicant is either subjectively unwilling to co-operate or unable to do so is not readily reached but, if it is, fairness to the respondent normally requires summary dismissal. Ultimately, the court was required to 'exercise a judicial discretion having regard to the interests of justice'—at [30] to [31].

In this case:

> The proceedings have ... been on foot for a little over 11 years. It seems quite apparent that the applicants are unable to organise themselves in a way which will permit reasonable and timely compliance with the Court's orders. ... . [T]he latest default is the last in a series of similar defaults—at [30].

The remaining issue was where prejudice might lie if the matter was reinstated. According to the court:

> [T]here would be real prejudice to the respondents actively opposing the notice of motion if the proceedings were reinstated. On the other hand it is difficult to identify any prejudice to the applicants of any permanent or ongoing kind ... . No costs are sought from the applicants. It is not suggested that any form of estoppel would arise. A further claim might be made if necessary and appropriate—at [30].

Decision

The notice of motion seeking an extension of time to file outstanding documents was dismissed because Buchanan J was not satisfied that the interests of justice required either the making of such an order or any interference with the conditional orders dismissing the application—at [31].

Leave to discontinue — application to vary

Davis-Hurst v Minister for Lands (NSW) [2009] FCA 725

Graham J, 30 June 2009

Issue

The issue before the court was whether orders giving leave to discontinue two claimant applications should be varied. The two notices of motion filed seeking the variation of those orders were heard together and dismissed.

Background

The notices of motion were filed because there were two relevant claimant applications (the main proceedings) relating to two separate parcels of land, referred in the court's reasons for decision as the Saltwater Reserve and the Khappinghat Creek land. Subject to one exception, the parties to the main proceedings were the same. On 17 December 2008, a memorandum of understanding (MOU) was entered into between the Director-General of the Department of Environment and Climate Change (NSW) and the Saltwater Tribal Council (Aboriginal Corporation) which dealt with both parcels of land. In the dictionary to the MOU, a definition of 'Saltwater People' was provided, which was significant because there was also a reference to other indigenous groups in the MOU, namely the Pirripaayi people and the Birpai people.

The fifth respondent in each proceeding, Keith Kemp, sought to vary orders made on 2 June 2009 (which were not to take effect until 28 days after that date) to discontinue both proceedings. Unless varied, the grant of leave to discontinue would take effect at the end of the day the matter was again brought before court. It was noted that:

> It is an unusual circumstance where a respondent wants to keep an application ... alive. That is what Mr Kemp effectively wants to do. As I understand it, he claims to be a member of the Pirripaayi people. It is common ground that the Pirripaayi people are also known as the Birpai people, referred to in the Memorandum of Understanding—at [9].

In an affidavit sworn 29 June 2009, Mr Kemp deposed that:

> The effect of the discontinuance of the proceedings will be that for all intents and purposes those people described in the MOU as the Saltwater people will be regarded as the traditional owners of the claim area, to the exclusion Pirripaayi people generally and me in particular. ...
>
> [I]n the event that the present application is discontinued it would be necessary for me to file a fresh native title application, wait for the registration test to be applied, and then wait further for the notification period to expire, before the matter could proceed to determination.

His Honour noted that the MOU:

- stated it was not intended 'in any way to affect or impact upon any native title rights and interests';
- acknowledged it 'does not constitute recognition of native title rights and interests nor does it constitute an authorisation of any act' under the NTA or the *Native Title Act 1994* (NSW); and

- provided that the Saltwater Tribunal Council would withdraw the main proceedings 'within a reasonably practicable time upon the commencement of this MOU'—at [10].

It was also noted that the solicitor appearing for the applicant in the main proceedings informed the court that the definition of 'Saltwater People' in the MOU was formulated to ensure Mr Kemp was included—at [11].

Decision
Justice Graham J saw 'no reason' why the orders of 2 June 2009 should be varied and so dismissed both notices of motion.

Mediation conference — 'without prejudice' privilege

Waanyi People v Queensland [2009] FCA 1179

Dowsett J, 24 August 2009

Issue
The Federal Court was considering whether the descendents of a person called Minnie are, in fact, members of the native title claim group described in the Waanyi People's claimant application. The question raised here was whether the *Evidence Act 1995* (Cwlth) applied so as to allow evidence otherwise subject to a 'without prejudice' privilege to be led. The evidence was not admitted. The comment that s. 131 of the Evidence Act should not be read into s. 136A (now s. 94D) of the *Native Title Act 1993* (Cwlth) (NTA) so as to qualify the privilege found therein is of note.

Background
The National Native Title Tribunal convened a meeting in 2007 over two days where two claims by two families to be entitled to inclusion in the claim group were considered. 'In the end', it was decided that Minnie's descendents were not so entitled. Parts of the meeting were held as a claim group meeting and attended only by people already recognised as members of that group. Other parts were mediation conferences under s. 136A(1) (now see s. 94D) held between the parties in dispute, 'namely those espousing the cause of Minnie's descendents and the accepted members of the claim group'. Pursuant to s. 136A(4), evidence may not be given and statements may not be made in proceedings before the court 'concerning any word spoken or act done at a conference' held pursuant to s. 136A(1) unless the parties agree otherwise. In this case: 'Such agreement has not been forthcoming'—at [2]. Counsel for Minnie's family sought to lead evidence of what happened at the meeting. Reliance was placed on s. 131(2)(g) of the Evidence Act, which is 'primarily concerned with protecting without prejudice discussions' i.e. exchanges 'designed to bring about settlement of litigation'. It allows evidence of such exchanges to be adduced if 'other evidence is likely to mislead' the court unless evidence of the 'without prejudice' communications is adduced. The concern was that evidence given in cross-examination might mislead the court into an inference that nobody spoke 'in favour of' the Minnie family or 'took the Minnie family's

part' unless evidence of what happened during parts of the meeting that were privileged was given—at [3] to [5].

Decision
His Honour was inclined to think the evidence may not be received because there was 'no cogent argument for implying the terms' of s. 131 of the Evidence Act into s. 136A of the NTA 'so as to qualify the general prohibition in the absence of the agreement contemplated by s. 136A(4)'. However, the court refused to receive the evidence because the 'situation contemplated by s. 131(2)(g) ... simply did not arise'. There was no risk that the evidence already adduced (or an inference from that evidence) was likely to mislead the court. Dowsett J noted that:

> One might infer that there was no support for the Minnie family at the claim group meeting [to which s. 131 did not apply] because it was clear from what had occurred in the privileged parts of the proceedings that there was a clear majority against acceptance of them into the group so that there was no point in taking the matter further. That does not exclude the possibility that people spoke in favour of the Minnie family—at [4] to [5].

Determination of native title

Thudgari People v Western Australia [2009] FCA 1334

Barker J, 18 November 2009

Issue
The issue here was whether the Federal Court should make a determination of native title pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA) in terms of proposed consent orders. The court decided to do so.

