NATIVE TITLE HOT SPOTS

NATIONAL NATIVE TITLE TRIBUNAL LEGAL NEWSLETTER September 2010, ISSUE 33

Contents

National Native Title Tribunal

Reconstituting the applicant - s. 66B does not cover the field

Lennon v South Australia [2010] FCA 743

Mansfield J, 16 July 2010

Issue

In this case, two of six people authorised pursuant to s. 251B to make a claimant application under the *Native Title Act 1993* (Cwlth) (NTA) had died. The question was whether those persons could be removed without an application under s. 66B to replace the current applicant with a new applicant comprised of the remaining four. Justice Mansfield held that a s. 66B application was not necessary. Rather, the four who remain continue to be 'the applicant' and may continue to deal with all matters arising under the NTA in relation to the application. Therefore, those four people may apply to the Federal Court pursuant to s. 62A and the court may then remove the name of the deceased person(s) 'as a party'. His Honour was of the view that O 6 r 9 of the *Federal Court Rules* (FCR) could also be relied upon—at [1] and [35].

In coming to this conclusion, Mansfield J disagreed with the finding by Justice Siopis in *Sambo v Western Australia* (2008) 172 FCR 271 (*Sambo*) at [30] that, since the 2007 amendments to the NTA, the only means by which changes can be made to the composition of the applicant is 'through' s. 66B of the NTA. See also *Bullen v Western Australia* [2010] FCA 900 (*Bullen*) at [60] where Siopis J repeats this view and *Roe v Kimberley Land Council Aboriginal Corporation* [2010] FCA 809 (*Roe v KLC*) where Justice Gilmour appears to take the same view as Siopis J. Both cases are summarised in *Native Title Hot Spots* Issue 33.

Leave to appeal sought

Presumably in recognition of the need for an authoritative decision to resolve the difference of opinion, the Commonwealth filed an application for leave to appeal from Mansfield J's judgment and sought referral of that application to the Full Court. The first directions hearing is scheduled for 29 September 2010.

Comment on order – is registration test triggered?

The order made was that the application be amended to delete the names of the two deceased persons. When the amended application is filed, s. 64(4) will require referral by the court's Registrar to the National Native Title Tribunal's Native Title Registrar, who will then have to decide whether the amended application must be tested for registration. All amended applications must be tested unless either ss. 190A(1A) or 190A(6A) applies. An amendment to change the composition of the applicant is not within the scope of either of those provisions. Therefore, it seems the amended application will have to be tested. If that is the result, then it runs counter to the current legislative policy expressed in the NTA.

In the Explanatory Memorandum (EM) to the Native Title Amendment (Technical Amendment) Bill 2007 at [1.249], it was said that:

> Item 82 would amend section 66B to expand the circumstances in which the Court may hear and determine an application to replace the applicant. To clarify the operation of the provisions, item 79 would repeal subsection 64(5) [which provided for the amendment of a claimant application to replace the applicant]. This would mean that all amendments to an application to replace an applicant would be made following an application under section 66B. The Registrar would not be required to reapply the registration test to applications amended to replace the applicant.

This was not considered by the court. Nor was the fact that, if the claim made in the application is registered and the court makes the order pursuant to s. 62A or O 6 r 9 of the FCR, then (unless the application is amended to reflect this change, then referred, tested and accepted for registration), the Tribunal's Registrar has no express power to amend the Register of Native Title Claims (RNTC) to reflect the change in composition of the applicant. Further, if no amended application is referred to the Registrar, then there will be a discrepancy between the applicant in the proceeding and the applicant as recorded on the RNTC, which has the potential to impact deleteriously on future act matters. This has more serious consequences if s. 62A or O 6 r 9 are used to add new people to 'the applicant' than it does, for example, if deceased persons are removed via those means.

By contrast, if a s. 66B(2) order is made, s. 66B(3) requires the court's Registrar to notify the Tribunal's Registrar as soon as practicable of the name and address for service of the new applicant and, if the claim made in the application is registered, s. 66B(4) requires the Tribunal's Registrar to amend the RNTC to reflect the order without the application of the registration test. This, along with the other 'knock on' effects noted above and what is said in the EM at [1.249], provide support for the view expressed in *Sambo*, *Bullen* and, seemingly, *Roe v KLC*.

Background

This case concerned the Antakirinja Matu-Yankunytjatjara (AMY) claimant application, originally made in 1995. Prior to it being amended in 1999, the native title claim group authorised six people to make the amended application. On the filing of the amended application, s. 61(2) of the NTA applied so that those six people were jointly 'the applicant'. When it was further amended in 2004, those six people jointly swore a further affidavit attesting to the fact that they were duly authorised.

Recently, negotiations between the applicant and other parties had progressed well and the court had been told there was 'a good prospect' of agreement as to the terms of a consent determination. In October 2009, Mansfield J gave the applicant leave 'to amend the claim in such manner as it may be advised to accommodate' the resolution of an overlap with another claimant application. Liberty to seek that any such amendment not be allowed at the next directions hearing (which was to be held in March 2010) was also granted.

Although it is not mentioned in the judgment, this issue arose because there was a meeting of the AMY claim group in Cooper Pedy on 13 November 2009 where a resolution was passed to authorise the applicant to amend the area covered by the application but before the amended application was filed on 12 March 2010, two of those who constituted the applicant died. The amended application was accompanied by an affidavit dated 9 March 2010 jointly

sworn by the four remaining authorised persons attesting to the fact that (among other things):

- We are authorised by all the persons in the native title claim group to make the amended application and to deal with matters arising in relation to it; and
- We were given the authority referred to in paragraph (d) above at a meeting of claim group members in Coober Pedy on 13 November 2009 to amend [the AMY application], the amended application being attached to this affidavit and ... dated 1 March 2010.

[Note that the swearing of a joint affidavit accords with O 78 r 6(2B)(b) of the FCR, which requires that if 'the applicant is a number of individuals jointly ... the accompanying affidavit must be sworn or affirmed by each individual', i.e. a single affidavit jointly sworn by all the individuals comprising the applicant. However, this is not the usual practice.]

The amended application included the two deceased persons in the group constituting the applicant, which was to be expected since the leave to amend granted on 8 October 2009 did not extend to changing the constitution of the applicant. At a directions hearing on 31 March 2010, a question arose as to whether the remaining four authorised persons could continue to give instructions as 'the applicant'. That question was listed for hearing.

At the hearing in April 2010, the applicant's solicitor indicated an order was sought to remove the deceased persons pursuant to s. 64(1C) [which states that s. 64(1B) 'does not, by implication, limit the amendment of applications in any other way'] and O 78 r 7(3) of the *Federal Court Rules*. It is not clear how reliance could be placed on s. 64(1C). Order 78 r 7 is headed 'Form of amendment of main application'. Order 78 r 7(3) provides that: 'The Court may give the directions and make the orders it considers appropriate '. Relying on *Sambo*, the Commonwealth argued:

- the court had no power to order the removal the deceased persons other than pursuant to s. 66B;
- another meeting of the native title claim group was required to authorise a replacement applicant and then an application brought under s. 66B(1) to replace the current applicant.

Meaning of 'the applicant'

His Honour noted that the NTA provides:

- a claimant application may be made by a person or persons authorised under s. 251B by all the members of the native title claim group;
- the 'applicant' constitutes all of the persons so authorised and is defined as constituting the authorised person or persons jointly, 'as distinct from the native title claim group itself'—at [5] to [6].

However, according to Mansfield J:

> [T]he NT Act does not thereby constitute the applicant as having an independent legal existence. It is a definitional term, referring to the persons authorised under s 251B. An application for determination of native title must be instituted in the names of the authorised persons as the parties ... . [T]he parties making the application are the authorised persons—at [5].

The Commonwealth acknowledged in its submissions that:

> The original authorisation could provide for the authorisation of the named persons or 'such of them as are eligible to act as an applicant and who remain willing and able to act in respect of the application in the future'. Although still requiring a formal change to the named persons described as the applicant in the application for a determination of native title, this would allow the continuation of the remaining named applicants. (Footnotes omitted.)

However, it went on to submit that: 'This does not ... appear to apply to the present case'.

His Honour was concerned that, if the Commonwealth's contention was correct, there was presently no 'applicant' capable of giving instructions. If so:

> [T]he application itself must therefore rest in a nether world: neither truly alive as there is no applicant ... , nor truly dead as it may be revived assuming the native title claim group authorises the remaining four persons constituting the applicant or others to maintain the claim and to make decisions with respect to it, and one or more of those authorised persons on their behalf then applies under s 66B to be substituted as the applicant—at [11].

Note that in *Bullen*, where Siopis J was dealing with a case where all of those who constituted the applicant were dead, it was found that the application did, indeed, go into a kind of suspended animation.

Comment - inference for s. 66B(2)?
With respect, while the authority given was not (apparently) subject to a specific 'willing and able' condition, such a condition could have been implied on the facts of this case. Indeed, his Honour went on to draw that very inference:

> Although it is not express, I consider that the authorisation in its terms is one for them, or so many of them, as continue to be living and able to discharge their representative function to do so. The authorisation contemplated not simply the making of the application, but dealing with matters in relation to it, which (as experience has shown) may extend over a quite lengthy period—at [34].

It is not clear why this assumption could not have been used to support the making of an order under s. 66B(2).

The 'nether world' his Honour speaks of may have more impact in cases where it is said one or more of the applicant's constituents are no longer authorised or that they have exceeded their authority but the application to remove them is contested. In such a case, prompt resolution of the issue via an application under s. 66B(1), with a fresh authorisation meeting if the original authority did not deal with reconstituting the applicant in the circumstances, would appear to be the appropriate course. In any case, if the route offered by Mansfield J in this case (i.e. s. 62A or O 6 r 9) was taken in a contested case, it seems the court would have to inquire as to whether those seeking to remain as 'the applicant' are authorised to do so by the claim group before agreeing to remove anyone from the group that constitutes the applicant.

Effect of the 2007 amendments – s. 66B does not cover the field
Prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth) (the Technical Amendments Act):

- subsection 64(5) provided for a claimant application to be amended to replace the applicant, provided the amended application was accompanied by an affidavit sworn by

the new applicant attesting to the new applicant's authority 'to deal with matters arising in relation to the application';
- section 66B was narrower, in that it did not cover an application to replace the applicant where one or more of the persons jointly comprising the applicant had died, was incapacitated or consented to being removed.

If an application was amended pursuant to s. 64(5) to remove deceased people or those who no long wished to be part of the applicant group, the registration test was triggered. Therefore, in *Butchulla People v Queensland* (2006) 154 FCR 233 (*Butchulla*, summarised in *Native Title Hot Spots* Issue 21), *Chapman v Queensland* (2007) 159 FCR 507 and *Doolan v Native Title Registrar* (2007) 158 FCR 56 (respectively *Chapman* and *Doolan*, both summarised in *Native Title Hot Spots* Issue 24), an alternative way to reconstitute the applicant was sought. In those cases, it was found that, if one or more of those who were authorised to constitute the applicant died or was 'unwilling or unable to act as authorised', then the name of that person could be removed as a 'party' pursuant to O 6 r 9 of the FCR 'without the necessity of a further authorisation' under s. 251B—at [2] and [15].

Order 6 r 9 provides that the court may make an order that a person cease to be a party to a proceeding if that person has been improperly or unnecessarily joined or has ceased to be a proper or necessary party to a proceeding.

The Technical Amendments Act deleted s. 64(5) and substituted a new s. 66B(1) which embraced removal on the additional grounds of death or incapacity and by consent. These amendments were considered in *Sambo* at [27] to [30], where (among other things) Siopis J looked to the intent behind them before finding that:
- since the passing of the 2007 amendments 'there is only one means whereby any changes can be made to the composition of the applicant and that is through s 66B';
- *Butchulla*, *Chapman* and *Doolan* had been 'superseded by the amendments';
- it was not open to the court to remove some of those who constitute the applicant pursuant to O 6 r 9 of the FCR on the basis that each is not 'a proper or necessary party'.

After some discussion, Mansfield J directly disagreed with *Sambo* in taking the view that s. 66B:

> [D]oes not in its terms cover the field so that it is the only means by which a native title claim group can prosecute an application once one of a number of persons who are authorised under s 251B to make and deal with the application has deceased—at [22].

Reference was made to *Doolan* at [125], where it was said that, since one of the purposes of the NTA was to recognise native title wherever it survives, 'the duty of the courts' was 'to ensure that that purpose was achieved ... even if it meant giving a strained construction to or reading words into' the NTA. Mansfield J thought s. 66B(1) should be construed to reflect that approach and to avoid 'potential frustration of the application for a lengthy period', drawing support from the 'practical consequence of the contrary construction' (i.e. that a fresh authority at a claim group meeting must be given in every case). This was seen to be 'obviously antithetical' to the purposes of the NTA at both 'an aspirational level having regard to the Preamble' and 'at the practical level' of how the NTA 'provides for Indigenous persons to make and maintain a claim' under s. 61(1)—at [23], [26] and [32].

Comment – assumption that separate meeting required in every case

With respect, his Honour's concerns about frustrating the process seems to be based on an assumption that s. 66B mandates a claim group meeting to obtain separate authorisation to replace the current applicant before a s. 66B(1) application can be made. However, there is no such directive in s. 66B. Whether or not this would be required would depend on the facts. What is required is credible evidence that those who seek to replace the current applicant are authorised to do so. This is hardly surprising, given that the proper authorisation of a claimant application is a 'fundamental requirement' of the NTA and 'of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration'—see *Moran v Minister of Land & Water Conservation for NSW* [1999] FCA 1637 at [48] and *Daniel v Western Australia* (2002) 194 ALR 278 at [11] respectively.

In uncontested cases where those making a s. 66B application are legally represented and there is evidence that persons included as part of the current applicant are deceased or incapacitated or consent to being removed, it seems that (for the very reasons his Honour notes) an order could be made under s. 66B(2) based on an inference of ongoing authority. And, as noted earlier, in contested cases, it seems the court would have to consider whether or not those seeking to alter the constitution of the applicant are authorised to do so, regardless of whether the application is made under ss. 62A or 66B of the NTA or O 6 r 9 of the FCR.

Proper construction of s. 66B – it's permissive

His Honour found that s. 66B(1):

- was (i.e. prior to the 2007 amendment) and is now permissive;
- indicates a legislative purpose that it not be 'the only means in every circumstance, by which the persons as parties constituting the applicant may be changed';
- is 'empowering' and 'clearly should exist' to enable the claim group to change the persons it authorises in any one or more of the circumstances referred s. 66B(1)(a) from time to time—at [25].

However, his Honour thought it would be 'inconsistent with the autonomy of the claim group that – at considerable expense and delay and inconvenience – it should ... be obliged to proceed' under s. 66B(1). Mansfield J could see no reason why 'the legislature would wish to impose upon a claim group such an obligation' in circumstances where, for example, where one of 20 authorised persons died or became incapacitated and the claim group did not wish to change the remaining authorised persons. Why, he asked rhetorically, would the legislature insist upon a further authorisation meeting? In those circumstances, s. 62A of the NTA or O 6 r 9 of the FCR provide 'a ready and economical means' to make that change—at [26].

(With respect and as noted above, s. 66B does not insist on a further meeting in all cases and it could also provide 'a ready and economical means' for change in the circumstances described if an inference of ongoing authority is available.)