Background
In 1997, a native title determination application was made on behalf of the Thudgari People. It was amended in 1999 to, among other things, further particularise the native title claim group. The court proceeded on the basis of an agreement that this made no change to the actual composition of the native title claim group. The application covered around 11,000 sq kms situated at the northern edge of the Gascoyne region of Western Australia, between the Ashburton and Gascoyne Rivers. It encompassed all or part of 16 pastoral stations and the Barlee Nature Reserve. The Dampier to Bunbury Natural Gas Pipeline and De Gray-Mullewa and De Gray-Mingenew Stock Routes traversed the application area and there was a very small portion of unallocated Crown land on the southern boundary.

In September 2000, the application was referred to the Tribunal for mediation pursuant to s. 86B but mediation did not formally commence until early 2007. With the Tribunal's assistance, the parties reached agreement as to the terms of a determination and they sought court orders in those terms in relation to part of the application area (the determination area). The parties consented to the application being discontinued over the remainder of the area it covered, with no order as to costs.

Description of native title holders – application v determination

During the course of negotiations, the applicant and the state agreed that the description of the native title claim group in the application was problematic. Subsequently, they settled on what was apparently a more accurate description for the purposes of the draft consent determination. The application was not further amended to reflect this. However, Justice Barker was satisfied that, provided the application itself was valid, the court 'may proceed to make a determination in such form as it sees fit based on the evidence'—at [12], referring to *Patch v Western Australia* [2008] FCA 944 (summarised in *Native Title Hot Spots* Issue 28) at [18].

While it appears to be of no relevance here, there may be cases where the description of the native title claim group in the application would need to be amended if reliance was placed upon ss. 47A(3) or 47B(3). The chapeau to each of ss. 47A(3) and 47B(3) states that: 'If the determination on the application is that the *native title claim group* [i.e. as described in the application] holds the native title rights and interests claimed', then the effect of determination recognising native title is as prescribed in ss. 47A(3) and 47B(3) e.g. the non-extinguishment principle applies to the creation of certain prior interests. It may also be necessary in certain circumstances because of the findings in *Commonwealth v Clifton* (2007) 164 FCR 355; [2007] FCAFC 190, summarised in *Native Title Hot Spots* Issue 27.

Requirements of s. 87

Section 87 provides that the court may make a determination of native title by consent without holding a hearing where:

- the period specified in the notice given under s 66 has ended;
- the terms of an agreement, in writing signed by or on behalf of the parties, are filed with the court;
- the court is satisfied that an order in, or consistent with, those terms would be within its power; and
- it appears appropriate to the court to make the orders sought.

The first two conditions were met. The court accepted an order in or consistent with the proposed determination was within power.

Appropriate to make the determination?

On this issue, his Honour noted (among other things) that:

- the discretion conferred by s. 87(1) must be 'exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose' of the NTA, which included that native title 'disputes' be resolved by mediation and agreement;
- the court was not required to undertake an inquiry into the merits of the claim and provisions such as s. 87 'recognise that the court adopts a different approach' to deciding whether it was appropriate to make a determination by consent than it 'brings to the task of deciding if native title should be recognised after a contested hearing';
- although there needs to be some 'foundation upon which' the court's jurisdiction is exercised, where the parties reach agreement on the terms of a determination, particular regard would be had to whether the agreement was 'freely entered into on an informed basis';

- if so, the fact that an agreement had been reached weighed 'in favour of the making of the determination of native title' and, in some cases, may even be 'a sufficient basis' for the making of consent orders;
- however, the requirement was usually met where the state, via 'competent legal representation, is satisfied as to the cogency of the evidence upon which the applicants rely'; and
- generally, this would not involve the court 'making findings on the evidence' the state considered, at least for the purpose of being satisfied the state was 'acting in good faith and rationally'—at [22] to [25], referring to the relevant cases.

In this case, the state played an active role in the negotiations and, in doing so, had acted on behalf of the 'State community generally'. It also had regard to the requirements of the NTA and had 'plainly ... conducted a thorough assessment process'. In doing so, it had 'satisfied itself that the determination is justified in all the circumstances'. According to the evidence before the court, among other things, the state was 'confident that the connection material indicates that the Thudgari claimants acknowledge and observe a shared set of normative rules for determining group membership' and it had considered the system of law and custom under which native title is held. The other respondents had considered the state's assessment—see [26] to [44].

Comment on extinguishment issues

As was noted at [45], it is 'important and relevant' that questions concerning extinguishment of native title were addressed 'so that the rights of respondents are also properly indicated by the consent determination'. The proposed consent determination did not contain deal with any extinguishment brought about by the construction of improvements on the areas subject to the various pastoral leases. This was relevant because of *De Rose v South Australia (No 2)* (2005) 145 FCR 290; [2005] FCFCA 110 (summarised in *Native Title Hot Spots* Issue 15).

However, Barker J took the view this issue was resolved because there was to be an Indigenous Land Use Agreement (ILUA) made 'upon or shortly after' the determination of native title and 'the vesting of native title' in the Wyamba Aboriginal Corporation. According to the court, the determination 'together with' the proposed ILUA 'deals with the topic of extinguishment of native title in such a manner' that the court could be satisfied that it was 'relevantly "appropriate"... to make the determination on the terms agreed to by the parties'—at [47] to [47], referring to *Hunter v Western Australia* [2009] FCA 654, summarised in *Native Title Hot Spots* Issue 31.

With respect, it is not clear from the judgment how an ILUA could deal with the issue of extinguishment of native title by the improvements that had already been constructed on pastoral leases as at the date of the determination. The determination by the court is that there has been no such extinguishment. A different approach was taken in *Adnyamathanha No 1 Native Title Claim Group v South Australia (No 2)* [2009] FCA 359. In that case, in addition to determining that improvements identified in order 12 had extinguished native title, the possibility of lawful post-determination extinguishment by the construction of new improvements was acknowledged in order 13 and, in order 24, the parties were granted liberty to apply in relation to that issue.

Decision
On the basis of the informed consent of the parties and the materials before the court, his Honour thought it appropriate to make an order under s. 87(2) consistent with the agreement reached by the parties as to the terms of a determination without holding a hearing. Any part of the application outside of the external boundaries of the determination area was to be discontinued and no determination was made in relation to that area.

Determination
It was determined that native title does not exist over some parts of the determination area. Over the remainder, the Thudgari People, as defined in the determination, are recognised as the native title holders. The native title rights and interests recognised in relation to that part of the determination area are comprised of non-exclusive rights to:

- access, enter, live and remain on the area;
- camp, erect shelters and light fires for 'cooking, heating and lighting purposes';
- take flora, fauna, fish and other natural resources;
- take and use water, other than water captured or controlled by pastoral lessees;
- engage in ritual and ceremony, care for, maintain and protect sites and areas of significance;
- be accompanied by people who, although not native title holders, are spouses, parents or descendants of the native title holders.

The Wyamba Aboriginal Corporation was determined to be the prescribed body corporate to hold native title in trust pursuant to s. 56(2) of the NTA. It is now registered on the National Native Title Register and so, pursuant to s. 224, is the 'native title holder' in relation to the relevant area.

The native title rights and interests do not include rights to minerals, petroleum or geothermal energy resources, as defined in specified state legislation, and are subject to, and exercisable in accordance with, Commonwealth and state law. As required under s. 225 and 94A, the other interests held in relation to the area where native title exists (such as those held under a pastoral lease) are set out in the determination, as is the relationship between those interests and the native title rights and interests.

Kowanyama People v Queensland [2009] FCA 1192

Greenwood J, 22 October 2009

Issue
The issue in this case was whether the Federal Court should make a determination of native title in terms of proposed consent orders pursuant to s. 87A of the *Native Title Act 1993* (Cwlth) (the NTA). The court decided to do so.

Background
The proposed determination covered part of the area subject to the Kowanyama People's claimant application, which was made over part of the Western Cape in Queensland in 1997. The proposed determination area would include part of the area subject to the Kowanyama Deed of Grant in Trust (DOGIT) and a coastal strip. Over the relevant part of the DOGIT, it

was proposed that 'exclusive' native title rights be recognised. Non-exclusive rights were proposed in relation to the coastal strip. In the east, that strip was bounded by a line that generally followed the high water mark. However, on the west, it was defined by a line in the Gulf of Carpentaria which approximated the water depth in which a grown Kowanyama person could wade at low tide, i.e. approximately 1.5 metres.

The respondents included the State of Queensland, the Commonwealth of Australia, three shire councils, Queensland Seafood Industry Association, energy supply companies and those holding pastoral leases. The legal representative for the Kowanyama People, the Cape York Land Council (CYLC), was also the Aboriginal/Torres Strait Islander representative body for the area concerned. The applicant, the state and the Commonwealth agreed to prioritise mediation of the application in several parts. Agreement was reached in relation to Part A, which represents about 13 per cent of the application area. The agreement was signed by those three parties and the other parties who hold an interest in Part A. CYLC, on behalf of the applicant, filed the agreement, with draft orders attached, pursuant to s. 87A(2) in October 2009.

Requirements of s. 87A

Among other things, s. 87A provides that if agreement is reached on a proposed determination of native title in relation to a part of the area covered by a native title determination application, the court may make an order in, or consistent with, the terms of the proposed determination without holding a hearing if it is satisfied that:

- an order in, or consistent with, the terms of the proposed determination would be within power; and
- it would be appropriate to do so.

Within power

Justice Greenwood was satisfied the orders were within power because the four 'factors' prescribed by s. 87A(1) were satisfied:

- there is a proceeding for a determination of native title on foot;
- an agreement has been reached on a proposed determination in relation to a part of the area subject to that application after the s. 66 notice period expired;
- the agreement was made by all of the requisite parties, in this case being the applicant, the representative body, the Commonwealth, the state, local government bodies and 'each person who holds an interest in relation to' the proposed determination area who 'is a party to the proceedings at the time the agreement is made'; and
- the terms of the proposed determination were in writing and signed by, or on behalf of, those parties—at [15].

Although it is not mentioned, presumably the court registrar gave notice to the other parties that the proposed determination had been filed, as required under s. 87A(3), but no objections were received—see s. 87A(8).

Appropriate

His Honour then identified the following considerations to be taken into account when deciding whether it would be appropriate to make the orders sought:

- the NTA 'recognises and encourages the resolution of applications' without the need for a hearing, including via the making of a determination in relation to only a part of the area covered by an application;
- the court 'will ... place emphasis upon' whether the agreement 'is freely made on an informed basis by all parties' and whether those parties are 'represented by experienced independent lawyers';
- in the case of a state party 'representing the public interest', the court will look to the consideration given to the issues raised by the proposed determination;
- it is recognised that the state, via its archival materials and long engagement with Aboriginal communities, is 'likely to be familiar with the historical arrangements within those communities';
- the court 'ought to have regard to sufficient material' to demonstrate the agreement and the proposed orders are "rooted in reality"' and, in that sense, should be satisfied that the proposed orders are 'prima facie appropriate'—at [20] to [24], referring to Chief Justice French in 'Native Title – A Constitutional Shift?' (University of Melbourne Law School, JD Lecture Series, 2009) and *Wik and Wik Way Native Title Claim Group v Queensland* [2009] FCA 789, summarised in *Native Title Hot Spots* Issue 31.

In this case, the state had been given 'extensive material' between May 1996 and August 2009, some of which had been considered by other respondents with an interest in the proposed determination area. The court was 'entirely satisfied' that the parties to the Part A agreement have been 'represented by lawyers experienced in these issues and that the parties have come to a fully informed agreement'. In addition, the state 'had a long engagement with the Aboriginal people' of the relevant area. It was also noted that, Dr John Taylor, the anthropologist who assisted the applicant and provided a report filed in the court, had worked with members of the native title claim group 'and their predecessors' since 1971. Based on the material before it, the court was 'entirely satisfied' that it was appropriate to make the orders sought by the parties—at [25] to [26], [29] and [45] to [46].

A brief outline of the evidence

Greenwood J went on to say 'a number of things' about the elements of the proposed determination 'on behalf the Kownayama People' including that:

- archaeological evidence demonstrated over 37,000 years of Aboriginal occupation of Cape York Peninsula and first European contact with Aboriginal people in the application area was recorded in the 1623;
- permanent European settlement for pastoral purposed began in the 1880s but, in 1897, steps were taken to set aside 'significant' areas stretching from below the Mitchell River to the tip of Cape York Peninsula as Aboriginal reserves;
- at the turn of the 20th century, an Anglican mission dedicated to the 'pastoral and physical care' of Aboriginal people was set up between the Mitchell and Nassau Rivers;
- this was abandoned in 1915 but a new site was chosen, called Kowanyama, an English rendering of the Yir Yoront *kawn yama* ('many waters');
- in the 1950s, the church began to 'critically examine its role in the advancement of the Aboriginal communities' of Cape York Peninsula and in 1967, 'transitioned the administrative control' of the Kowanyama mission to the state;

- Aboriginal people had 'consistently asserted access to their homelands for traditional owners which, on the anthropological evidence, has not been denied by station managers';
- in 1987, the vesting of title to the Mitchell River Aboriginal Reserve (aka Kowanyama) in the Kowanyama Aboriginal Council under the DOGIT 'initiated a period of increasing community autonomy and control over lands and resources'—at [29] to [34].

After outlining this history of the area and the anthropological studies done during more recent times, Greenwood J stated that:

> The anthropological material demonstrates that the laws and traditions of the Kowanyama People flow from a totemic ideology constituting a normative system that is widely shared and has been reproduced over generations. ... . The interests of the claimants ... are acquired through *descent* which is why identifying family lines (patrilines) associated with parcels of land (estates) in the claim area has been important to identifying the scope of the claimant group—at [37], emphasis in original.