His Honour considered the changes in the wording of s. 66B(1) introduced by the Technical Amendments Act, concluding they were 'generally not indicative of a significant legislative policy change from the position previously obtaining'. According to Mansfield J, the 'clear reason' for the changes was to 'more accurately reflect' the fact that s. 61(2) 'makes the

authorised person or persons the applicant'. His Honour saw the repeal of s. 64(5) as merely 'facultative' of the claim group's right to act in relation to individual authorised persons 'if it wishes to do so'—at [27].

With respect, [1.249] of the EM to the Technical Amendments Act (quoted earlier) clearly indicates that one of the other reasons for the amendments was to allow for the applicant to be reconstituted without an amendment to the application that triggered the registration test. It also makes it clear that it was intended that 'all amendments to an application to replace an applicant would be made following an application under section 66B'. Both of these seem to indicate 'a significant legislative policy change', contrary to his Honour's view.

Applicant was not constituted on a representative basis

In this case, the evidence indicated that the 19 family groups that made up the claim group did not 'claim identity as subgroups within the wider claim group ... or geographical association with any particular part of the claim area, or in some other way'—at [36].

In cases where the sectional interests within the claim group were 'balanced by the particular combination of authorised persons', s. 66B was said to empower the claim group 'in its terms and in the circumstances it specifies'. On the other hand:

> It would not be consistent with the clear objectives of the NT Act ... to impose the s 66B procedure on the claim group where there were no such considerations. One might ask rhetorically why a native title claim group should have removed from it the capacity to make decisions for itself about whether, in particular circumstances, such as the death of an authorised person, it wishes to enliven s 66B or whether it is content to allow the remaining authorised applicants to continue to act in accordance with their authorisation?—at [29].

His Honour found further support for his view in the fact that:

- as with s. 66B(2), the power available under O 6 r 9 of the FCR is discretionary and so, where the applicant is constituted on a sectional basis but the claim group 'did not choose to react' to the death of an authorised person who represented a sectional interest, this could be brought to the court's attention 'and its significance determined';
- claimant applications are 'almost invariably' accompanied by a certificate under s. 203BE by the relevant representative body (note that, in fact, only about 50% of applications are certified but nothing seems to turn on this assertion);
- since s. 66(3)(a)(iii) ensures the representative body is given a copy of any application made under s. 61 and that body is then entitled to become a party to the proceeding pursuant to s. 84(2), if an application to 'remove a party as one of the persons constituting the applicant' is made either by 'the surviving authorised persons' or under O 6 r 9, the court would have the benefit of submissions from the representative body if necessary (with respect, this is only true in cases where the representative body is a party or, at least, is providing legal representation);
- support from a representative body for an application by the surviving authorised persons, whether under s. 62A or O 6 r 9, would 'indicate that no such [sectional representation] considerations ... are in play';
- if such considerations were 'real', the court 'could and would have regard to them in deciding whether to make the order sought'—at [30].

Again, with respect, none of these factors take the matter much further. If the change in the constitution of the applicant is uncontested, and those seeking the order for that change are legally represented or the representative body is a party to the proceedings, then shouldn't the discretion under s. 66B(2) be available to the court for precisely the same reasons as his Honour says the discretion under O 6 r 9 of the FCR would be available?

Comment – Parliament's intent

Before deciding that the surviving authorised persons could bring an application either 'in accordance with' s. 62A of the NTA or under O 6 r 9 of the FCR to remove 'from the names of the parties' the names of the two deceased persons, Mansfield J made one final point:

> The Explanatory Memorandum at 1.261-1.263 refers to the then existing s 66B as enabling the member or members of the native title claim group to apply to the Court to replace the applicant. It notes that the amendment proposed "would expand the scope of s 66B to provide for other circumstances in which the native title claim group may seek to replace the applicant". It uses the permissive word "may" at least twice. ... . It is clearly expressed as providing an extended opportunity to, rather than imposing a confining obligation upon, a claim group to replace a person or persons who are authorised to act as an applicant. The Explanatory Memorandum at 1.266 also contains the passage referred to by Siopis J in *Sambo* quoted above at [19], but in its context as the final sentence relevant to the proposed amendment, it represents a conclusion inconsistent with the preceding test, and in my view inconsistent with the wording of the amended s 66B(1)—at [31].

With respect, as noted earlier, this ignores [1.249] of the EM where the intention of the amendment is said to be:

> To clarify the operation of the provisions [s. 64(5) and 66B], item 79 would repeal subsection 64(5) [which provided for the amendment of a claimant application to replace the applicant]. This would mean that all amendments to an application to replace an applicant would be made following an application under section 66B.

It is also of note that in the EM at [1.288], it was said in relation to what became s. 84D that:

> Any application to replace the applicant *should be made under s 66B*, rather than by the Court directly under proposed s 84D(4), *as an order made pursuant to s 66B will have certain consequences*. In particular, the Registrar is required to amend the Register of Native Title Claims following an order under s 66B so that the details of the applicant are up-to-date (emphasis added).

Again, it seems clear that Parliament's intention was that s. 66B would be the sole route to reconstituting the applicant, given this is said in relation what is otherwise a broad discretionary power vested in the court by s. 84D(4).

Continuing authorisation could be implied in any case

In addition to the reasons noted above, his Honour was prepared to find that the application to remove the deceased persons was competent because:

> [I]n the absence of any evidence to suggest to the contrary, ... authorisation is to be understood in the context of the native title claim group recognising the circumstances of one or other of the authorised persons may change, and that one change may involve the death of one or more of them. Although it is not express, I consider that the authorisation in its terms is one for them, or so many of them, as continue to be living and able to discharge their representative function to do so—at [34].

On this reasoning, in applying to have the deceased 'authorised members' removed 'as parties to the application', the surviving authorised persons were 'acting in accordance with their authorisation' to deal with matters arising in relation to the application pursuant to s. 62A or, 'alternatively', O 6 r 9 of the FCR 'may be used to support the application'—at [35].

However, as noted earlier, it is not clear why this inference of implied authority could not have been used to make an order under s. 66B(2).

Decision

Mansfield J decided that, where one or more of a number of persons authorised under s. 251B to make a claimant application dies, 'generally the remaining persons so authorised may continue to deal with all matters arising' under the NTA in relation to the application and they continue to be 'the applicant' for that purpose. 'Consequently, on their application the court may remove the name of the deceased person as a party'—at [1].

In the reasons for judgment at [37], the order proposed is that 'the names of the parties to the proceeding as applicant be amended by deleting the names of two deceased persons'. However, the order actually made is that the application be amended to delete the names of those persons.

Comment – each authorised person is a separate party

As noted earlier, Mansfield J took the view that:

- the NTA does not 'constitute the applicant as having an independent legal existence';
- a claimant application 'must be instituted in the names of the authorised persons as *the parties*';
- '*the parties* making the application are the authorised persons'—at [5] (emphasis added)—at [5] (emphasis added).

His Honour must be of the view that each authorised person is a party in his or her own right, which is reinforced by the fact that O 6 r 9 only applies to a person who is 'a party' to a proceeding. It seems his Honour agrees with what Carr J said in *Central West Goldfields People v Western Australia* (2003) 129 FCR 107 at [10], i.e. that a person authorised as one of the group comprising the applicant 'is also a party within' the meaning of O 6 because that person 'is named as one of the ... joint applicants who seek the relief (albeit in a representative capacity)'.

However, Carr J's use of the term 'joint applicants' seems to beg the question, i.e. where more than one person is authorised, why does s. 61(2)(d) emphatically state that those persons are jointly 'the applicant'? Further, why does s. 253 go to the trouble of stating that '***applicant*** has a meaning affected by subsection 61(2)' (emphasis in original)? What is to be made of s. 84(2), which provides that: 'The applicant is *a party* to the proceeding'? (Emphasis added.) These questions illustrate that the construction adopted may be too strained. It may tear at the fabric of scheme adopted in 1998 as amended in 2007, particularly since it seems the discretion under s. 66B(2) is available based on an inference as to continuity of authority in an appropriate case.

As to s. 62A, Mansfield J takes the view that some of those parties (the authorised persons) who are 'the applicant' can apply to change the constitution of 'the applicant' by removing some or all of the other parties who are also 'the applicant' because this is a 'matter arising under' the NTA 'in relation to the application'. With respect, this is a circular argument that may also be too strained a construction. It is also sits uneasily with the findings in *Roe v KLC* at [35], [37] and [42] that s. 62A effectively grants standing exclusively to 'the applicant' and that one only of two people who jointly constituted the applicant had no standing to bring proceedings on behalf of the claim group. See also *Tigan v Western Australia* [2010] FCA 993.

Comment – take steps to avoid the issue

It should not be assumed that the process enshrined in s. 66B is of itself inefficient. This case highlights two matters:

- legal representatives for claimant applications should identify foreseeable contingencies (e.g. death, incapacity) in native title proceedings and take instructions to address them, thereby avoiding the need for further authorisation meetings should they materialise;
- before every claim group meeting, those calling it should consider whether there are any issues as to the constitution of the applicant that could be dealt with at that meeting.

Adopting these practices would ensure the claim group retains ultimate control of the proceedings with the minimum of delay, cost and inconvenience to that group and its representative, along with the other parties and the court. Further, using s. 66B to replace the applicant, rather than using the FCR to amend the application, means that the registration test is not applied and the Register of Native Title Claims is amended to reflect the change. It also means time and resources are not drawn away from the progress of the claim in the court and into the registration process.

The orders made in *Chapman* should be also noted in this context. The court relied on O 6 r 9 of the FCR to make orders that three of the people who constituted the applicant (two of whom were alive) 'cease to be parties to the proceedings' and that the RNTC 'be amended to reflect removal of the names of those persons as applicant'. No meeting of the claim group had been held to authorise their removal. While this approach may appeal to some, these orders raise a number of issues.

First, even if it is assumed *Sambo* is wrong and O 6 r 9 supports the making of such orders, the court noted at [17] that there may have to be a declaration 'reflecting the foundation for the consequential order under O 6 r 9' (i.e. the order that the RNTC be amended) and, in 'contentious' cases, a hearing and a declaration as to 'the right of persons to continue to be an applicant'. Therefore, in those cases, this approach would not provide the 'ready and economical means' for change sought by Mansfield J.

Second, the order directing the amendment of the RNTC was effectively made against the Registrar, who was not a party to the proceedings. The Registrar is a statutory office holder with independent duties in relation to the management of the RNTC pursuant to Pt 5 and Pt 7 of the NTA. (Of course, the Registrar complied with the order because, as was recently noted in *Siminton v Australian Prudential Regulation Authority* (2006) 152 FCR 129; [2006] FCAFC 118 at [28], an order 'made by a superior court of record stands and is bound to be observed'.) Kiefel J's comment as to the need in some cases for a declaratory foundation for such an order appears to be a nod in the direction of this issue.

Finally, many of the issues noted above arise here also, e.g. the first order implies each of the three people affected is a party to the proceedings. Further, the order that the RNTC be amended to 'reflect removal of the names of those persons *as applicant*' (emphasis added) is awkwardly worded and seems to simply skirt the issue, given the three people removed were not 'the applicant' but merely a part thereof.

Applicant has standing exclusively & must act jointly

Roe v Kimberley Land Council Aboriginal Corporation [2010] FCA 809

Gilmour J, 2 August 2010

Issue

The issue in this case whether one of two people who jointly constituted the applicant in a claimant application had standing to bring proceedings against a representative body on behalf of the native title claim group. This involved consideration of ss. 61 and 62A of the *Native Title Act 1993* (Cwlth) (NTA) and whether any lack of standing could be cured by relying on s. 84D to allow an application to proceed despite a defect in the applicant's authority.

It was found that s. 62A effectively granted standing exclusively to 'the applicant' to deal with all matters arising under the NTA in relation to a claimant application. Therefore, one only of the two people who jointly constituted the applicant had no standing to bring the proceedings. Further, as these proceedings were 'quite separate' from the claimant application, they were not 'within the compass' of s. 84D. The application was dismissed and the applicant was ordered to pay the respondents' costs—at [35], [53], [56] and [59].

Background

Joseph Roe and Cyril Shaw, who are jointly 'the applicant' in a claimant application brought on behalf of the Goolarabooloo and Jabirr Jabirr claimant application (GJJ claim) were named as the applicant in separate proceedings commenced by filing of a Form 5 application under O 4 r 1 of the *Federal Court Rules* (FCR) (the separate proceeding). It was brought on behalf of the members of the GJJ claim group against the Kimberley Land Council Aboriginal Corporation (KLC), the representative body for the Kimberley region under Part 11 of the NTA. Mr Roe subsequently applied for leave to file an amended application and statement of claim in which he was the sole applicant in a representative proceeding under Part IVA of the *Federal Court of Australia Act 1976* (Cwlth) (FCA), along with an order that Mr Shaw cease to be a party to the separate proceeding. The KLC and Mr Shaw sought dismissal of the application on the grounds that Mr Roe had 'no standing to pursue it' because he was 'only one of two named applicants' and could not act alone. Both the KLC and Mr Shaw also opposed the making of the proposed amendments—at [4] and [10].

Relief sought

The KLC had negotiated with Woodside Energy Ltd (Woodside), the State of Western Australia and the Commonwealth over a proposal to build a liquid natural gas processing facility (LNG) at James Price Point on the Dampier Peninsula, an area covered by the GJJ claim. Mr Roe challenged the validity of two joint meetings of the GJJ and the neighbouring Djaberra Djaberra native title claim group held on in February and April 2009 and resolutions passed at those meetings purportedly authorising the KLC to perform its facilitation and assistance functions under s. 203BB. It was alleged that KLC misrepresented that it was authorised to:

- negotiate to pursue the development of an LNG Precinct at James Price Point;
- negotiate an ILUA for the proposed development of an LNG Precinct at James Price Point on behalf of the GJJ claim group;
- enter into the heads of agreement and HPA relating to the proposed development of the LNG Precinct on behalf of the GJJ claim group.

It was also said this amounted to misrepresentations that:

- the people who decided in 2005 to refuse permission to develop an LNG Precinct on the Dampier Peninsula had decided that the development should now be allowed to proceed;
- the process was clear, transparent and was driven by traditional owners (TOs) and all decisions were made by TOs;
- all TOs were given every opportunity to participate in the consultation process;
- the KLC acted under instructions from TOs at all times and made best efforts to provide information to TOs so that they could make informed decisions;
- the right people made their own decisions about their own country.

The KLC was said to be precluded from acting by a conflict of interest and duty arising from the circumstances referred to above. Declarations as to the KLC's alleged lack of authority, misrepresentations and conflict interest and duty were sought, along with order to restrain the KLC from:

- continuing to represent the GJJ claim group in connection with the conduct of the GJJ claim or any matter arising under the NTA in relation to the GJJ claim;
- representing any other claim group in connection with the conduct of a native title claim which overlaps the GJJ native title claim or any matter arising under the NTA in relation to such native title claim;
- disclosing any legal advice, anthropological evidence or other confidential information relating to the GJJ claim without prior written permission from the applicant in the GJJ claim or leave of the court.

An order that KLC pay the applicant's costs on an indemnity basis was also sought.

Proposed amended application – representative proceedings

Justice Gilmour noted that Mr Roe's proposed amended application under Part IVA of the FCA was 'significantly different' from the application as filed in that it 'proposes to introduce new class members, new causes of action and new issues'. The KLC submitted that, even if those causes of action were maintainable:

> [T]hey should be the subject of fresh proceedings, or alternatively if the amendment is allowed, Mr Roe should be ordered to immediately pay the costs of the amendment and the costs thrown away by the KLC on an indemnity basis—at [33].

Effect of s. 62A – the applicant has standing exclusively

It was noted that jurisdiction in relation to these proceedings was conferred by s. 213(2), which provides that, subject to the NTA, 'the Federal Court has jurisdiction in relation to matters arising under' the NTA. Standing was conferred by s. 62A and was:

> [I]n effect ... granted exclusively to the applicant to deal with all matters arising under the NTA in relation to the claimant application. This proceeding is unequivocally stated to be brought on behalf of the GJJ native title claim group in native title claim WAG 6002/98—at [35].

Under ss. 61(2)(c) and 61(2)(d), where more than one member of the native title claim group is authorised to make the application, those persons are jointly 'the applicant' and none of the other members of the claim group is the applicant. As was noted:

> Section 62A(a) provides ... that ... the applicant may deal with all matters arising under the NTA in relation to the application. An application for a determination of native title is a representative proceeding—at [36].

Gilmour J rejected Mr Roe's submission that the use of 'may' in s. 62A(a) indicated it was permissive and did not confer standing exclusively on the applicant:

> One of the main objects of the NTA by s 3(c) is to establish a mechanism for determining claims to native title. An evident purpose of s 62A, read together with s 61, as part of achieving that objective, is to confer upon the applicant, and upon no other members of the native title claim group the entitlement to deal with all matters arising under the NTA in relation to the application—at [37], referring to Drummond J in *Ankamuthi People v Queensland* (2002) 121 FCR 68; [2002] FCA 897 at [7] to [8].

Cases dealing with whether 'may' indicated a provision was discretionary rather than mandatory were not relevant to the interpretation of s. 62A(a) because:

> [I]t is permissive or empowering and is to be read as though it contained the following italicised words "... *it is* the applicant *who* may deal ...". Looked at in that way, having regard to the purposes of the NTA no one else is so empowered, whether or not they are a member of the relevant claim group—at [39].

The KLC's submission that only 'the applicant' in the GJJ claim (i.e. Mr Roe and Mr Shaw acting jointly) had standing to sue the KLC on behalf of that group was accepted. Counsel for Mr Roe acknowledged this in the course of the proceedings but 'concluded in effect that the position could be cured through orders' under s. 84D NTA—at [42].

Section 84D did not apply to these proceedings

Section 84D provides that the court may order a person who, alone or jointly, made an application under s. 61 to produce evidence that he or she was authorised to do so or order a person who has dealt with a matter, or is dealing with a matter, arising in relation to such an application, to produce evidence that he or she is authorised to do so. Such orders can be made on the court's own motion, on the application of a party to the proceedings or on the application of a member of a native title or compensation claim group. Subsection 84D(4)

provides that the court may, after balancing the need for due prosecution of the application and the interests of justice:

- hear and determine *the application*, despite the defect in authorisation; or
- make such other orders as the court considers appropriate.

Subsection 84D(4) applies if:

- an application does not comply with s. 61 because it was made by a person or persons who were not authorised by the claim group to do so; or
- a person who is or was, or one of the persons who are or were, the applicant in relation to the application has dealt with, or deals with, a matter arising in relation to the application in circumstances where the person was not authorised to do so.

His Honour found that s. 84D was not 'a source of power' for the court 'to make any orders in this proceeding'. Rather:

> [I]t confers ... a discretion in native title proceedings to hear and determine a claimant application notwithstanding any defect in the applicant's authorisation or to make such other orders as the Court considers appropriate. The application variously referred to in s 84D ... is an application made under s 61 of the NTA. Counsel for Mr Roe conceded as much. The present application (WAD 74 of 2010) is not such an application nor is the present motion to amend which is made within it—at [51].

The court's discretion under s. 84D(4)(b) to make 'such other orders' as it considers appropriate 'falls to be construed upon a consideration' of s. 84D as a whole, Part 4 (which is where it appears) and the NTA. It was noted that:

> Considered in that context the "other orders" contemplated are orders relating to or concerning "the application", that is the application made under s 61 (WAG 6002 of 1998) [the GJJ claim], not a proceeding such as the present—at [52].

His Honour concluded that:

> Section 84D does not provide any basis for Mr Roe to acquire standing in this application as presently formulated. Mr Roe's counsel has conceded that, if he is wrong about the effect of s 84D, Mr Roe has no standing to bring the present application—at [53] to [54].

Decision

Leave to amend was refused and the application was dismissed, along with the notices of motion made within it, because the court was 'not disposed' to allow an amendment to 'convert' this proceeding into 'a completely new proceeding, with Mr Roe as the sole applicant'. It was noted that Mr Roe knew from 20 April 2010 at the latest that Mr Shaw disavowed the proceeding and that his counsel acknowledged 'as far back as 17 May 2010' that a representative proceeding 'would involve the commencement of new proceedings', which his Honour thought was 'the appropriate course in this case'—at [55] to [56]

Costs

The KLC and Mr Shaw sought costs against Mr Roe on an indemnity basis but his Honour refused to make an order in those terms. However, as it was 'unreasonable of Mr Roe to have pressed on in the current proceeding', Mr Roe was ordered to pay the costs of Mr Shaw and the KLC.

Postscript – application to replace applicant
It has been reported that a resolution was passed at a meeting of the GJJ claim group held on 2 August 2010 to replace Mr Shaw and Mr Rowe with six other people as the applicant in the GJJ claim. An application for orders to that effect has since been made to the court. It will be heard shortly after 6 October 2010.

Tigan v Western Australia [2010] FCA 993

Gilmour J, 10 September 2010

Issue
The question in this case was whether three of the five people who jointly comprised the applicant in a claimant application had standing to file a notice of change of solicitor. Justice Gilmour found they did not have standing because actions taken or authorised by 'the applicant' are not lawful unless taken jointly by all of those who comprise the applicant. It is a 'statutory requirement that, although authorised individually, members of the applicant must ... act jointly'. If dissention arises, then the native title claim group must take steps to 'effect a change in the membership of the applicant'—at [27] to [30].

Background
Three of the five people authorised under s. 251B of the *Native Title Act* 1993 (Cwlth) as 'the applicant' for a claimant application made on behalf of the Mayala People filed a notice that purported to change the solicitor on the record from the principle legal officer of Kimberley Land Council Aboriginal Corporation (KLC), Robert Powrie, to Western Legal. The KLC, on behalf of the applicant, filed a notice of motion seeking an order directing the Federal Court Registrar to remove the notice of change of solicitor. It was supported by affidavits from the other two people who comprised the applicant, Valarie and David Wiggan, in which they stated that they had not consented to the change of solicitor.

The respondents to the notice of motion were the three members of the applicant who had sought the change of solicitor. One of the three respondents, Aubrey Tigan, filed an affidavit saying (among other things) that there had been a claim group meeting on 20 August 2010 at which a decision was made to change the group of people who constituted the applicant so that Valarie and David Wiggan would no longer be included in that group. Mr Tigan deposed that, as a result, an application to replace the applicant would be made to the court.

It was agreed for the purposes of these proceedings that a resolution to change solicitors was passed by a majority of the 93 claim group members present who voted (56 for, 32 against) at the claim group meeting. It was also agreed that a resolution to instruct Western Legal was passed and that the three respondents had instructed Western Legal to file the notice of change of solicitor.

Applicant has exclusive standing
The respondents' first submission was that the native title claim group as a whole, by a decision made at a claim group meeting, may deal with all matters arising under the NTA, just as the applicant may pursuant to ss. 61 and 62A. His Honour rejected this submission, finding instead that 'it is the applicant who may deal exclusively with all matters arising under the Act in relation to the claimant application', including filing a notice of change of

solicitor—at [11] to [12], repeating what was said in *Roe v Kimberley Land Council Aboriginal Corporation* [2010] FCA 809, summarised in *Native Title Hot Spots* Issue 33.

Gilmour J referred to *Ankamuthi People v Queensland* (2002) 121 FCR 68 (*Ankamuthi* summarised in *Native Title Hot Spots* Issue 1) for support, where Drummond J found at [8] that 'only the named applicant ... has control' of the proceedings commenced by filing a claimant application. In that case, Drummond J acknowledged that the Cape York Land Council 'may well have acted on instructions of a large majority' of the native title claim group in filing a notice of discontinuance' but still found it was not thereby empowered to do so—at [16].

It should be noted (although his Honour does not) that there is one occasion when persons other the applicant have standing and that is when members of the claim group make an application to replace the applicant in circumstances where the requirements of s. 66B(1) are met.

Applicant must act jointly – majority does not rule

The respondents' second submission was that the persons who jointly comprise the applicant are not required to be unanimous in order to make a valid decision—at [11].

Gilmour J rejected this because it was 'inimical to the object' of ss. 61 and 62 'in the context of the Act as a whole'. His Honour referred with approval to Kiefel J's comments in *Butchulla People v Queensland* (2006) 154 FCR 233; [2006] FCA 1063 (*Butchulla People*) at [38] that:

> The evident purposes of s 61 are to provide for representation of the claim group, to limit the number of persons who may act as 'the applicant' in the proceedings and, when more than one person is authorised, to require them to act *in concert* with each other. It may be assumed that since the persons authorised have a common interest in the subject matter of the claim *acting jointly* should not present a difficulty. (His Honour's emphasis.)

Gilmour J also pointed out that the fact that s. 61(2)(c) states that the persons authorised are 'jointly' the applicant was 'important' and that, 'jointly' means: 'in conjunction, in combination, unitedly, not severally or separately'—at [19] referring to the Shorter Oxford English Dictionary.

After carefully considering what was said in *Doolan v Native Title Registrar* [2007] FCA 192; (2007) 158 FCR 56 (*Doolan*) and *Chapman v Queensland* [2007] FCA 597; (2007) 159 FCR 507 (*Chapman)*, his Honour concluded that these cases did not support the respondents' second submission: 'Indeed they reaffirm what was said by Kiefel J in *Butchulla People*—at [22] to [26].

According to Gilmour J, at least two propositions 'emerge from these cases', namely:

- they are to be distinguished on their facts from the present case because in this case 'the Wiggans are both alive and there is no evidence that they are not willing or able to act as members of the applicant';
- both *Doolan* and *Chapman* 're-affirm the statutory requirement that, although authorised individually, members of the applicant must, in accordance with the Act, act jointly'—at [27].

In his Honour's view, three of the five members of the applicant could not 'cause the applicant to deal with a matter arising under the Act in relation to the application by majority decision'. Rather, they 'must act in concert' and:

> If dissension arises ... between the named persons who are the applicant, then there are procedures under the Act for the native title claimant group to effect a change in the membership of the applicant. Indeed that has been foreshadowed in this case—at [28].

National Native Title Tribunal future act determinations
The respondents submitted that the National Native Title Tribunal had made determinations by consent in right to negotiate proceedings that supported their submissions. While the applicant 'provided very persuasive written submissions that this is not the case, and that the Tribunal's approach is consistent' with the court's approach, Gilmour J found it was not necessary to consider these submissions—at [29].

Decision
It was found that the respondents' action in instructing Western Legal to act and to file a notice of change of solicitors was not an action by, or authorised by, the applicant. Accordingly, the Registrar of the court was ordered to remove the notice of change of solicitors from the court file and to return it to Western Legal—at [30].

Costs
An application for costs against Western Legal was found to have no basis. The question of costs was otherwise reserved for further argument, 'in particular, whether the respondents to the motion ought be liable to pay these'—at [31].

Applicant's power to seek leave to discontinue

Close on behalf of the Githabul People #2 v Queensland [2010] FCA 828

Collier J, 6 August 2010

Issue
This case concerns whether the applicant in a claimant application was authorised to seek leave to discontinue the application and, if leave was granted, whether it should be conditional. Justice Collier decided the applicant was authorised and exercised the discretion available under O 22 r 2(2) of the Federal Court Rules (FCR) to grant leave to discontinue, subject to a condition preventing a further application over the area without leave of the court. Such leave will only be granted if (among other things) an anthropological report dealing with all Indigenous issues is first prepared and distributed to the respondents to the existing claim and the Indigenous respondents to that claim are given appropriate assistance by Queensland South Native Title Services Ltd (QSNTS).

Background
Late in 2007, a determination recognising native title was made in relation to part of the area covered by a claimant application brought on behalf of the Githabul People, i.e. the part of application area within the State of New South Wales. The State of Queensland was not, at that time, prepared to recognised the Githabul People as native title holders over the part the application area within Queensland's borders (see *Close on behalf of the Githabul People v*

Minister for Lands [2007] FCA 1847, summarised in *Native Title Hot Spots* Issue 27). The application in question in this case (Githabul # 2) was filed by Trevor Close shortly afterwards in April 2008. It covers 245 hectares on the Queensland side of the Queensland/New South Wales border, referred to as the Mt Lindesay area. Mediation was conducted for about six months until July 2009 when Justice Dowsett ordered it to cease.

The application was later listed for trial at the request of a lawyer employed by QSNTS acting on behalf of the applicant. Trial was to commence on 11 October 2010. However, at a claim group meeting in May 2010 (the May meeting), a split in the claim group became apparent. QSNTS was told certain claim group members would not participate any further and so sought to vacate the trial. However, in June 2010, Justice Greenwood refused to vacate the trial dates and joined Kenneth Markwell, Myfanwy Lock and Ruth James (all of whom claimed native title interests) as respondents. Orders were also made that:

- Mr Close file an affidavit explaining how he was authorised to make the application and the events of the May meeting concerning whether he continued to be authorised to prosecute the application;
- QSNTS's Chief Executive Officer file an affidavit explaining the recent decision to withdraw funding when the matter had been set down for trial at the request of QSNTS's lawyers and indicating whether QSNTS consulted with those affected by the decision and was satisfied the claim group members understood the general course of action being taken, referring to ss. 203BB(1) and 203BC(1).

QSNTS's evidence indicated funding was withdrawn because of counsel's advice that the split in the claim group meant there was no long a reasonable prospect the application would succeed. The Principal Legal Officer for QSNTS, Shahzad Rind, deposed to the fact that:

- Mr Close gave him written instructions to seek discontinuance of the application on 23 July 2010;
- the native title steering committee of the Githabul people, consisting of seven people the claim group had given the role of directing and assisting Mr Close, unanimously resolved at a meeting on 2 August 2010 (which Mr Rind attended) that Mr Close should be authorised and directed to seek leave to discontinue.

The notice of motion seeking leave was filed on 27 July 2010.

Applicant was, in fact, authorised to seek discontinuance

It was accepted that the steering committee's authorisation on 2 August 2010 was effectively given 'by the claim group itself'. However, the notice of motion seeking discontinuance was filed before that date (i.e. on 27 July 2010). 'Notwithstanding this irregularity', Justice Collier found on the evidence that 'specific authority has been conferred' on Mr Close by claim group members to seek leave to discontinue on the basis that the resolution of the steering committee was effective *nunc pro tunc* (now for then) to authorise the earlier filing of notice of motion—at [18].

Authorised in any case via ss. 62A and 251B

Collier J found that Mr Close was 'in any event' authorised to seek leave to discontinue the proceedings 'by reason of the combined effect' of ss. 251B and 62A of the NTA —at [21] and see also [33].

Section 251B 'describes the process whereby 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'. Relevantly, s. 62A provides that, in the case of a claimant application 'the applicant may deal with all matters arising under this Act in relation to the application'—at [22] to [23].

While the court was not aware of any authority directly on point, decisions that considered s. 62A 'more broadly' were noted, including *Roe v Kimberley Land Council Aboriginal Corporation* [2010] FCA 809 (summarised in *Native Title Hot Spots* Issue 33), where Gilmour J found that s. 62A conferred standing 'exclusively upon the applicant in respect of dealing with all matters arising under' the NTA 'in relation to the application' and that the effect of s. 62A is that 'no-one else is so empowered, whether or not they are a member of the relevant claim group'—at [24] to [29].