Prescribed body corporate

For the purposes of s. 59, the court was satisfied that the requirements of r. 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cwlth) were met i.e. that the Abn Elgoring Ambung Aboriginal Corporation was a prescribed body corporate. It was noted (among other things) that:

- it was a registered Aboriginal and Torres Strait Islander corporation and one of its objectives was that it act as an 'agent' prescribed body corporate pursuant to a native title determination made under s. 55 of the NTA;
- claim group members met in Kowanyama and nominated the corporation to act as a prescribed body corporate;
- at its first annual general meeting, the corporation consented to being nominated to do so and two directors subsequently signed a notice of consent on behalf of the corporation to so act;
- the only people eligible to hold membership are people of at least 15 years of age who are also native title holders as defined in the proposed determination—at [48] to [52].

Interestingly, the parties sought, and the court made, a specific order giving 'liberty to apply in relation to matters arising out' of the determination of the PBC (see order 14).

Decision

Greenwood J was satisfied the making of the proposed determination was within the court's power and it was appropriate to make them—at [53].

Determination
The Kowanyama People, as described in the determination, are recognised as the native title holders. Their native title is not to be held in trust. Abn Elgoring Ambung Aboriginal Corporation is the prescribed body corporate (PBC) for the purposes of s. 57(2). It will perform the functions mentioned in s. 57(3). Subject to some qualifications, the nature and extent of the native title rights and interests in relation to part of the determination area (other than in relation to water) are the rights to possession, occupation, use and enjoyment of that area to the exclusion of all others. In relation to the remainder of the determination area (other than in relation to water), they are non-exclusive rights to:

- be present on the area, including by accessing, traversing and camping (but with 'camping' not to include either permanent residence or the construction of permanent structures or fixtures);
- light fires on the area for cultural, spiritual or domestic purposes (including cooking) but not for the purpose of hunting or clearing vegetation;
- take, use, share and exchange 'traditional natural resources' (as defined in the determination) for non-commercial, cultural, spiritual, personal, domestic or communal purposes; and
- maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from harm.

Subject to some qualifications, the nature and extent of the native title rights and interests in relation to water are the non-exclusive rights to hunt and fish in or on, and gather from, the water and to take and use the water but only for non-commercial cultural, spiritual, personal, domestic or communal purposes.

There are no native title rights in, or in relation to, minerals as defined in the *Mineral Resources Act 1989* (Qld) and petroleum as defined in the *Petroleum and Gas (Production and Safety) Act 2004* (Qld). 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. The nature and extent of non-native rights and interests in relation to the determination area (or respective parts thereof) are also set out in the determination, as is the relationship between the two sets of rights (native title and non-native title), as required by s. 225.

Ampetyane v Northern Territory [2009] FCA 834

Reeves J, 7 August 2009

Issue
The issue in this case was whether the Federal Court should make a determination of native title pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA) in terms of proposed consent orders. The court decided to do so. The non-exclusive native title 'right to be accompanied' by non-native title holders recognised in this determination is noteworthy.

Background
This determination is in respect of approximately 117,600 hectares of land in the Northern Territory comprising the eastern half of the Pine Hill pastoral lease. The claimant application

it relates to was made in July 1999. In 2004, the applicant provided the Northern Territory government with an anthropological report that was assessed by Emeritus Professor Basil Sansom, as was a supplementary anthropological report provided in October 2006. In February 2007, the territory indicated it was prepared to enter into an indigenous land use agreement and join in proposing a determination be made by the court to settle the proceedings. In March 2009, the territory Cabinet instructed the solicitor for the territory to agree to the proposed consent determination of native title. The applicant and the territory filed a statement of agreed facts, a joint tenure report and joint submissions and asked the court to make an order in the terms of a minute of proposed consent determination.

Requirements of s. 87 satisfied

Justice Reeves was satisfied that the requirements of ss. 87(1)(a) and (b) and 94A of the NTA had been met and that the court had power to make the consent determination sought. His Honour went on to consider whether it was appropriate to make the order 'reflecting the agreement reached by the parties' as contemplated by s. 87—at [10] to [17].

The court was satisfied that:

- the parties had had the benefit of independent, competent legal representation,
- the terms of the minute were unambiguous and clear;
- the agreement had been produced as a result of negotiation;
- the territory government had taken a real and significant interest in the proceedings;
- the joint submissions of the applicant and territory indicated that the parties were in agreement that there was adequate evidence to support the consent determination, with the term 'adequate evidence' taken to reflect the fact that there is a 'credible or arguable basis for the application'—at [18] to [19], referring to *Lovett v Victoria* [2007] FCA 474 at [37] to [38].

Decision

Therefore, his Honour found that it was appropriate to make the order sought by the parties. The court congratulated the parties on reaching agreement, noting that the order of the court did not grant something new to the Ilkewartn and Ywel peoples. It merely recognised what they had long held—at [20] and [22] to [24].

Determination

The persons holding the common or group rights comprising the native title in relation to the determination area are the Aboriginal persons who are:

- members of the Ilkewartn and Ywel Anmatyerr landholding groups by virtue of descent (including adoption) through father's father, father's mother, mother's father and mother's mother (with some further refinement as to what that means in any particular case);
- recognised and accepted as members of one or both of the Ilkewartn and Ywel Anmatyerr landholding groups by senior members of those landholding groups on the basis of one or more defined non-descent based connections including spiritual identification with, and responsibility for, the area, conception and/or birthplace affiliation with the area, long term residence of the area, close kinship ties (including intermarriage), shared sub/section and/or moiety affiliation and authority and responsibility for shared Dreaming tracks and sacred sites connected with the area.

The Ilkewartn Ywel Aboriginal Corporation is the prescribed body corporate pursuant to s. 57(2) of the NTA.

The native title rights and interests recognised include the right to:

- access, travel over and live on that area, including (for the latter purpose) to camp, erect shelters and other structures;
- hunt, gather and fish on that area, take and use the natural resources of that area, access, take and use natural water on or in that area and to light fires for domestic purposes but not for the clearance of vegetation;
- access, maintain and protect sites and places on or in the determination area that are important under traditional laws and customs;
- conduct and participate in certain cultural activities;
- make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves as being governed by the traditional laws and customs acknowledged by the native title holders;
- share or exchange natural resources obtained on, or from, the determination area (including traditional items made from the natural resources).

Also recognised is a non-exclusive right to be accompanied on the land and waters by persons who, although not native title holders:

- 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
- are required by the native title holders to assist in, observe or record traditional activities on the determination area.

There are no native title rights and interests in:

- minerals as defined in s. 2 of the *Minerals (Acquisition) Act* (NT);
- petroleum as defined in s. 5 of the *Petroleum Act* (NT); or
- prescribed substances as defined in s. 3 of the *Atomic Energy (Control of Materials) Act 1946* (Cwlth) and/or s. 5(1) of the *Atomic Energy Act 1953* (Cwlth).