In the light of these authorities, Collier J concluded that only the applicant (Mr Close in this case) has authority to seek leave to discontinue a claimant application. Further, the applicant is 'not obliged to seek the approval of the claim group to do so' because:

> The phrase "all matters arising under this Act in relation to the application" in s 62A is ... unambiguous, and should not read narrowly. "All matters" means ... all matters, including discontinuance, and the words "in relation to" have been held to be extremely wide although their meaning will be determined by the context—at [32].

Grant of leave

Leave of the court was required because a claimant application is a representative proceeding—at [2], referring to O 22 r 2(2) of the FCR, *Ankamuthi People v Queensland* (2002) 121 FCR 68 (*Ankamuthi*) and *McKenzie v South Australia* [2006] FCA 891 (*McKenzie*), summarised in *Native Title Hot Spots* Issue 1 and Issue 21 respectively.

While all of the parties agreed leave to discontinue should be given, the grant of leave pursuant to O 22 r 2(2) of the FCR was 'at the unfettered discretion of the judge'. The 'traditional approach' was that the court would usually allow discontinuance provided this caused no injustice to the other parties—at [34] to [35], referring to *Covell Matthews & Partners* [1977] 1 WLR 876 at 879.

In this case:

- the applicant's legal advice was that the claim 'no longer has reasonable prospects of success;
- the late joinder of several Indigenous respondents indicated 'the existence of other possible native title interests';
- the state 'is not prepared to be a party to a consent determination in the current environment';
- the applicant wanted to 'continue mediation ... and commission further expert anthropological research specifically dealing with the issue of indigenous interests in the area'—at [36].

Among other things, it was also noted that, 'notwithstanding any order of discontinuance, it is very possible' that another claimant application 'will be filed in future in respect' of the Mt

Lindesay area by the same claim group. Collier J thought this 'an unsatisfactory state of affairs', sympathising with the state's desire for 'finality', but was of the view that discontinuance was unlikely 'to produce such finality'—at [37] to [38].

While there was an 'obvious question' as to why it should not 'simply be dismissed' rather than discontinued given the applicant conceded the application had 'no prospects of success', Collier J was prepared to grant leave subject to certain conditions, given that:

- there was no opposition to discontinuance;
- the applicant proposed to 'continue mediation' and 'commission further anthropological research'; and
- 'the general principle' was that a party 'ought not be obliged to conduct litigation against its will'—at [40].

Decision

Leave to discontinue was granted. It was subject to conditions agreed to by the state and the applicant that any further claimant application could only be filed with the leave of the court and, in respect of any such application, the court must be satisfied that, among other things:

- 'expert anthropological evidence' has been obtained 'specifically dealing with all indigenous interests in the relevant area'; and
- QSNTS had offered 'appropriate assistance to the second and third respondents'—at [40].

It was noted the court has power to impose conditions pursuant to O 22 r 7 of the FCR, i.e. 'a discontinuance under O 22 shall not, *subject to the terms of any leave to discontinue*, be a defence to a proceeding for the same, or substantially the same, cause of action'—at [40], emphasis in original.

The orders also contain a condition that no application for leave to file a further claimant application can be brought until one month after the anthropological report has been provided to the state and the other respondents. Order 4 provides that a failure to comply with the conditions will mean that Order 4 and the discontinuance itself will be a defence to any further claimant application brought by or on behalf of the Githabul People in relation to any part of the Mt Lindesay area.

Gorringe on behalf of the Mithaka People v Queensland [2010] FCA 716

Mansfield J, 29 June 2010

Issue

The issue before the Federal Court in this case was whether to grant leave to discontinue a claimant application made on behalf of the Mithaka People pursuant to ss. 13(1) and 61(1) of the *Native Title Act* 1993 (Cwlth) (NTA) after the matter had been substantively allocated at the applicant's request. The matter was adjourned to allow for consideration of some preliminary issues the court thought needed to be addressed.

Background

In December 2009, a solicitor retained by Queensland South Native Title Services Limited (QSNTS) appeared for the applicant in the Mithaka application and informed the court that

the application could proceed to trial. Orders were sought to have it substantively allocated as soon as possible. In March 2010, orders to give effect to that proposal were made. Pursuant to those orders, the applicant filed a statement of claim in April 2010 and the State of Queensland filed a defence in May 2010. However, QSNTS sought an order in June 2010 for leave to discontinue the proceeding with each party to bear its own costs. The application for discontinuance was accompanied by the affidavit of a senior legal officer employed by QSNTS who deposed that QSNTS had received instructions to discontinue the proceeding because the applicant considered that to be in the best interests of the Mithaka people. Subsequently, three of the six persons who comprise the applicant for the Mithaka application filed affidavits stating that, to the extent instructions were given to seek leave to discontinue, they were given under duress and they no longer wished to discontinue the application. At the hearing in June 2010, QSNTS indicated that:

- it did not have funds to progress the matter, contrary to information previously given to the court;
- 'the applicant' was dysfunctional; and
- the applicant had given instructions to withdraw the proceeding.

The state indicated it would seek costs if leave to discontinue was given.

Matters to be addressed before discontinuance application can progress

Justice Mansfield was of the view that the parties needed to consider and address a number matters if the application for leave to discontinue was to progress, including:

- whether either the authorisation of the Mithaka applicant under s. 251B or the power given to the applicant under s. 62A extended to withdrawing the application, or to seek leave to do so, including conditional terms as to costs;
- whether the applicant had to justify the grant of leave to discontinue without addressing the possible consequences to the agreements with claimant groups in previously overlapping claims;
- whether the applicant should be required to account for the benefits received under any indigenous land use agreement (ILUA) or other agreement the applicant had entered into in that capacity;
- the basis upon which discontinuance is sought, having regard to the certification of the application by the former representative body, Queensland South Representative Body Aboriginal Corporation (QSRBAC);
- the status of QSNTS to bring the motion in its own name and its status in relation to the engagement of solicitors for the applicant, apparently because there was no formal notification of a change of solicitors from QSRBAC to QSNTS;
- the extent to which QSNTS, if it is bringing the motion either on its own behalf or on behalf of the applicant, now has instructions to do so;
- the basis upon which QSNTS now asserted that there are not funds available to progress the application—at [24].

Note that, in *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA 828 (summarised in *Native Title Hot Spots* Issue 33), Justice Collier found that the applicant (and only the applicant) has authority to seek leave to discontinue a claimant application.

Decision
Orders were made that:

- the applicant must file an affidavit (or affidavits) stating whether the application for discontinuance is to proceed; and
- if it is, the affidavit(s) must set out the basis upon which the applicant is authorised by the native title claim group to discontinue the proceedings.

The 'asserted' dispute between those constituting the applicant about how the claimant application should proceed was referred to 'a mediator to be appointed' by the court's Registrar, with the outcome to be reported to the court by 16 July 2010. If the application to discontinue is not to proceed, a further amended statement of claim must be filed, the state has liberty to renew its application for further and better particulars and the court will consider making a further order referring the matter to mediation. In either case, the time for pastoral respondents to file defences was extended to 20 August 2010. The matter was adjourned to the next directions on 4 August 2010, with liberty to apply.

Postscript
At a directions hearing held 4 August 2010, these orders were suspended pending consideration by the applicant of a proposal by the state that would allow negotiations in relation to the claim to continue. If that option is not taken up, the discontinuance application will be listed for hearing on 12 October 2010.

Registered native title claimant – all those authorised are deceased

Bullen v Western Australia [2010] FCA 900

Siopis J, 20 August 2010

Issue
In this case, the two persons comprising the applicant for a registered claimant application were deceased. The State of Western Australia granted two mining leases in relation to the area covered by the application. The main issue was whether there was a 'registered native title claimant' at the time of those grants. Justice Siopis found that there was a registered native title claimant at the relevant time because the names of the two deceased men appeared on the Register of Native Title Claims at that time.

Background
Under the NTA, s. 61(1) provides that the applicant for a claimant application is the member or members of the native title claim group authorised in accordance with s. 251B by the native title claim group to make the application. Section 62A provides that the applicant 'may deal with all matters arising' under the NTA 'in relation to the application'. If more than one person is authorised, s. 61(2) provides that all those people are jointly the applicant. 'Registered native title claimant' is defined in s. 253 to mean 'a person or persons whose name or names appear [sic] in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the [relevant] land or waters'.

In this case, reference to a 'native title party' is a reference to a 'registered native title claimant'.

The Esperance Nyungar claimant application was registered on the Register of Native Title Claims (RNTC) in July 1999 with Malcolm John Bullen and James Edward Dimer recorded as the applicant. Mr Bullen died shortly afterwards in October 1999. Mr Dimer died on 6 September 2005.

In December 2005, after both Mr Bullen and Mr Dimer had passed away, the Goldfields Land and Sea Council Aboriginal Corporation (GLSC, the representative body) tried to stand in for the applicant and made a future act determination application (FADA) to the National Native Title Tribunal 'on behalf of the Esperance Nyungar People' in relation to some exploration licences. The evidence before the Tribunal was that it was inconvenient for the Esperance Nyungar People to take steps to replace the applicant at that time.

The Tribunal dismissed the FADA on the basis that there was no native title party capable of making it and so it was a nullity. It was noted that, despite the difficulties sometimes encountered with replacing the applicant pursuant to s. 66B:

> [T]here is no alternative ... if all the persons who jointly comprise the applicant, whose names appear on the Register [as so are the registered native title claimant and hence the native title party in the Tribunal proceedings] are deceased—see *Dimer v Stewart* (2006) 200 FLR 385; [2006] NNTTA 70 (*Dimer*) at [17].

On September 2003, when Mr Dimer was still alive, the state gave notice under s. 29 that it intended to grant the two mining leases the subject of these proceedings. Negotiations pursuant to s. 31(1) commenced in October 2003. However, in June 2007 (after both Mr Dimer's death and the Tribunal's decision in *Dimer*), the state granted the leases under the *Mining Act 1978* (WA) without any agreement being reached under s. 31(1)(b) of the NTA and without any FADA being made and determined by the Tribunal. Before doing so, it wrote to the GLSC saying it relied on the Tribunal's decision in *Dimer*:

> As a consequence of this decision there is no legal impediment to the State granting tenements situated within the Esperance Nyungar claim area pursuant to section 28(1)(b) of the Native Title Act, as there is no native title party.

Paragraph 28(1)(b) provides that, subject to the NTA, an act to which this Subdiv P applies (in this case, the grant of a mining lease):

> [I]s invalid to the extent that it affects native title unless, before it is done, the requirements of one of the following paragraphs are satisfied ... (b) after the end of that period, but immediately before the act is done, there is no native title party in relation to any of the land or waters that will be affected by the act.

In September 2008, the GLSC wrote to the state alleging it had not complied with the requirements of the NTA. The state responded in October 2008, repeating its view that there was 'no legal impediment' to the grant of the leases and that each was a valid future act pursuant to s. 28(1)(b).

On 30 October 2008, GLSC repeated its view that the grants of the leases were invalid future acts and contended *Dimer* was 'incorrect'. Further, it was said that 'the deceased applicants' names have at all material times been on' the RNTC 'as the applicant' and that the Tribunal in *Dimer* 'overlooked the fact that native title claims are representative proceedings'. The GLSC sought cancelation of the leases, in lieu of which an application would be made for a declaration of invalidity. The state responded, maintaining its position and noting that the relevant minister had no power in this case under the *Mining Act* to cancel the leases. As a result, the application dealt with in this case was made on 19 October 2009. It sought a declaration that, 'at the relevant time, there was a registered native title claimant notwithstanding the death of both Mr Bullen and Mr Dimer'. On 23 April 2010, the application was amended so that the relief sought was a declaration that, 'immediately before the grant' of the mining leases in question, 'there was a registered native title claimant as defined by section 253' of the NTA 'in respect of the areas to which the mining leases relate'.

The issues

The applicants contended (among other things) that:

> [T]he Native Title Act should be construed beneficially in a manner guided by the content of the Preamble to the Native Title Act, and that the objects of the Native Title Act would be frustrated if the State's approach was correct. This was because the native title claim group would be deprived of one of the main benefits derived from the Native Title Act, namely, the right to negotiate. Accordingly, said the applicants, the declaration sought should be made.

The state contended there was no native title party within the meaning of s. 28(1)(b) at the relevant time in relation to the land that would be affected by the grant of the mining leases because there were no living persons comprising the applicant at that time. The state argued (among other things) that the applicants' submissions 'were entirely inconsistent with the reality of the right to negotiate process provided for in Subdiv P of Div 3 of Pt 2', i.e. the process would be stymied if there was no living applicant with whom to negotiation. The state also argued that:

> [T]he native title claim group and the representative body must act conscientiously to ensure that the necessary person or persons are authorised to act on behalf of the claim group in relation to future acts and other matters arising under the Native Title Act—at [42].

Question was not hypothetical

Justice Siopis rejected the contention that the declaration sought by the applicants 'related to a matter which was entirely hypothetical' because there was 'a real controversy as to whether there was, immediately before the grant of the mining leases, a registered native title claimant in respect of the relevant land' and deciding the question 'would quell that controversy'. Further, the applicants had 'a real interest in having the question determined' because the mining leases relate to land subject to their claimant application and 'quelling of the controversy will have very significant practical consequences'. If there was no registered native title claimant at the relevant time, 'the validity of the mining leases cannot be impugned' whereas if the applicants are right, there is a risk that the validity of the leases would be 'impugned to the extent' that native title is subsequently proven that is affected by the rights held under the leases. There were 'obvious commercial consequences' to these two 'risk profiles' and 'resolution of the question' would allow for risk mitigation. Further, the

court was 'being asked to grant a declaration in relation to an established factual scenario in relation to past conduct'—at [26] to [29].

Construing the NTA

The answer to the question in this case turned on the proper construction of the relevant provisions of the NTA, something Siopis J had 'some difficulty' in ascertaining. As was noted:

> The difficulty has arisen in relation to trying to reconcile the competing considerations of, on the one hand, the importance of the right to negotiate to a native title claim group as a benefit under the Native Title Act; and, on the other hand, the public interest in having applications for mining tenements dealt with within a reasonable time—at [44].

Despite this difficulty, it was found that there was a native title party within the meaning of s. 28(1)(b) in relation to the land the subject of the leases immediately before the grant were made on 27 June 2007 because 'there was in existence on that date a "registered native title claimant" in relation to the relevant land, for the purposes of that section of the Native Title Act'—at [47].

This conclusion was reached firstly because:

- the applicants' contentions were 'consistent with the fundamental concepts which underlie' the NTA;
- among other things, they prescribe that recognition of native title 'is to occur by means of a representative proceeding brought on behalf of a native title claim group by a person or persons from that claim group, authorised by that claim group, and referred to as "the applicant"';
- subsection 190(1) provides that claims accepted for registration must be registered on the RNTC and s. 186(1)(d) provides that 'the name and address for service of the applicant' must be entered onto the RNTC;
- the applicant is 'the person or persons who is, or are, authorised to bring the native title determination application on behalf of a native title claim group';
- only 'an authorised applicant can act on behalf of the native title claim group' and ss. 61(2) and 62A provide that 'only the applicant has the power to do things necessary to prosecute the native title claim';
- section 25B 'provides for the process' the claim group must undertake 'in order to authorise a person or persons to act as the applicant' on the claim group's behalf—at [49] to [52].