The non-native title rights and interests recognised in the determination include:

- the territory's interests as the grantee of an energy supply easement under the *Crown Lands Act* and the interests of NT Gas Pty Ltd as the grantee of rights pursuant to that easement and as holder of a pipeline licence under the *Energy Pipelines Act* (NT);
- the rights of Aboriginal persons (whether native title holders or not) pursuant to ss. 38(2) to 38(6) of the *Pastoral Land Act 1992* (NT) and by virtue of the *Northern Territory Aboriginal Sacred Sites Act* 1989 (NT).

Wilson v Northern Territory [2009] FCA 800

Reeves J, 31 July 2009.

Issue

The issue in this case was whether the Federal Court should make a determination of native title pursuant to ss. 13 and 87 of the *Native Title Act 1993* (Cwlth)(the NTA) in terms of proposed consent orders. The court decided to do so. The recognition of differentiated rights and interests as between the native title holders is noteworthy.

Background

The claimant application relevant to this case covered part of the town of Elliott in the Northern Territory. It was filed on 6 July 2001. A written agreement relating to the whole of the area was filed on 15 July 2009. The proposed determination area was part of Mudburra-Jingili country lying to the south and east of the area where native title was recognised in *King v Northern Territory* [2007] FCA 1498, summarised in *Native Title Hot Spots* Issue 26. The claimants in these proceedings were the same estate groups as those recognised as native title holders in that determination.

Requirements of s. 87

Justice Reeves noted (among other things) that:

- the discretion conferred by s. 87(1) must be exercised judicially;
- the court must have regard to the objects and purposes of the NTA, one of the most important of which is the resolution of disputes by negotiation and agreement;
- section 87 should be regarded as the opportunity for the court to recognise the parties' success in reaching a negotiated outcome and facilitate the agreement reached by making an appropriate determination in accordance with its terms—at [12] to [14].

Lovett v Victoria [2007] FCA 474 at [37] (summarised in *Native Title Hots* Spots Issue 25) and *Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229 at [29] were cited with approval.

Decision

The court was satisfied both that the orders sought were within power and that it was appropriate to make them because:

- the court had jurisdiction to make the orders pursuant to s. 81 of the NTA and there was nothing to suggest that power had been exceeded;
- the parties had independent competent legal representation and the agreement had been reached by negotiation
- the agreement was in writing, signed by or on behalf of the parties and filed with the court;
- material, including two anthropological reports, supported the conclusion that the claimants had native title in the area concerned;
- the interests of the community generally had been properly considered by the territory government; and
- the proposed orders were clear and set out the matters in s. 225, thereby satisfying the requirements of s. 94A of the NTA—at [4], [7] to [10] and [17] to [19].

Determination

Native title was determined to exist over part of the determination area (see Schedule C). Over the remainder, it was determined that native title did not exist (see Schedule D). The determination area comprises part of Mudburra-Jingili country. The native title holders are the members of the Elliott (Gurungu/Kulumintini) estate group, together with certain other

Aboriginal people who, in accordance with traditional law and custom, have rights and interests in respect of the determination area, 'subject to the rights and interests of' the Elliott (Gurungu/Kulumintini) estate group members. Those 'other Aboriginal people' are the members of the 14 neighbouring Mudburra or Jingili estates specified in clause 6(a) of the determination and the spouses of the Elliott (Gurungu/Kulumintini) estate group. Each estate group includes persons who are members of that group by reason of:

- patrilineal descent;
- his or her mother, father's mother or mother's mother being or having been a member of the group by reason of patrilineal descent;
- being adopted or incorporated into these descent relationships.

In relation to that part of the area identified in Schedule C to which s. 47B of the NTA applies, and subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders, native title is comprised of the right to possession, occupation, use and enjoyment to the exclusion of all others. In relation to the remainder of the area identified in Schedule C (the non-exclusive areas), the native title rights and interests of the Elliott (Gurungu/Kulumintini) estate group members are specified non-exclusive rights to use and enjoy the area, which include the right to do the following in relation to that area:

- travel over, move about and have access;
- hunt and fish, gather and use natural resources such as food, medicinal plants, wild tobacco, timber, stone and resin, take and to use natural water;
- live and camp (and, for the purposes of camping, erect shelters and other structures);
- light fires for domestic purposes but not to clear vegetation;
- conduct and participate in cultural activities and practices;
- maintain and protect sites and places of significance under traditional laws and customs;
- share or exchange subsistence and other traditional resources;
- be accompanied by persons who, although not native title holders, are people :
    - required by traditional law and custom for the performance of ceremonies or cultural activities on the areas;
    - who have rights in relation to the areas according to the traditional laws and customs acknowledged by the estate group members;
    - required by the estate group members to assist in, observe, or record traditional activities; and
- conduct activities necessary to give effect to these rights—at [9].

These rights and interests are subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders.

In relation to the non-exclusive areas, the other Aboriginal people who are native title holders (as defined in clause 6) have the following non-exclusive rights to use and enjoy those areas:

- travel over, to move about and to have access;
- hunt and fish on the land and waters;
- gather and to use the natural resources such as food, medicinal plants, wild tobacco, timber, stone and resin;
- take and to use the natural water;

- camp;
- light fires for domestic purposes but not the clearance of vegetation; and
- conduct activities necessary to give effect to these rights—at [10].

These rights are subject to both the rights and interests of the Elliott (Gurungu/Kulumintini) estate group members and the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders.

All of the native title rights and interests are subject to, and exercisable in accordance with, valid laws of the territory and the Commonwealth. In the non-exclusive areas, those rights and interests are 'for the personal or communal needs of the native title holders which are of a domestic or subsistence nature and not for any commercial or business purpose'. Other interests recognised in the determination area included those of Elliott District Community Government Council, NT Gas Pty Ltd and Aboriginal persons under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).

A prescribed body corporate for the purposes of ss. 57(2) and 57(3) of the NTA is to be nominated within 12 months. The parties have liberty to apply to establish:
- the precise location and boundaries of public works and adjacent areas; and
- to establish whether any of the improvements noted in the determination were constructed unlawfully.

Wik and Wik Way Native Title Claim Group v Queensland [2009] FCA 789

Greenwood J, 29 July 2009

Issue
The issue in this case was whether the Federal Court should make a determination of native title in the terms proposed by the parties pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (NTA). The court decided to do so. The determination took effect on the registration of an Indigenous Land Use Agreement (ILUA) on 5 October 2009.