His Honour noted that s. 66B:

> [C]ontemplates the replacement of the "current applicant" in a number of circumstances, including, significantly, in the circumstance where the person or persons, comprising the applicant, has, or have, died. It is apparent from the language and structure of s 66B, that the Native Title Act contemplates that even where the person or persons comprising the current applicant has, or have, died, the current applicant, as comprised by the deceased person or persons, remains the registered applicant, albeit in an inchoate form, until replaced on the register by the "new applicant". This follows from the fact that s 66B(1) uses the term "the current applicant", and not "the former applicant", to describe the status of the applicant, even where the person or persons comprising the applicant has or have died. Further, the Native Title Act contemplates that the name of the deceased person or persons comprising the applicant is, or are,

> to remain registered as the current applicant until such time as a Court order is made under s 66B(2) and, consequent thereon, the register is amended to reflect the names of the person or persons comprising "the new applicant" and the address for service of the new applicant—at [55].

According to Siopis J, it followed from this that, until the application was 'amended, pursuant to' s. 66B(4), the RNTC would 'continue to show the names of the ... persons comprising the current applicant, as the applicant' even in cases where those persons 'may be incapable of carrying out the statutory functions of the applicant prescribed' under the NTA, including 'the conduct of the negotiations called for' under s. 31—at [56].

Secondly, adopting the applicant's position would not mean (as had been submitted) that a person who is, or persons who are, the applicant would be succeeded by their personal representatives or executors 'as the persons comprising the applicant' because:

> [T]he Native Title Act does not contemplate that the personal representative or executor of a deceased person comprising the applicant would, by operation of law, succeed the deceased person in that capacity. The Native Title Act does not contemplate the replacement of the applicant occurring in any manner, other than by the manner referred to in s 66B of the Native Title Act. That section provides specifically for the circumstance of having to replace the applicant where a person or persons comprising the applicant has, or have, died. It provides for the replacement of the deceased person or persons, with a person or persons, who is, or are, authorised by the native title claim group to act as the applicant, in the specified manner prescribed by the statute. It also provides for the obtaining of an order under s 66B(2), as an essential precondition to effecting the replacement on the register of the current applicant—at [60].

Nor did his Honour accept that the view he took would 'render the right to negotiate provisions unworkable', given that Subdiv P contained provisions that:

> [P]ermit the government and grantee parties to obtain relief in circumstances where the native title claim group delays unduly in appointing a replacement applicant with a capacity to carry out the negotiations called for by s 31 of the Native Title Act—at [61].

Siopis J was satisfied that 'the right of a government or grantee party to apply' to the Tribunal under s. 35 for 'a determination that the future act may be done' provided a 'sufficiently flexible' mechanism 'to deal with any undue delay' in replacing the applicant if the applicant is 'incapable of satisfying the duty' under s. 31(1)(b) to 'negotiate in good faith'—at [63].

As was noted, a FADA can be made pursuant to s. 35 provided at least six months has passed since the notification day included in the relevant notice given under s. 29 and no agreement as contemplated by s 31(1)(b) has been made. According to the court:

> No such agreement could be made unless the applicant in relation to a native title claim in question had the capacity to agree to an agreement. This, in turn, could not happen in circumstances where the registered applicant was comprised of a person or persons, who was, or were, deceased. On an application under s 35, the arbitral body has the power under s 38 to make a determination that the act may be done—at [64].

Finally, Siopis was of the view that adopting the view of the state and the other respondents would lead to the future act being done 'in circumstances where it is unlikely that Parliament would have intended that' it be done, giving the following as an example:

> The applicant of a native title claim is comprised of two persons. The applicant, comprised by those two persons, has been registered as such, for much longer than four months from the notification day. Negotiations under s 31 have been ongoing for a considerable period of time. Both the persons comprising the applicant are travelling in the same vehicle to a meeting to continue the negotiations. They are both killed when the vehicle is involved in a traffic accident. In my view, Parliament could not have contemplated that, in those circumstances, the future act could, without more, be done, with the consequence that the native title claim group in respect of the relevant land would be deprived of the right to negotiate—at [67].

Decision
For the reasons summarised above, the declaration sought by the applicants was made.

Comment - *Dimer*
Siopis J's decision does not deal with the situation that confronted the Tribunal in *Dimer*, where the native title party could not make a future act determination application (because all those who constituted it were dead) but a representative body attempted to stand in the applicant's shoes. Section 75 provides that a future act determination may be made by a 'negotiation party' (i.e. grantee, government or native title party). His Honour's decision implies the Tribunal was right to find that it could not deal with the application but that it may have done so for the wrong reasons. In other words, since GLSC was not one of the entities identified in s. 75 and the native title party was legally incapable of making the application, the Tribunal was not entitled to deal with it and so was empowered to dismiss the application pursuant to s. 148(a) as it did.

Delay in Victorian native title settlement framework

Edwards on behalf of the Wamba Wamba, Barapa Barapa, Wadi Wadi People v Victoria [2010] FCA 744

North J, 16 August 2010

Issue
In this case, Justice North was not happy with timetable the parties had agreed in relation to a claimant application made on behalf of the Wamba Wamba, Barapa Barapa, Wadi Wadi People and so referred it back to the National Native Title Tribunal to see if it could be expedited. This claim is being dealt with under the Victorian native title settlement framework.

Background
The Tribunal filed a mediation report with the court prior to a directions hearing which updated the court on the progress of mediation. The report indicated the matter would be settled by April 2012. According to North J, this 'appeared to conflict' with earlier submissions indicating it would settle by the middle of 2011. Therefore, his Honour called for 'further explanation'. It was noted that the adoption of the State of Victoria's native title settlement framework took some time and resulted in 'a considerable slowing of the progress of native title applications in Victoria'. It was against this background that the court

became concerned that 'utilising the new Framework, the time for conclusion of this application has been almost doubled'. The state contended the timetable had not changed. Rather, the new timetable included nine months required to deal the authorisation, notification and registration of an indigenous land use agreement that was not factored into earlier versions. The Tribunal member conducting the mediation, Dr Gaye Sculthorpe, indicated the timetable was more comprehensive than previous versions and was 'quite tight, given that the application involves three distinct groups'—at [2] to [8].

Notwithstanding these explanations, his Honour was concerned that the outcomes promised from adopting the framework 'might not be being delivered in the way which the Court was led to expect'. It was noted that the relevant applications 'go back 10 years'. North J was disappointed that the resolution of those claims would take 'yet another two years, under what was said to be a new and more efficient system'—at [9].

Decision
The 'issue of the timetable' was referred back to the Tribunal 'for re-examination, with a view to providing a timetable which more satisfactorily reflects the expectations of the history which I have outlined'. The Tribunal is to report on 'attempts to expedite an outcome in a timelier manner than is proposed in the present' Tribunal report—at [11].

Claim group membership criterion - descent from a known ancestor

Aplin on behalf of the Waanyi Peoples v Queensland [2010] FCA 625

Dowsett J, 18 June 2010

Issue
The separate questions determined in this case were whether a particular person known as Minnie (*Mayabuganji*) was Waanyi and whether her descendants should be included in the native title claim group for a claimant application made on behalf of the Waanyi People. The 'crux of the ... problem' (i.e. what it meant to say a person must be 'a biological descendant of a known Waanyi person') was that the parties 'tended to assume that biological descent ... is an ascertainable fact, capable of being known with certainty' when it actually 'more likely to be a matter of belief or opinion' absent DNA or other scientific evidence. Therefore, what mattered was 'whose belief or opinion is relevant'—at [83].

Justice Dowsett was inclined to the view that:

> [A] person who has not previously been recognized as being Waanyi [such as one of Minnie's descendants] must demonstrate that he or she identifies as Waanyi, either by assertion or by virtue of the way in which he or she conducts him - or herself. Living according to Waanyi laws and customs may be sufficient. When a person has one Waanyi and one non-Waanyi parent, it may be sufficient that the person has not chosen to abandon Waanyi identity. When a person is born of two Waanyi parents the question of self-identification may never arise. Only in this very wide sense, it is necessary to identify oneself as Waanyi or assert such affiliation—at [266].

It was more difficult to answer the question about whether Minnie was a 'known Waanyi person'. It was found as a matter of fact that Minnie 'identified as a Waanyi person' and 'was accepted by Waanyi people at Burketown and at Lawn Hill [respectively in and near the claim area] as being Waanyi' during her lifetime, i.e. from circa 1888 to 1943.

However, whether Minnie's descendants were entitled to 'Waanyi identity' depends upon the claim group accepting 'each of them as being of Waanyi descent which ... in turn, depends primarily upon whether the present Waanyi people accept that Minnie was a Waanyi person'. It is the members of the claim group that 'must determine that question' but, to date, they have refused to do so. The court could not 'take that decision for them'. Nor could his Honour 'find that during her lifetime, the Waanyi people, as a whole, accepted her as being Waanyi'. The findings in this case 'as to such acceptance are limited to the position as it was at Lawn Hill and at Burketown'. In the end:

> It is for the claim group to determine whether that is a sufficient basis for accepting that she was a Waanyi woman, descent from whom is a basis for Waanyi identity—at [266].

Background

A claimant application was filed in 1999 on behalf of the Waanyi people. Minnie's descendants, who were numerous, had emerged and asserted they should be included in the claim group at a time when 'virtually all other matters in dispute' had been resolved and a native title determination was otherwise 'imminent'. The issue was brought into stark relief when the applicant sought to amend the application in 2009 so that membership of the native title claim group would require self-identification as Waanyi *and* recognition by other Waanyi people *in addition to* biological descent from 'known Waanyi ancestors'. Effectively, the applicant submitted Waanyi identity depends 'substantially, if not entirely, on acceptance by other Waanyi people' that any particular person is of Waanyi descent—at [5], [226] and [268].

Gregory Phillips, one of Minnie's descendants, submitted that Waanyi identity depended on biological descent or adoption and acceptance of that fact by one or more senior Waanyi persons. (It was noted that, although Mr Phillips relied on biological descent, he seemed to accept that this would 'generally be reflected in a person's views as to his or her affiliation and the views of family members and others'.) On Mr Phillip's submission, any claim group description that did not include Minnie's descendants did not 'accurately describe the group which, according to Waanyi traditional laws and customs', has native title in relation to the application area—at [19] and [226].

In those circumstances, the court listed the dispute for separate determination—at [5].

Claim group membership raises a justiciable question

Dowsett J found that resolving disputes about 'the rules governing membership of the claim group' and 'their operation' involved determining 'justiciable questions' because:

- the NTA 'provides a mechanism for obtaining a determination' that native title, 'vested in a claim group, continues to exist';
- pursuant to ss. 61 and 62, a claimant application 'must contain certain information concerning claim group membership and its decision-making processes';

- while the term 'native title claim group' is a 'creature' of the NTA, what it describes is 'a pre-existing social group – those people of indigenous descent who claim a shared interest in land or waters pursuant to shared traditional laws and customs' as explained in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422;
- the identification of that social group 'is a necessary element in any determination as to the existence' of native title;
- membership of a native title claim group 'involves rights recognized by the common law';
- the regime contained in the NTA 'prescribes a procedure for establishing' the continued existence of native title 'vested in the members of an identifiable claim group'—at [17] to [18].

This was compared with 'proceedings to identify and enforce the rules of a voluntary association' with which the courts do not generally concern themselves but will in cases where (for example) the organisation must, by force of an Act, be registered and so is found to be a 'creature' of Parliament—at [9] to [12].

Waanyi people

His Honour referred to a report by Professor David Trigger (one of the anthropologists called by the applicant) to describe 'the Waanyi people and their history'. According to that report:

- 'Waanyi' denotes an Aboriginal language of the southern Gulf of Carpentaria region, the existence and location of which 'have been well known' since first contact;
- it is now used to identify Aboriginal people who have, or assert, traditional connection with, and rights and interests in, the claim area;
- most contemporary Waanyi people have lived most of their lives close to some part of Waanyi land;
- they understand themselves to be descended from previous generations of Waanyi people and acknowledge and observe a body of laws and customs, inferentially going back to British sovereignty;
- under those laws and customs, they have rights and interests in the claim area—at [21] to [24].

Waanyi membership rules according to the applicant

According to Professor Trigger's report, in order to be a Waanyi person 'entitled' (among other things) to 'rights in Waanyi country', a person must:

- be a descendant (biological or adopted) of a Waanyi person;
- identify himself or herself as a Waanyi person; and
- be recognized by the broad group of Waanyi people as being a Waanyi person—at [25].

It was said in the report that a 'reasonable degree of acceptance' of the proposition that a person is a Waanyi person 'among the holders of Waanyi traditional law and custom' was needed. Elsewhere, it was indicated that acceptance of an assertion of Waanyi identity 'may be demonstrated when no senior Waanyi person is willing to dispute the claim publicly'—at [26] to [27].

The report also stated that, under Waanyi law laws and customs, each person has 'particular traditional connections to some section or sections of Waanyi country' determined by reference to laws and customs 'anchored in the systems of dreamings and skins'. Further:

> It is fundamental to Waanyi law and custom that rights to country are organized according to how people fit into the kinship system, including the skins system, dreamings and various spiritual features of the traditional landscape—at [27].

The report indicated that (among other things):

- acknowledgment 'on the basis of ancestral links to one or more known Waanyi forebears ... may be through the father or the mother' and anyone with 'at least one Waanyi grandparent is usually able to sustain a claim to membership of the group';
- there is no stated preference for patrilineal or matrilineal inheritance but 'a choice is usually made';
- there is 'no single rule for resolution of multiple inherited potential [linguistic] affiliations. The choice often involves negotiation, largely carried out orally'.

It also indicated that, while Waanyi people 'identified more with smaller clan groups within the Waanyi language group' in the past, there is now 'a greater focus upon membership of the larger group'. However, Professor Trigger still considers that:

> [A]ccording to Waanyi laws and customs, an individual person's claim to country is ultimately accepted or rejected through a process of collective debate and consideration, which process remains anchored in separate discussions among different Waanyi extended families—at [30].

Dealing with claims to membership rights made by 'Diaspora people'

Professor Trigger's identified what he called 'Diaspora people', i.e. Aboriginal people who, 'for whatever reason', have 'dispersed or been dispersed into areas away from their traditional lands'. According to Professor Trigger:

> Lengthy physical absence from the Southern Gulf region encompassing Waanyi land does not erase the right of persons to assert membership of the group; though this can be a complex and politically fraught issue—quoted at [33].

Professor Trigger also observed that among the Waanyi people:

- each individual family 'generally claims distinctive connection to one or more of the identified Waanyi "countries"' and these claims 'are matters for public consideration';
- without 'a link to one of the distinctive Waanyi countries, it is difficult for people asserting Waanyi identity, on the basis of deceased Waanyi forebears, to gain acceptance by the Waanyi group';
- this is because 'connection through a deceased forebear to one of the Waanyi countries' involves 'a position' in the Waanyi kinship and skins systems 'as well as a publicly acknowledged set of relationships to particular ... spiritual features of Waanyi country';
- people asserting Waanyi identity 'are expected to know their forebears' and if they do not, 'they should be able to derive [this information] ... from discussions with knowledgeable senior Waanyi people'—at [34].

Conclusions on applicant's position on recognition

His Honour concluded that:

> A person's connection to a particular area in Waanyi county is a matter of public knowledge. It may not necessarily be asserted publicly unless the need arises. Such need may arise in connection with land claims, Native Title, cultural heritage and related negotiations. Group recognition depends upon the relevant person asserting such connection to key persons regarded as senior in terms of knowledge of Wannyi cultural and historical matters. Senior persons exercise considerable influence over the decision-making process although, in practice, inter-personal politics may affect the outcome. As the matter is one of oral tradition, claims should be of a substantially public nature. Public assent may be inferred when no senior Waanyi person is prepared publicly to oppose a particular claim—at [35].

Basis of claim by Minnie's descendants

Mr Blackwood, an anthropologist retained by Mr Phillips and other members Minnie's family, described that family in his report, indicating that:

- the family members are descendants of a single apical ancestor who was a 'full blood' Aboriginal woman named Minnie (Mayabunganji) and her husband Ah Sam, a Chinese immigrant;
- they married in the late 19th century and lived and worked around the Gulf Region including Burketown, Woods Lake, Lawn Hill and Touchstone;
- their children were numerous and five of their daughters also had children;
- those five daughters were Sarah, Bessie, Janie, Lora (or Laura) and Maudie (all deceased) and their grandchildren now constitute the senior generation of the family;
- after Ah Sam's death in 1919, Minnie continued to live in the area until her death in 1943;
- the family's claim to native title is made on the basis of their descent from Minnie, who they believe was a Waanyi woman from the Lawn Hill area born in the early years of European settlement;
- Minnie's parents were (inferentially) born prior to such European settlement—at [38].

Evidence as to identity of Minnie's parents – look to contemporary opinion

According to Professor Trigger, the oral history and archival records suggested that the association Minnie and her descendants had with Waanyi country was historical.

His Honour accepted there was little evidence upon which a firm view could be formed as to the identity of either of Minnie's parents, let alone their language affiliation. It was noted that this was 'hardly surprising' given 'the passage of time and the absence of official records for much of the relevant period'. However, Dowsett J went on to make the following point:

> [W]hen one purports to identify oneself as the offspring of particular parents, one is generally stating an opinion or belief based on experience and the views of others, not stating proven biological facts. If Minnie said that she was Waanyi, then she was saying something about her understanding of her parentage. If other members of the community in which she lived said that she was Waanyi, they were also stating opinions. ... Opinion and belief may be based on knowledge, but are not, themselves, knowledge. In my view it is more helpful to look to such evidence as there is concerning Minnie's opinion of herself and the opinions of her contemporaries than to seek to create theoretical histories for her parents—at [125].

Factual findings

His Honour considered at length the evidence of numerous witnesses—at [167] to [225].

Dowsett J noted that, in this case, all of the witnesses' views as to Minnie's affiliations were 'almost certainly based upon the views of others'. His Honour inferred that those views had been 'passed down to the witnesses, in some cases over many years and through numerous

generations'. While these 'inherited' views could not really be challenged in cross-examination, the reported views of non-witnesses 'may be of great value, notwithstanding the fact that their views cannot be tested in cross-examination'. His Honour found that, in this case, it was likely that earlier generations had a clearer knowledge of Minnie's roots than do present generations. However, his Honour cautioned that:

> Where there is unchallenged evidence that a relevant opinion was expressed, it may still be necessary to consider its reliability, having regard to the particular person in question, the likelihood that he or she would have had a reasonable basis for the opinion, and whether it is likely that he or she was being truthful and was otherwise reliable. Much may depend upon the circumstances in which the opinion was expressed—at [228].

Dowsett J surveyed what others who knew Minnie had to say about her.This included what was said in a conversation between Mr Phillips, Arthur Peterson and Billy Foster tape recorded in 1991. Mr Peterson was a senior Waanyi man. At the time, Mr Phillips was conducting interviews with Indigenous elders to help him establish his ancestry. He, Mr Peterson and Mr Forster were discussing Mr Phillip's grandmother Bessie, who was one of Minnie's daughters. While the context was not 'entirely clear', Mr Arthur apparently identified Bessie as Waanyi. His Honour noted (among other things) that:

- Mr Peterson was a senior Waanyi man 'whose views would normally have been respected';
- there was little or no evidence to support the applicant's submission that there was 'room for uncertainty as to whether he meant to identify Minnie as Waanyi' or, if he did, that this was done 'out of a desire to tell Mr Phillips what he thought that he wanted to hear';
- although the tape was 'not entirely easy to understand and the 'persuasiveness of this evidence' had been criticised, it should not be dismissed out of hand—at [231].

Yuan Hookey's evidence on this issue was 'also of particular importance', given that both his parents were Waanyi and Mr Hookey grew up next door to Minnie in Burketown. He lived with his mother and his grandmother (also Waanyi), both of whom recognised Minnie as Waanyi.

While Burketown was outside Waanyi country, Waanyi people had historically resided there. According to Dowsett J, the fact that 'one Waanyi family living in Burketown ... in close proximity to Minnie recognized her as a Waanyi woman' provided some basis for drawing inferences that 'she was Waanyi, or that she was so recognized by the broader Waanyi community'. This was because:

> It seems unlikely that in a relatively small community, one Waanyi family would have held views which differed substantially from those held by other Waanyi families in the area—at [232].

If Mr Hookey's evidence was accepted as 'credible and reliable' (and his Honour found it was), it could provide the basis for 'significant inferences concerning both Minnie's view of herself and the views of her Waanyi contemporaries, or at least of those living in close proximity to her'. Further: 'If Minnie believed herself to be Waanyi, it was probably because she believed that at least one of her parents was Waanyi'—at [233].

Roy Seccin was treated by all the anthropologists involved in this case as a senior Waanyi man who was very knowledgeable about Waanyi affairs. However, it seemed the only

person he discussed 'the Minnie question' with was Mr Blackwood. The conversation took place in 2004, when Mr Seccin was around 86 years old. He was born circa 1918 at Lawn Hill and grew up there but his contact with Minnie probably occurred at Burketown.

Mr Seccin clearly identified Minnie as being a Waanyi woman. His Honour found it 'difficult to discount' this opinion 'given the high regard in which he [Mr Seccin] was otherwise held as a senior and knowledgeable man'. There was no challenge to Mr Blackwood's evidence that the conversation took place, albeit the accuracy of his report of it was challenged because of some variations between his account of the conversation and his field notes. However, Dowsett J was satisfied that notes are 'often designed to prompt memory rather than to be ... a precisely accurate account of ... events' and generally accepted Mr Blackwood as 'an accurate reporter'. It was also noted there was 'no evidence suggesting a motive' for a person of Mr Seccin's 'seniority and knowledge' to make 'any assertion which he did not believe to be true'. Nor was there any reason 'to doubt that he believed that Minnie was a Waanyi woman'. The court accepted Mr Seccin knew Minnie while he was at Lawn Hill and she was in Burketown and inferred that, if there had been 'any dispute about her affiliation' at either location, Mr Seccin might be expected 'to have known of it'—at [235] to [239].

His Honour concluded that:

> It is difficult to resist the inference from Mr Seccin's evidence that during his time at Lawn Hill, the Waanyi people there accepted ... [Minnie] as a Waanyi person. Such acceptance must have pre-dated her departure from Lawn Hill and may have dated from 1888 or earlier. It follows from Mr Seccin's views, using the logic which I have previously used in connection with Mr Hookey's evidence, that Minnie identified as a Waanyi woman. It also follows that at the time at which Mr Seccin knew her, she was probably accepted as a Waanyi woman by the Waanyi community in Burketown. ... Mr Hookey's evidence also supports the inference that she was accepted as Waanyi by the Waanyi people at Burketown until her death in 1943. Mr Seccin lived his life as a Waanyi man. I infer that throughout that period, he accepted that Minnie was a Waanyi woman. It is reasonable to infer that those Waanyi people with whom he had contact throughout his life, and from whom he derived information about Waanyi affairs, provided him with no basis for departing from that view—at [239].

Dowsett J placed substantial weight upon the evidence of Mr Hookey and Mr Seccin, rather than that of other witnesses, because they identified 'the time at which each of them first learned that Minnie was Waanyi' and, in each case, 'the relevant view was formed during Minnie's lifetime'. His Honour inferred that this was 'based upon information received in an environment in which any contrary view would probably have been apparent'—at [245].

Based on the evidence, the following factual findings (among others) were made:

- during her life, Minnie identified herself as a Waanyi woman based on her belief that she had at least one Waanyi parent;
- Mr Seccin met Minnie in the early to mid-1920s and, from that time on, he understood her to be a Waanyi woman;
- in about 1942, Mr Hookey was told Minnie was a Waanyi woman and, from that time on, he understood her to be a Waanyi woman—at [250].

These (and other) findings supported 'further inferences, based upon the fact that neither man apparently perceived any reason to change his view concerning Minnie's affiliation' which were that:

- neither man 'became aware of any dissent concerning the question within his family or the Waanyi community in which he was living, or in which he had learnt of Minnie's Waanyi affiliation';
- although 'there was a gap between Minnie's departure from Lawn Hill and Mr Seccin's first meeting with her', views at Lawn Hill did not change during that time—at [251].

Further, since Minnie was 'a long-standing resident at Lawn Hill', it was 'unlikely that she was quickly forgotten'. Therefore, it was inferred that:

- from 1888 'until at least 1939, Minnie was recognized by the Waanyi people at Lawn Hill as a Waanyi woman'; and
- from 'about 1916 until her death in 1943, Minnie was recognized by the Waanyi people at Burketown as a Waanyi woman'—at [251].

Credibility and reliability

In his Honour's view, Mr Seccin and Mr Hookey were the people whose views concerning Minnie were likely to be reliable because:

- they both knew her;
- their respective Waanyi identities did not depend upon her status as a Waanyi woman—at [240].

This, combined with Mr Peterson's statement to the effect that the Minnie family was of Waanyi descent, 'made it difficult to resist the conclusion that the reason for this shared view is that it is based in truth'—at [240].

Membership of the claim group

Subsection 61(1) and s. 253 provide that the native title claim group must be 'the persons ... who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed'. Those sections, along with s. 251B (which deals with authorisation), 'inevitably' lead to the conclusion that, for the purposes of the NTA the claim group must 'determine its own composition'. However:

> A claim group cannot arrogate to itself the right arbitrarily to determine who is, and who is not a member. As to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs—at [256].

His Honour then referred to various cases, concluding that the case law 'clearly demonstrates that membership must be based on group acceptance', a requirement that 'is inherent in the nature of a society'. However, a society may 'accept the views of particular persons as sufficient to establish group acceptance'—at [260].

Acceptance of a claim to Waanyi identity depends on 'recognition by other Waanyi people that the relevant candidate is descended from a recognized Waanyi person'. However, this did not precisely accord with the wording of the proposed amended description of the claim group 'which requires that a person be recognized as being a Waanyi person'. This would in itself 'necessitate a decision as to the meaning of the term "Waanyi person"'.

According to Dowsett J:

> The amendment is intended to define that term. It can hardly do so by reference to the term itself. Fairly clearly, the intention is that the person must be recognized as being of Waanyi descent—at [263].

In the event, it was held that:

> [A] person who has not previously been recognized as being Waanyi [such as one of Minnie's descendant's] must demonstrate that he or she identifies as Waanyi, either by assertion or by virtue of the way in which he or she conducts him- or herself. Living according to Waanyi laws and customs may be sufficient. When a person has one Waanyi and one non-Waanyi parent, it may be sufficient that the person has not chosen to abandon Waanyi identity. When a person is born of two Waanyi parents the question of self-identification may never arise. Only in this very wide sense, it is necessary to identify oneself as Waanyi or assert such affiliation—at [266].

Up to the claim group as to whether Minnie recognised as a Waanyi person

As noted earlier, as a matter of fact it was found that Minnie identified as a Waanyi person and was accepted as such by Waanyi people at Burketown and at Lawn Hill. This finding is binding on the parties.

However, according to Dowsett J, her descendants' entitlement to Waanyi identity depends on group acceptance of each of them as being of Waanyi descent. This, in turn, depends 'primarily upon whether the present Waanyi people accept that Minnie was a Waanyi person'. This was something the claim group must determine. It was not a decision the court could make. Nor could Dowsett J find that the Waanyi people, as a whole, accepted Minnie during her lifetime as being Waanyi. The findings in this case as to acceptance were 'limited to the position as it was at Lawn Hill and at Burketown' at that time. It was now up to the claim group to determine whether 'that is a sufficient basis for accepting that she was a Waanyi woman, descent from whom is a basis for Waanyi identity'—at [267].

It was noted that this issue arose:

> [I]n a way which makes it difficult to resolve rationally. At a time when a Native Title determination is imminent, the members of the Minnie family have emerged as possible members of the claim group. There are many of them. For reasons of history, mixed descent and geographical dispersal, many Waanyi people do not recognize the family as Waanyi. There are conflicting views on the subject. It is no doubt difficult for the claim group to marshal the various views in order to assess their persuasiveness—at [268].

Suggestions for progress of the matter

Dowsett J thought it unlikely that a claim group meeting could 'give the necessary measured consideration to the question in order to arrive at an informed and fair decision' because the 'politics of the situation are likely to confuse and distort views of the evidence which must be considered in order to make that decision'—at [269].

Therefore, Dowsett J made some suggestions, which were that:

- those advising the claim group should 'encourage them to seek the considered views of a small committee, perhaps made up of those who presently constitute the applicant';
- that committee should 'examine the evidence in the light of' the court's findings (which bind them) and 'subject to such legal or other advice as they may deem appropriate';

- the committee 'should be asked to formulate a recommendation for adoption' at a claim group meeting after giving careful consideration to 'the recorded views of Mr Hookey, Mr Seccin and Mr Peterson and the likely bases of those views', i.e. these views 'should not be dismissed out of hand merely because they do not comply with preconceived notions concerning' Minnie's descendants—at [269].

Possibility of judicial review

While resolution of this matter is primarily for the claim group, his Honour pointed out that any decision of that group 'may not ... be beyond review, given its significance' under the NTA. It was noted there is no precedent as to 'the availability of judicial relief in the event that persons who, *according to traditional laws and customs, are entitled to Native Title rights and interests*, are *wrongfully* excluded from membership of the claim group'. Dowsett J thought that the doctrine of fraud on the power, which provides relief against the oppression of the minority of company shareholders, might provide an analogy—at [270] (emphasis added).

In this context, the discussion of the process for the recognition of Diaspora people by Professor Trigger is of note:

> Lengthy physical absence from the Southern Gulf region encompassing Waanyi land *does not erase the right of persons to assert membership of the group*; though this can be a complex and *politically fraught* issue. Families or individuals who may have lived distant from Waanyi country for several generations appear to maintain the *potential right to reactivate involvement in Waanyi affairs and Waanyi country*. Their success in doing so follows from a range of factors, including their choice of whether to live in the southern Gulf region or at least participate actively in social interaction with Waanyi people, and the strength of their assertions. Central to the negotiation of establishing acceptance of a person's right to involvement in Waanyi culture and country is agreed knowledge about their forebear(s)—quoted by Dowsett J at [33], emphasis added.

Decision

After making the findings of fact noted above, his Honour decided to entertain requests for further findings of fact and submissions as to appropriate orders.

Postscript

On 24 June 2010, the notice of motion to amend the description of the claim was adjourned to 23 July 2010 or an earlier date to be fixed. The parties were also order to confer with a view to agreeing to a proposed consent determination. On 23 July 2010, the court made a declaration by consent that the laws and customs of the Waanyi People concerning who are Waanyi People are that a person is a Waanyi person if and only if

- the other Waanyi People recognise that he or she is descended (which may include by adoption) from a person who they recognise as having been Waanyi; and
- the person identifies himself or herself as a Waanyi person.