Background
This is the fourth consent determination of native title in favour of the Wik and Wik Way Peoples. (For the other determinations, see *Wik Peoples v Queensland* [2000] FCA 1443 and *Wik Peoples v Queensland* [2004] FCA 1306.) It covers an area on the western side of Cape York Peninsula landward of the high water mark bounded by the Embley and Edward Rivers and the upper reaches of the watercourses that drain into the Gulf of Carpentaria. The related claimant application was filed on 14 September 2001. The respondent parties were the State of Queensland, Ports Corporation of Queensland, Cook Shire Council, Albatross Hire Pty Ltd, 15 commercial fishing licence holders represented by the Queensland Seafood Industry Association and Rio Tinto. The application was amended in May 2009 to remove the sea component and this proposed draft consent agreement filed on 6 July 2009.

Requirements of s. 87 satisfied
Justice Greenwood was of the view that:

- the NTA recognises and encourages resolution by mediation, negotiation and agreement without the need for a hearing, assessment of evidence and fact-finding by the court;
- the court need not consider 'the body of material that would be available' in the course of a contested hearing but it 'ought to have regard to sufficient material which is capable of demonstrating that the agreement and the proposed orders are "rooted in reality"'—at [16], referring to Chief Justice French in 'Native Title – A Constitutional Shift?' (University of Melbourne Law School, JD Lecture Series, 2009).

His Honour concluded that:
- all parties were represented by experienced independent lawyers and the agreement was freely made;
- negotiations had been taking place since 1996 and the state had given appropriate consideration to the issues raised;
- there had been a long history of engagement with the Wik and Wik Way Peoples, with anthropological reports and affidavits being submitted in 1997, 2000, 2001 and 2004;
- the applicant had retained the experienced linguist and anthropologist, Professor Peter Sutton, who had worked with the claim group and their predecessors since 1976—at [18] to [23].

The court was satisfied that:
- there was extensive evidence of inhabitation of the area by Aboriginal people from at least 1606;
- the Wik language had evolved over at least 300 years in the area;
- the anthropological material demonstrated that the Wik and Wik Way Peoples were descended from a society of Aboriginal people who were in occupation of the area at sovereignty and who formed a society united by their acknowledgement and observance of a normative body of traditional laws, customs and beliefs;
- through their continued acknowledgement and observance of these normative laws and customs, the Wik and Wik Way Peoples had, since sovereignty, maintained a connection with the determination area;
- the content of those native title rights and interests which derive from the practice of traditional laws and customs had been established;
- the proposed consent orders were consistent with the anthropological material and addressed the elements of s. 225 of the NTA and
- it was within the court's power and appropriate to make a determination of native title in terms of the proposed consent orders—at [24] to [29].

Decision
As all of the requirements for doing so were found to have been met, the court made the orders and the determination of native title sought by the parties, noting that this was 'a proud day for the Wik and Wik Way Peoples'—at [43] and [44].

Determination
Native title is held by the Wik and Wik Way Peoples in accordance with the traditional laws acknowledged and traditional customs observed by them as common law holders. Native title is not to be held in trust. The Ngan Aak-Kunch Aboriginal Corporation, the prescribed body corporate in relation to the three previous Wik and Wik Way determinations, was

determined to be the prescribed body corporate in relation to this determination—see s. 59A(2).

The following non-exclusive native title rights and interests were recognised in relation to the determination area (other than in relation to water):

- live on, camp and erect shelters and other structures;
- access, be present on, move about in and on and use area;
- take and use the natural resources of area for the purpose of satisfying the personal, domestic or non-commercial communal needs;
- maintain and protect from harm by lawful means sites and places of significance;
- conduct social, religious, cultural, spiritual and ceremonial activities;
- hunt and gather in, on and from area for the purpose of satisfying personal, domestic or non-commercial communal needs; and
- inherit and succeed to the native title rights and interests.

The nature and extent of native title rights and interests in relation to water, including tidal waters, are non-exclusive rights to hunt and fish in or on, gather and to take water, use and enjoy water for the purpose of satisfying the personal, domestic or non-commercial communal needs. The nature and extent of non-native title rights and interests in relation to the determination area (or respective parts thereof) are also set out in the determination, as is the relationship between the two sets of rights (native title and non-native title), as required by s. 225.

Kuuku Ya'u People v Queensland [2009] FCA 679

Greenwood J, 25 June 2009

Issue

The issue was whether the Federal Court should make a determination of native title recognising the Kuuku Ya'u People as native title holders pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA). The court decided to do so. The determination became effective if, and when, the details of three Indigenous Land Use Agreements were entered in the Registrar of Indigenous Land Use Agreements. The last of those agreements was registered on 17 November 2009.

Background

The Kuuku Ya'u People's claimant application, which was made in 1995, covered land, waters, reefs and islands in Cape York, Queensland. Two further applications were made in April 1997 and May 1998. All three were consolidated in 1999. The respondent parties were the Commonwealth, the State of Queensland, the Australian Maritime Safety Authority, Cook Shire Council, Lockhart River Aboriginal Shire Council and two fishing licence holders. The parties reached an agreement to resolve the proceedings after mediation by the National Native Title Tribunal, supervised by the court. Three Indigenous Land Use Agreements (ILUAs) were made as part of the agreement to resolve the applications.

Orders within power and appropriate

Subsections 87(1) and (2) provide that the court may make orders in terms of an agreement reached by the parties only if the orders are within power and it appears 'appropriate' to do so. His Honour observed that this was (among other things) because:

> An order ... made under the Native Title Act, recognising the traditional laws and customs of Aboriginal People, is an order made in the exercise of the judicial power of the Commonwealth in accordance with the Australian Constitution and ... reflects ... an independent determination of national inclusion that binds not only the parties to the claim but is good against the whole world—at [3].

As was noted, pursuant to s. 94A, the proposed order must set out details of the matters mentioned in s. 225. For the reasons set out below, his Honour was satisfied that the orders the parties sought in this case were within the court's power and that it was appropriate to make those orders—at [10] to [11] and [22].

Evidence required for consent determination

Four 'important things' to keep in mind when determining whether it appears appropriate to make the orders sought by the parties were noted:

- the NTA encourages resolution of claims by 'mediation ...and ... agreement without the need for a hearing' and so the court 'will not lightly second-guess' the agreement by requiring 'formal proof';
- the court will place emphasis on whether the agreement 'is genuine and freely made on an informed basis' by all parties, represented by experienced independent lawyers and in the case of a state party, whether appropriate consideration has been given to the claim;
- a state government is 'likely to be familiar with' the matters that 'might usefully inform aspects of a proposed agreement as to native title rights subsisting in Aboriginal people'; and
- in light of these three considerations, it was not necessary for the applicant to file 'a substantial body of evidence' as to the merits of the claim 'as though findings of fact were required to be made'—at [12] to [16].

Greenwood J acknowledged it may be necessary to provide some evidence showing the agreement is 'rooted in reality' and was of the view that a 'focused synopsis of the primary material' was 'helpful' in this context—at [15].