It was also declared by consent that Minnie (*Mayabuganji*):

- identified herself as a Waanyi woman during her life;
- was understood by the late Roy Seccin, from the early to mid-1920s, to be a Waanyi woman and has been understood by Yuen Hookey, from about 1942, to be a Waanyi woman;

- was recognised by the Waanyi People at Lawn Hill from 1888 until at least 1939 as a Waanyi woman and from about 1916 until her death in 1943 was recognised by the Waanyi People at Burketown as a Waanyi woman.

Orders were made by consent that the applicant has leave to amend the application in the form filed in the court. In the amended application, the native title claim group is 'the Waanyi People', further described as follows:

> A person is a Waanyi person if and only if:
> - the other Waanyi people recognise that he or she is descended (which may include by adoption) from a person who they recognise as having been Waanyi; and
> - the person identifies himself or herself as a Waanyi person.
>
> It is accepted that adoption may take place and that where adoption has occurred it confers upon the adoptee the right to identify as being a Waanyi person.
>
> The following deceased persons are recognised as having been Waanyi people from whom living Waanyi people may be descended: [going on to list a number of people but not including Minnie].

The applicant is also to file and serve an agreement signed by all of the parties setting out the terms of a proposed consent determination, along with supporting submissions and materials, by 29 October 2010. The State of Queensland and any other respondent who wants to do so are to file and serve supporting materials by 12 November 2010. The matter is listed for determination on 8 December 2010. There was no order as to costs.

Mining leases as category C past acts

James v Western Australia [2010] FCAFC 77

Sundberg, Stone and Barker JJ, 29 June 2010

Issue

The National Native Title Tribunal referred a question of law to the Federal Court which was, essentially, whether the grants of certain mining leases were 'past acts' as defined in the *Native Title Act 1993* (Cwlth) (NTA). This involved determining whether the leases were invalid to some extent but would have been valid to that extent if native title did not exist at the time of the grants. It was agreed that, at the time of each grant, the leases affected areas otherwise subject to a native title right to exclusive possession.

The question was reserved to the Full Court, which found the leases were category C past acts to which the non-extinguishment principle found in s. 238 of the NTA applies. One of the critical factors leading to this finding was that the right to control access (which is intrinsic to the right to exclusive possession) was 'wholly extinguished in the hands of native title holders' but 'merely regulated or qualified by a grant of a mining lease over the land of other title holders'—at [55].

The extent to which the decision in *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*) on the effect of post-RDA mining leases could be distinguished was at the heart of the question

referred. In *Ward*, the mining leases considered were not category C past acts. However, all of those leases affected areas where 'excusive' native title had already been extinguished before the RDA commenced. Justice Sundberg, Stone and Barker were of the view that what was said in *Ward* merely raised a 'hypothetical scenario' about what might happen had this not been the case but the High Court 'did not return' to consider that question. Therefore, *Ward* could be distinguished—at [48].

Background

Tribunal mediation of the Martu People's claimant application began in 1996. In September 2002, a determination was made by consent in *James v Western Australia* [2002] FCA 1208 (*James No 1*) recognising the Martu People as native title holders in relation to a large part of the area covered by their application. The leases in question affected parts of the area covered by the remainder of the application. All but one of the leases was granted under the *Mining Act 1978* (WA) (Mining Act) and all were granted 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 parties could not reach agreement as to the effect of these grants on native title. Therefore, resolution of that question was relevant to the resolution of the Martu People's application.

Referral

The Tribunal referred the question to the court pursuant to s. 136D of the NTA. Section 86D empowered the court to determine the question and enabled it to adopt any agreement on facts reached between the parties during the mediation in doing so. The referral was contained in a special case, as required by O 78 r 16 of the Federal Court Rules, and the State of Western Australia had carriage. Following a request from the parties, the question was reserved to a Full Court pursuant to s. 25(6) of the *Federal Court of Australia Act 1976* (Cwlth)—see *James v Western Australia* [2009] FCA 1262, summarised in *Native Title Hot Spots* Issue 31.

The 'referral area' was so much of the area subject to the Martu People's application that is (or was) subject to the grant of a mining or general purpose lease on or after the RDA commenced but before the NTA commenced under either the Mining Act or the *Western Mining Corporation Limited (Throssell Range) Agreement Act 1985* (WA). 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 (from A to D) of 'past act', as defined in ss. 229 to 232 of the NTA for the purposes of Pt 2 of the TVA, does it fall?

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

- the Martu People, as defined in the determination made in *James No 1*, 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. the right to exclusive possession);
- there has been no prior extinguishment of the native title;
- any question as to the validity of the leases arose only because of the existence of native title at the time of the relevant grant.

Subsequent to the referral, amendments to the NTA made by the *Native Title Amendment Act 2009* (Cwlth) repealed s. 136D and replaced it with s. 94H, which was in substantially the same terms. The parties agreed that the referral should be treated as if it were made under s 94H.

Past acts

Generally speaking, 'past acts' are certain acts which took place before 1 January 1994 that would be invalid because of the existence of native title had there not been intervention via Pt 2, Div 2 of the NTA to validate those attributable to the Commonwealth and allow a state or a territory to validate those attributable to that state or territory. The effect the validation of a past act attributable to the Commonwealth on native title is set out in s. 15. It varies depending on which of the four categories the act falls within (i.e. Category A to D as defined in ss. 228 to 232). In this case, 'the only category relevant ... is "category C past act", which is a past act consisting of the grant of a mining lease'. Section 19 provides for legislation to the same effect for past acts attributable to a state or territory which, in this case, was the TVA—at [5] and [8].

Pursuant to s. 15(1)(d), the non-extinguishment principle found in s. 238 applies to a category C past act attributable to the Commonwealth. As the court noted at [7], s. 238(2) gives the grant of a mining lease that confers exclusive possession which is a Category C past act as an example of its application:

> In such a case the native title rights and interests will continue to exist but will have no effect in relation to the lease while it is in force. However, after the lease concerned expires ..., the rights and interests again have full effect.

In this case, the only relevant part of the 'elaborate definition' of a 'past act' was s. 228(2), which provides (among other things) that an act is a past act 'in relation to' the land or waters in question if:

- at any time before 1 January 1994 when native title existed in relation to particular land or waters, an act took place that was not the making, amendment or repeal of legislation; and
- 'apart from' the NTA, that act was invalid to any extent but would have been valid to that extent if native title did not exist.

As was noted, each of the leases in question was granted before 1 January 1994 and was an 'act' as defined in s. 226 of the NTA. Therefore, the only issue in this case was whether the leases were invalid to any extent because of the existence of native title 'apart from' the NTA (or, in this case, the TVA). As the court noted: 'It is only if that prima facie invalidity is established that the effect, if any, on native title of the TVA is considered'—at [10] to [11], referring to *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 469 to 470.

Effect of RDA

The parties agreed that s. 10(1) of the RDA provided the only possible reason for invalidity in this case. As was noted, s. 10(1) 'operates in two kinds of cases' involving state laws—at [13].

The first case (a *Gerhardy* 1 case) is where a state law 'omits to make the enjoyment of rights universal', in which case the RDA operates to confer that right on 'persons of a particular race, colour or national or ethnic origin' who would otherwise not enjoy that right. In these cases, the law is not invalidated. Rather, s. 10(1) confers a right 'which is complementary to the right created by the ... law'—at [13].

The second case (a *Gerhardy* 2 case) is where the state law:

> [I]mposes a prohibition forbidding the enjoyment of a human right or fundamental freedom enjoyed by persons of another race, or deprives those persons of a right or freedom previously enjoyed by all regardless of race—at [13].

Here, s. 10(1) confers a right on those persons which 'necessarily' results in an inconsistency between s. 10 of the RDA and the state law. In these cases, s. 109 of the Constitution 'operates to invalidate' the state law 'to the extent of the inconsistency'. As was noted, it is only in the second case that the validation provisions of the NTA past act regime operate, bringing with them the consequences of validation. The non-extinguishment principle applies to the grant of a category C past act, the only category relevant in this case—at [13] to [14], referring to *Gerhardy v Brown* (1985) 159 CLR 70 at 98 and *Ward* at [106] to [108].

If the leases were not category C past acts, then extinguishment would be determined by applying the inconsistency of incidents test and native title would be permanently extinguished to the extent of any inconsistency. This issue was considered in *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* [2010] FCA 498 (summarised in *Native Title Hot Spots* Issue 32).

Submissions

In brief and among other things, the state submitted that:

- assuming the Martu People were 'owners' or 'occupiers' as defined in s. 123 of the Mining Act (the state law), they were entitled to compensation under that Act and so the RDA had no operation, the leases were valid and were not past acts;
- if the Martu People were not 'owners' or 'occupiers' under the state law, then there was unequal enjoyment of the human right to be compensated for deprivation of property and, as a *Gerhardy* 1 case, s. 10 of the RDA would confer that right, the leases would be valid and so not past acts;
- alternatively, since all land is open for mining under the state law, any right to control the use and access for mining purposes was removed from any interest holder and so the state law did not treat native title and non-native title holders differently.

Again, in brief and among other things, the applicant submitted that:

- the human right of the Martu People affected by the grant of the mining leases was not the right to be compensated for the deprivation of property but the right to own and inherit property;
- the practical effect of the Mining Act was that native title was extinguished to some extent, leaving other titles intact, which meant this was a *Gerhardy* 2 case.

Further reference is made to the parties' submissions only where this is necessary to explain the court's reasoning. However, note that the court comprehensively summarised them at [15] to [38].

Unequal treatment – *Gerhardy* 2 case

Before answering the referred question, the court noted that:

- the grant of a mining lease under the Mining Act, if valid, extinguished any native title right to control access to the area concerned because such a right is inconsistent with the right of access 'arising under the lease';
- however, the grant of such a lease did not extinguish the rights of any non-native title landholders to any extent because it was not 'a true common law lease' but, rather, 'a liberty granted to a person, for a specific length of time, to enter upon land, search for things and take them away', a point 'reflected' in s. 113 of the Mining Act which provides that the owner may 'resume possession' of the area concerned on 'the expiration or earlier termination of the lease';
- a native title holder with a right to exclusive possession 'cannot enjoy the right conferred' by s. 113 because the native title right to control access is inconsistent with, and so permanently extinguished by, the grant of the lease—at [39] to [40], referring to *Ward* at [285] and [309], *Gowan v Christie* (1873) LR 2 Sc&Div 273 at 284 and s. 237A of the NTA

As was noted, determining the question raised by s. 10(1) of the RDA required a comparison between 'the security of possession and enjoyment of native title rights by the native title holders with the security of possession and enjoyment of other forms of title by the holders thereof'. According to their Honours:

> On that comparison, the practical operation and effect of the *Mining Act* on the grant of a mining lease is that native title holders do not enjoy their right to own and inherit property (including the right to be immune from the arbitrary deprivation of property) equally with other title holders. We have described the "right" in question in that composite form because that is how it was described by Brennan, Toohey and Gaudron JJ in *Mabo v Queensland [No 1]* ... (1988) 166 CLR 186 at 217. However nothing turns on whether it is more accurately rendered as a right to own and inherit property or a right to be immune from the arbitrary deprivation of property—at [41].

It was found that this was a *Gerhady* 2 case because:

- the effect of s. 10(1) of the RDA is to confer on native title holders the right to own and inherit property (including the right to be immune from the arbitrary deprivation of property) 'to the same extent as enjoyed by any other landholder';
- that right 'cannot exist so long as the *Mining Act* has its extinguishing effect' and so the two 'are inconsistent'—at [42].

Decision - leases were category C past acts

Given the findings noted above, the court held that the leases in question were past acts because:

- this is 'the third situation posited' in *Ward* at [108], i.e. the Mining Act 'extinguishes only native title and leaves other titles intact';
- the 'discriminatory burden of extinguishment' is removed 'because the operation' of the state law 'is rendered invalid' to that extent by s. 109 of the Constitution;
- therefore ('apart from' the TVA), the grant of each mining lease was invalid to that extent by operation of s. 10(1) of the RDA;
- accordingly, each mining lease is a 'past act'—at [42] to [43].

Since the answer to the first referred question was 'yes', it was common ground that the answer to the second question was that the leases were category C past acts as defined in s. 231 of the NTA—at [43].

***Ward* on vesting of reserves**

The court went on to explain in more detail why it did not accept the state's submissions, including those in relation to the effect of vesting nature reserves in *Ward* at [250], where it was said that:

> On its face, the Land Act 1933 does not single out native title rights and interests for different treatment. And leaving aside the question of compensation, there is nothing to suggest that, so far as concerns the vesting of reserves, the practical operation of the Land Act 1933 resulted in the different treatment of native title rights and interests and non-native title rights and interests.

The practical effect of the scheme for vesting of reserves was that all interests in land (i.e. native title and non-native title) were brought to an end by the vesting but with no compensation payable to native title holders when it was payable to others. Therefore, the High Court concluded that the vesting of a reserve was a *Gerhardy* 1 case, i.e. the vesting was valid but s. 10(1) of the RDA provided with a right of compensation to native title holders—at [46].

***Ward* on mining leases**

Among other things, the court considered the comments in *Ward* at [319] that:

- if the native title holders were 'occupiers' under the Mining Act, they were entitled to compensation under s. 123 of that Act, the RDA would not be engaged, there would be no invalidity in respect of the mining leases and, 'to the extent that the grant of those mining leases extinguished native title', it would 'remain extinguished';
- if there were not 'occupiers', s. 10 of the RDA would confer the right to compensation to the same extent as the Mining Act conferred that right upon 'occupiers'.

Their Honours repeated their earlier observation, i.e. that the court in *Ward* was concerned with 'occupiers' because, on the facts *Ward*, the native title holders were not 'owners' because their right to control access had been extinguished prior to the commencement of the RDA, i.e. in *Ward*, the court was dealing with at *Gerhardy 1* case—at [49] to [50] and [52].

The determination of native title made at first instance in *Ward* was so general that it was impossible for the High Court either to determine which other native title rights and interests that had been extinguished or to identify those that subsisted. In that context, Sundberg, Stone and Barker JJ agreed with the applicants' submission that the references in *Ward* to 'extinguished native title' should be understood as:

> [R]eferring to the extinguishing effects, if any, which were themselves non-discriminatory; to circumstances in which there was no inequality in the enjoyment of the right to own property other than the absence of compensation'—at [51].

In this case, the state was trying to 'attract the assistance of *Ward* by pigeonholing' this as a *Gerhardy 1* case. However, apart from general introductory material in *Ward* at [106] to [109], where the two *Gerhardy* cases were identified, the only place where a *Gehardy 1* case was posed in *Ward* was at [309], where it was said that: 'This would raise the issue of invalidity of

the grant by operation of the RDA and subsequent validation by the NTA' and the TVA. The court was of the view that *Ward* indicated that, if this issue did arise, it 'would be resolved in favour of invalidity, and validation' by the NTA and the TVA—at [53].

The court rejected the state's alternative case that, under the Mining Act, no interest holder had a right to be asked permission to use or have access to land for mining purposes and so the RDA was not attracted because (among other things):

- it ignored the fact that the right to control access was 'wholly extinguished in the hands of native title holders' but 'merely regulated or qualified by a grant of a mining lease over the land of other title holders', something made clear by s. 113 of the Mining Act; and
- it did not accommodate the mandatory comparison between 'the security of possession and enjoyment of native title rights ... and the security of possession and enjoyment of other forms of title'—at [55].