In this case, the affidavits of two anthropologists, David Thompson and Athol Chase, along with their report called 'Overview of Connection Materials' (the report) were before the court. Among other things, the report addressed evidence of contact, continuity of occupation and the content of normative laws and customs of the Kuuku Ya'u People and also drew on material gathered for land claims under the *Aboriginal Land Act* 1991 (Qld). Three further 'extensive' reports were provided to the state and the Commonwealth governments between March 1999 and February 2006.

The court was satisfied the material before it demonstrated that:

- the Kuuku Ya'u People were descended from a society of Aboriginal people who were in occupation of the land and waters of the determination area at sovereignty and who formed a society united by their acknowledgement and observance of a normative body of traditional laws, customs and beliefs;

- through their continued acknowledgement and observance of these normative laws and customs, the Kuuku Ya'u People had, since sovereignty, maintained a connection to the determination area;
- the content of the native title rights and interests which derived from the practice of traditional laws and customs had been identified—at [21].

According to his Honour, the agreement provided for consent orders that were 'entirely consistent with the anthropological material'. His Honour was also satisfied that:
- the relevant materials were made available to the Commonwealth and the state;
- the state had given appropriate consideration to the claim; and
- the parties had reached an informed agreement with the assistance of 'independent experienced legal advisers'— at [20] and [21].

Determination
The Kuuku Ya'u People (defined as the descendents of named individuals and persons adopted by them according to Kuuku Ya'u traditional law and customs) are the native title holders. (In some cases, the determination specifies that the native title holders are the descendants resulting from a particular union of those named individuals.) In some parts of the determination area (and other than in relation to water), the native title consists of the right to possession, occupation, use and enjoyment to the exclusion of all others. Over the remainder, the non-exclusive native title rights (other than in relation to water) consist of the right to:
- be present on (including by accessing, traversing and camping on) the determination area, with 'camping' defined not exclude permanent residence or the construction of permanent structures or fixtures;
- take, use, share and exchange traditional natural resources from the determination area for non-commercial cultural, spiritual, personal, domestic or communal purposes;
- maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from harm;
- light camp fires on the determination area for cultural, spiritual or domestic purposes (including cooking) but not for the purpose of hunting or clearing vegetation.

Native title in relation to water comprises the non-exclusive right to:
- hunt and fish in or on, and gather from, the water for non-commercial cultural, spiritual, personal, domestic or communal purposes;
- take and use the water for non-commercial cultural, spiritual, personal, domestic or communal purposes.

There are no native title rights in, or in relation to, minerals as defined by the *Mineral Resources Act* 1989 (Qld) and petroleum as defined by the *Petroleum Act* 1923 (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld). The native title rights and interests are subject to and exercisable in accordance with both the laws of the state and the Commonwealth and the traditional laws acknowledged and traditional customs observed by the native title holders. Other interests recognised in the determination include the rights and interests of:
- the parties under three ILUAs;

- the state and public under the *Nature Conservation Act 1992* (Qld) in relation to the use and management of certain national parks and the state and others under the *Nature Conservation Act* 1992 (Qld), the *Fisheries Act 1994* (Qld), the *Marine Parks Act* 2004 (Qld) and the *Coastal Protection and Management Act* 1995 (Qld);
- the Great Barrier Reef Marine Park Authority, the Australian Maritime Safety Authority and those with grants made under the *Fisheries Management Act* 1991 (Cwlth).

Prescribed body corporate

Northern Kuuku Ya'u Kanthanampu Aboriginal Corporation was a 'prescribed body corporate' for the purposes of ss. 56(2) and (3) of the NTA and Reg 4(1) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cwlth). Reg 4(2) was satisfied. Therefore, when the determination of native title became effective on 17 November 2009, it became the prescribed body corporate. Following the entry of its details in the National Native Title Register, it became a registered native title body corporate that holds the Kuuku Ya'u People's native title on trust—see [23] to [27].

Hunter v Western Australia [2009] FCA 654

North J, 11 June 2009

Issue

The issue in this case was whether the Federal Court should make a determination of native title pursuant to s. 87A of the *Native Title Act 1993* (Cwlth) (NTA) in terms of proposed consent orders. The court decided to do so. The rights recognised in relation to pearl oyster shell and the native title 'right to be accompanied' are noteworthy.

Background

The Nyangumarta People, who are descendants of twelve sets of apical ancestors, made two claimant applications that covered 39,931 sq km in northwest Western Australia, including the coast along Eighty Mile Beach and extending east into the Great Sandy Desert. Most of the area is unallocated Crown land. Part is subject to pastoral leases. The respondents were the State of Western Australia, the Western Australian Fishing Industry Council (Inc) (WAFIC), the Commonwealth, the pastoral lessees, Telstra Corporation Limited, certain persons on behalf of the Njamal People and the Yamatji Marlpa Barna Baba Maaja Corporation. In February 2007, the applications were referred to the Tribunal for mediation pursuant to s. 86B of the NTA. With the Tribunal's assistance, the parties reached agreement as to the terms of a determination of native title and orders in respect of part of the area covered by the first application and all of the area covered by the second in February 2009. The balance of the area covered by the first application is now overlapped by a claimant application made on behalf of the Karajarri People and will be finalised at a later date. Section s. 87A was relied upon in relation to the first application and s. 87 in relation to the second. However, as Justice North noted, in this case the 'substance' was the same—at [11].

Should the orders be made?

North J was satisfied that the court had power to make determinations in the terms sought by the parties. The question was whether it was 'appropriate' to do, referring to ss. 87 and 87A. According to the court:

- this requirement 'must be construed in the context' of the NTA 'as a whole and in conformity with' its purpose;
- given 'mediation and ultimate agreement' are the primary means for resolving claims under the NTA, the court's 'main concern' was 'whether there has been a genuine agreement which was made freely and on an informed basis';
- whether the parties had independent and competent legal representation and whether the state parties had given appropriate consideration to the applicant's claims was relevant;
- the emphasis on mediation towards agreement is designed to minimise cost and delay'—at [16] to [17].

According to his Honour:

> In most circumstances the fact of agreement will be sufficient evidence upon which the Court may act... . It will not ordinarily be necessary for the Court to be provided with evidence of the primary facts substantiating native title—at [17].

In this case, all parties were legally represented. As to the state's consideration of the applications, Gary Hamley (from the state's Office of Native Title or ONT) gave evidence by affidavit that (among other things) agreement was reached via the process set out in ONT's connection guidelines. The connection report, which was also provided to the court subject to some deletions to maintain confidentiality, was 240 pages in length. North J thought it was 'clearly appropriate to make the orders and the determination sought by the parties' because the evidence demonstrated both that the state had given 'detailed and comprehensive' consideration to the claim and that the applicant had provided 'a strong basis' to support the claim—at [26].

Evidence required for consent determination

In the light of a 'recurring concern' about the 'undue burden' being placed on claimants, the court wrote to the parties. The state responded with 'a helpful and constructive submission which explained ... that the detail of the report in this case was provided by the applicants as a matter of ... choice'. However, North J hoped the state would 'give careful consideration' in future 'to easing the present unnecessary burden either placed on or assumed by native title applicants'—at [24] to [25].

Prescribed body corporate

The court was satisfied it was appropriate to determine that the Nyangumarta Warrarn Aboriginal Corporation be the trustee prescribed body corporate for the common law holders of native title pursuant to s. 55 of the NTA because:

- the evidence showed it was registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cwth) and so it was a prescribed body corporate for the purposes of ss. 56(2) and 56(3) and pursuant to reg 4(1) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cwth);
- as required by s. 56(3), the corporation's 'rule book' satisfied the court that it holds the relevant native title rights and interests in accordance with the regulations;
- the Nyangumarta People filed a written nomination as required by s. 56(2)(a)(i) and the corporation filed a written consent to the nomination in accordance with s. 56(2)(a)(ii)—at [27] to [30].

Decision
For the reasons summarised above, his Honour decided it was appropriate to make the orders sought—at [33].

Determination
The Nyangumarta People were determined to be the native title holders in relation to the determination area. However, as Nyangumarta Warrarn Aboriginal Corporation was determined to be the prescribed body corporate to hold the native title in trust, and it is now registered on the National Native Title Register, pursuant to s. 224 the corporation is the 'native title holder'.

Subject to some qualifications, the nature and extent of the rights and interests in relation to areas where native title had not been extinguished, or where extinguishment must be disregarded, are:

- an entitlement as against the whole world to possession, occupation, use and enjoyment of the land and waters of that part to the exclusion of all others (except in relation to flowing and underground water); and
- the right to use and enjoy the flowing and underground waters, including the right to hunt, fish and gather for personal, domestic or non-commercial communal needs.

Subject to the same qualifications, over the remainder of the determination area (except inter-tidal areas, see below), the native title rights and interests confer specified non-exclusive rights on the native title holders (including the right to conduct activities necessary to give effect to those rights) such as:

- the right to access and move freely within that area;
- the right to live, 'being [the right to] to enter and remain on the land, to camp and erect shelters and other structures for that purpose';
- the right to do specified activities, including the right to be accompanied by people who, although not native title holders, are spouses, parents and children of native title holders or are required by traditional law and customs for the performance of ceremonies or cultural activities or who have rights in relation to any part of the area according to the traditional laws and customs acknowledged by the native title holders.

In inter-tidal areas, the rights recognised are rights to:

- access, remain within, and move freely through and within those areas;
- do specified activities, e.g. fish and hunt, take flora, fauna and traditional resources and share and exchange natural resources for personal, domestic and non-commercial communal needs, engage in cultural activities and protect places and sites of importance from physical harm.

The nature and extent of the native title rights and interests in relation to pearl oyster (*P maxima*) are specifically addressed and are:

- the right to take live adult *P maxima* for the purposes of sustenance and using its shell for traditional ceremonial activities (including the ceremonial exchange of goods);
- the right to take shell of dead *P maxima* for the purpose of using it for traditional ceremonial activities (including the ceremonial exchange of goods).

However, this does not include taking *P maxima* when using breathing apparatus (other than a snorkel or its equivalent) or using it for sale, barter or exchange other than exchanges made in accordance with traditional ceremonies.

The native title rights and interests include rights to ochre only to the extent that it is not a mineral pursuant to the *Mining Act 1904* (WA) and do not include other minerals and petroleum as defined in the *Mining Act 1904* (WA), the *Mining Act 1978* (WA), the *Petroleum Act 1936* (WA) and the *Petroleum and Geothermal Energy Resources Act 1967* (WA). 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 relation to determination area are recognised, such as those held under the pastoral leases and by fishing, pearling and mining parties.

Nambucca Heads Local Aboriginal Land Council v Minister for Lands [2009] FCA 624

Perram J, 10 June 2009

Issue

The issue before the court was whether to make a determination that native title did not exist in relation to an area subject to a non-claimant made by Nambucca Heads Local Aboriginal Land Council (the council) under the *Native Title Act 1993* (Cwlth) (NTA).

Background

The area concerned (lot 526) was conveyed in fee simple to the council pursuant to s. 36 of the Aboriginal Land Rights Act (NSW) (ALR Act). Subsection 36(9) of that Act provided the transfer was 'subject to any native title rights and interests existing in relation to the lands' and s. 40AA provided that the council:

> [M]ay not sell, exchange, lease, dispose of, mortgage or otherwise deal with land vested in it subject to native title ... under section 36 (9) ... unless the land is the subject of an approved determination of native title.

In 2008, the council resolved to approve entry into a call option with the trustee of a unit trust owned equally between Indigenous Business Australia and the council for the transfer of lot 526 (and another lot). A non-claimant application was made in order to comply with s. 40AA of the ALR Act. A person who holds a 'non-native title interest in relation to the whole of the area in relation to which the determination is sought' may make a 'non-claimant application' (see ss. 61 and 253). There was 'no doubt' that the council had such an interest in lot 526—at [8] to [9].

There was nothing in the material before the court to indicate native title subsisted in lot 526. Section 86G of the NTA provides (among other things) that, if a non-claimant application is 'unopposed', the court may make an order in the terms of sought by the applicant (the council) without holding a hearing if the order is within power and it appears appropriate to do so. The application was 'unopposed' because both of the respondents (the Minister for

Lands and NTSCORP Limited) notified the court in writing that they did not oppose the making of the orders sought.

Decision
Justice Perram determined that no native title exists in relation to the land subject to the application and that 'such determination is an approved determination' as required by s 40AA of the *Aboriginal Land Rights Act 1983* (NSW)—at [12] to [13].

Gandangara Local Aboriginal Land Council v Minister for Lands [2009] FCA 1136

Jagot J, 30 September 2009

Issue
The issue in this case was whether the Federal Court should make a declaration that no native title exists in relation to certain land in accordance with s. 86G the *Native Title Act 1993* (Cwlth) (the NTA). The court concluded the declaration should be made.

Background
The declaration sought related to a non-claimant application made under the NTA by the Gandangara Local Aboriginal Land Council (the council). It covered a parcel of land transferred in freehold to the council by the State of New South Wales on or around 31 March 2003 pursuant to the *Aboriginal Land Rights Act 1983* (NSW). As the court noted, there were certain restrictions on dealings in a memorandum on the title to the land. Compliance with one of those restrictions was the reason for seeking a determination that no native title existed. Notice of the application was published in accordance with s. 66 of the NTA with the notification period ending on 10 May 2009. There was no response to the notice. Both of the respondents (the Minister for Lands and NTSCORP Ltd) indicated they did not oppose orders in, or consistent with, the terms sought by the council. Justice Jagot was satisfied the order sought was within the court's power and that the other requirements of s. 86G were met—at [6], [7] and [8].

Decision
His Honour decided to made a declaration that no native title existed in relation to the area subject to the application in the terms sought by the council.