Mining Act – no compensation for extinguishment of underlying title

The court had asked the parties to make submissions on the effect of the compensation provisions of the Mining Act but it was not necessary to refer to them to answer the question referred. However, some of the submissions were dealt with, including those relating to the compensation provisions of the Mining Act.

After determining which of the various versions of s. 123 of the Mining Act applied at the time of each grant, the court considered whether that provision (in any of its relevant incarnations) extended to providing compensation for extinguishment of an underlying title. It was found that it did not because (among other things), there was no discernible legislative intention that 'extinguishment of title would flow from the grant of a mining tenement'—at [57] to [69] and [75] to [76].

This was not inconsistent with the fact that native title was partially extinguished by the grant of a mining lease because:

> The inconsistency that results from the comparison between the legal nature and incidents of rights granted by the leases and the native title right to control access is not the result of any intention on the part of those who drafted the *Mining Act* in 1978. It results from the inconsistency of incidents test mandated by *Ward*. In determining whether compensation is payable for extinguishment of title, it is ... appropriate to inquire whether extinguishment was in contemplation at all. That turns on the provisions of the *Mining Act*—at [70].

No decision on whether Martu People occupiers or owners under the Mining Act

While it was not necessary to determine this issue, the court gave it some consideration. It was noted that native title holders cannot satisfy the definition of 'occupiers' for the purposes of the Mining Act as persons 'in actual occupation under any lawful title granted by or derived from the owner of the land' because:

- the Crown 'is not apt to be described' as the 'owner' of land the subject of native title; and
- in any case, native title is not 'granted or derived from the Crown'—at [78].

However, this did not answer the question because 'occupier' is defined in the Mining Act in an inclusive, rather than exhaustive, way. Therefore, findings of fact may be required and the

time at which the question is asked may also be relevant. Either way, whether or not the Martu People were 'occupiers' for the purposes of the Mining Act was a question that could not be answered on the facts contained in the special case—at [78] to [79].

As to whether the Martu people are entitled to compensation as 'owners', the court indicated they are either 'owners' as defined in s. 8(c) of the Mining Act (i.e. the person who, for the time being, 'has the lawful control and management' of the area concerned, 'whether on trust or otherwise') or, if not, s. 10 of the RDA 'requires compensation to be provided' because it is a *Gerhardy 1* case—at [81].

Future act determination appeal – s. 116 of the Constitution & international instruments

Cheedy on behalf of the Yindjibarndi People v Western Australia [2010] FCA 690

McKerracher J, 2 July 2010

Issue
The main issue in these appeal proceedings was what (if any) application did s. 116 of the *Commonwealth of Australia Constitution Act 1900* (which deals with religious freedom) and certain international instruments have in future act determination proceedings under the *Native Title Act 1993* (Cwlth) (NTA)? The other issues raised include whether the National Native Title Tribunal's determination under s. 38 of the NTA effected a compulsory acquisition of native title. Both appeals were dismissed because the native title party failed to establish that the Tribunal erred on any question of law.

Appeal filed, stays sought
The native title party filed notices of appeal on 20 July 2010. The grounds are similar to those raised in this matter. Stays of both this judgment and the two related Tribunal determinations are also sought. The appeals will be heard together over two days in November.

Background
These proceedings relate to a registered claimant application made on behalf of the Yindjibandi People in the Pilbara region of Western Australia. The area covered by that application adjoins the area in which the Yindjibandi People were recognised as holding native title rights and interests in *Daniel v Western Australia* [2005] FCA 536. The applicant was the native title party in right to negotiate proceedings: *FMG Pilbara Pty Ltd/Cheedy/Western Australia* [2009] NNTTA 91 (summarised in *Native Title Hot Spots* Issue 31) and *FMG Pilbara Pty/Wintawari Guruma Aboriginal Corporation/Cheedy/Western Australia* [2009] NNTTA 99 (WF09/1).

Section 38 provides that the Tribunal must make one of the following determinations:
- a determination that the future act must not be done;
- a determination that the future act may be done;

- a determination that the future act may be done subject to conditions to be complied with by any of the parties.

Section 39 sets out the matters the Tribunal must take into account when making its determination, which includes the effect the effect of the future act on:

- the enjoyment by the native title parties of their registered native title rights and interests;
- the way of life, culture and traditions of any of those parties;
- the development of the social, cultural and economic structures of any of those parties;
- the freedom of access by any of those parties to the area concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on that area in accordance with their traditions;
- any area or site of particular significance to the native title parties in accordance with their traditions on the area concerned.

In each matter, the Tribunal determined that future acts (the grant of three mining leases) could be done, initially subject to four conditions but ultimately reduced to three. The first determination (WF08/31) was made in relation to mining lease M47/1413 and the second (WF09/1) in relation to mining leases M47/1409 and M47/1411. An appeal under s. 169 of the NTA from the Tribunal's two future act determinations was made in each case. As the appeals gave rise to similar issues, they were heard together. Justice McKerracher outlined the material before the Tribunal and the Tribunal's role—at [16] to [22] and [26] to [44].

Jurisdiction

Pursuant to s. 169(1):

> A party to an inquiry relating to a right to negotiate application before the Tribunal may appeal to the Federal Court, on a question of law, from any decision or determination of the Tribunal in that proceeding.

As the appeal must be 'on' a question of law, it was noted that:

- a decision of the Tribunal cannot be made the subject of an appeal unless, in making it, the Tribunal 'has acted otherwise than in accordance with law';
- there will be a relevant error of law if the Tribunal 'identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant material';
- wrong findings may be the subject of an appeal on a ground of law if the Tribunal "reaches a mistaken conclusion, fails to give adequate weight to a factor of great importance or gives excessive weight to a factor of no great importance in circumstances where to do so was 'manifestly unreasonable'";
- similarly, a failure to address a submission 'which relates to a matter of substance, and if accepted has the capacity to affect the outcome of a case' is an error of law—at [24] to [24], referring to the relevant authorities.

In hearing and determining the 'appeal' under s. 169, the court exercises its original jurisdiction: *Hicks v Western Australia* [2002] FCA 1490 at [12].

Grounds of appeal

The grounds of appeal were that the Tribunal:

- erred in not finding that ss. 38 and 39 have the intention, design, purpose or effect of prohibiting or of seeking to prohibit the free exercise of the applicant's religion, contrary to s. 116 of the Constitution;
- erred in finding that international instruments were not relevant to its inquiry because there is no relevant ambiguity in s. 39;
- erred in failing to consider submissions of substance as to the relevance of international instruments to the Tribunal's inquiry;
- erred in that the determination amounted to a compulsory acquisition of native title interests;
- made errors of law in drawing erroneous inferences and making erroneous findings;
- denied procedural fairness to the applicant by failing to afford the applicant an opportunity precisely identify the location of sites of significance within the proposed lease area—see [48] to [110], [112] to [172].

In both appeals, notices of a constitutional matter under s. 78B of the *Judiciary Act 1903* (Cwlth) were served but no state or territory sought to intervene on the constitutional matter. Nor did the Commonwealth—at [47].

Section 116 of the Constitution

According to the court, in each appeal the constitutional ground involved the assertion of the following errors:

- the religious beliefs of the Yindjibarndi were characterised in a way that 'did not do justice to the evidence' and the Tribunal focussed on 'religious obligations or beliefs relating to the need for strangers to gain an agreement with the Yindjibarndi' before entering Yindjibarndi country 'but not also upon other particular [identified] religious observances' (referred to as the observances argument); and
- the effect or result of the Tribunal's decision was that the Yindjibarndi were prevented from meeting their religious obligations and carrying out their religious observances, which made either the decision or ss. 38 and 39 of the NTA which authorised the decision 'invalid for inconsistency' with s. 116 of the Constitution (referred to as the effect argument)—at [64].

Section 116 of the Constitution provides that:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The Tribunal had accepted that:

> [T]he spiritual beliefs and cultural practices of aboriginal people which arise from, and are a given expression in, their traditional laws and customs, may well constitute a religion for the purposes of s 116.

However, as his Honour noted, the Tribunal held (among other things) that:

- whether the requirement that the native title party must enter into agreement with outsiders before those outsiders can enter Yindjibarndi land is a religious belief or

practice is not an issue for the Tribunal unless the Tribunal decides that implementation of ss. 38 or 39 through a decision of the Tribunal might offend s. 116 of the Constitution;
- a determination to the effect that a future act may be done, with or without conditions which do not require agreement of a native title party, was not one which would have the intention, design, purpose or effect of interfering with the free exercise of the native title party's religious beliefs—at [48] to [51].

At [55] to [56], the court summarised the native title party's submissions as being that:

> [T]he Tribunal erred in confining its consideration of the s 116 issue to the question of whether a decision by the Tribunal to the effect that the [future] act [in this case, the grant of a mining lease] may be done without conditions or conditions which do not require the agreement of the native title party was one which should have the actual intention, design, purpose or effect of interfering with the free exercise of the native title party's religious beliefs. By focussing solely on this aspect of the religious beliefs of the Yindjibarndi, they argue that the Tribunal overlooked the effect this decision would have on particular religious observances most directly associated with the three areas in question.
>
> In particular, the Yindjibarndi submit that the evidence in the Tribunal demonstrated that the 'effect' or 'result' of application of s 38 and s 39 NTA by the Tribunal would be that the Yindjibarndi would be prevented from carrying out, not only their religious obligations to manage and control the land and to ensure strangers do not enter without an agreement but also the particular religious observances identified and defined as the religious observances.

The native title party argued that:
- the weight of judicial opinion is that s. 116 operates as a 'constitutional guarantee' and so should be given a 'liberal construction appropriate to such a constitutional provision', with regard being given to the practical effect of the law in question;
- section 116 'requires looking beyond matters of legal form and to the practical effect of the law in question' to ensure there is no 'circuitous advice' [sic, read as 'device'];
- the protection afforded by s. 116 to their religious beliefs and religious observances should have been taken into account by the Tribunal in its inquiry with respect to s. 39(1)(e) of the NTA, i.e. there is a public interest in upholding the constitutional guarantee of religious freedom;
- section 116 should also have been taken into account under s. 39(1)(f) of the NTA, i.e. the protection of the right of Yindjibarndi to freely practice their religious beliefs, and their religious observances, was a relevant consideration in determining whether or not, and if so under what conditions, a future act may be done;
- the Tribunal adopted a narrow construction, thereby preventing the Yindjibarndi from 'freely exercising their right to carry out their religious observances on the land for a significant period of time';
- although the Tribunal's decision did not, of its own force, bring about this result, it 'nevertheless satisfies a condition precedent to the exercise of power which will in turn bring about that result'—at [60] to [63].

Observances argument did not raise a question of law

The native title party contended the Tribunal characterised the religious beliefs of the Yindjibarndi in a way that 'did not do justice to the evidence'. It was said that the Tribunal did not give proper consideration to particular religious observances specifically referred to in evidence and submissions, which included:

- ensuring that strangers did not enter in the absence of an agreement which incorporated the reciprocal rights and responsibilities set out in the *Galharra* rules of the *Birdarra*;
- annually obtaining ochre from the ochre quarry located within M47/1409 in order to 'work' the nearby *Maliya* (honey) *Thalu* and sacred stones from a riverbed located within M47/1413;
- protecting the sacred site located in M47/1411; and
- annually singing the songs associated with that area—at [54].

In deciding that this aspect of the appeal was not made out, McKerracher J held (among other things) that:

- the 'observances argument' was really a challenge to the weight given to certain evidence before the Tribunal, whereas an appeal under s. 169 is limited to a question of law;
- it would not be 'appropriate to seek to overturn or disapprove [of] findings of fact made by the Tribunal';
- it was not an error of law that 'the Tribunal reached one conclusion on the facts when another was open'—at [65] to [66].

Effect argument used the wrong test for inconsistency

The submission here was that the 'effect' or 'result' of the Tribunal's application of ss. 38 and 39 of the NTA was to prevent the Yindjibarndi from 'carrying out their religious obligations to manage and control the land and to ensure strangers do not enter without agreement' and other religious observances that were identified.

McKerracher J rejected this argument, finding that the native title party relied on 'the wrong test for inconsistency' between ss. 38 and 39 of the NTA and s. 116 of the Constitution in that:

> The 'effect' or 'result' of a statute is not the primary test for assessing whether that statute is consistent with s 116. Section 116 directs attention primarily to the purpose of the impugned law, rather than to its 'effect' or 'result'. It may be that the effect of the law, in some circumstances, could assist in construing its purpose but the effect of the law is not the starting point—at [73].

In this case there was 'no indication at all' that the purpose of ss. 38 or s 39 was 'for' prohibiting the free exercise of religion. His Honour went on to note (among other things) that:

- the expression in s. 116 '*for* prohibiting the free exercise of any religion' means that it is 'the objective or purpose of the legislation to which attention must be directed', i.e. the end or object the legislation serves;
- to the extent that any question of law arose on this issue in this case, the Tribunal's conclusion of law was consistent with the authorities on s. 116 of the Constitution;
- laws 'may have disruptive or limiting effects upon religious freedom without contravening' s. 116—at [74] to [82], referring to *Kruger v The Commonwealth* (1997) 190 CLR 1 and *The Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120.

Section 116 is directed at the making of law, not its administration

There was another problem with the s. 116 argument as put in this case:

> Section 116 is directed to the making of Commonwealth laws, not with their administration or with executive acts done pursuant to those laws. Section 116 is not capable of regulating or invalidating

> the Tribunal's decision. The relevant enquiry is whether the Commonwealth may enact s 38 and s 39 NTA—at [83].

A law authorising administrative acts or decisions that prohibit the free exercise of religion will only be invalid pursuant to s. 116 if 'the purposive content of the law is established'. Sections 38 and 39, along with Tribunal determinations in relation to those sections, do not prohibit religious freedom 'because they do not prohibit anything'. According to the court:

> If any act did, it would be the grant of the [mining leases] ... the subject of the Tribunal proceedings. That grant is a separate administrative act and subject to separate considerations and controls. Any such grant would be made under the Mining Act which, being State legislation, is not subject to s 116 of the *Constitution*—at [85].

As was noted, if preventing access by strangers to Yindjibarndi country without agreement was the relevant religious obligation, then there was 'no prohibition or impairment of the fulfilment of that obligation' arising from the Tribunal's determination 'or from any other effect' of ss. 38 and 39 of the NTA: 'Until the relevant ... [tenements] are granted, there is nothing to prevent the Yindjibarndi from reaching an agreement for their grant'—at [86].

No error of law raised by effect argument

Finally, the court noted that the relevant finding by the Tribunal (i.e. that the grant of the proposed leases, subject to conditions, would not interfere with the religious freedom of the Yindjibarndi) was a finding of fact. An appeal under s. 169 is limited to questions of law. No error of law was disclosed in this respect. In particular, McKerracher J accepted that the Tribunal had regard to the evidence led in making the relevant finding of fact and that finding was open on the evidence—at [88].

International instruments – no ambiguity identified

The second and third grounds of appeal related to the Tribunal's approach to the relevance (or not) of international instruments to the inquiry. The international instruments at issue were the *International Covenant on Civil and Political Rights* (ICCPR) and the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration).

Before the Tribunal, the native title party argued ss. 38 and 39 should be construed so that the Tribunal's determination accorded with the international standards of the ICCPR and the UN Declaration. The government and grantee parties argued that reliance on these instruments was misplaced because they had not been enacted into Australian domestic law and no ambiguity existed in ss. 38 and 39 that would require reference to those instruments as aids to interpretation. The Tribunal agreed with the latter submissions, adopting the findings on this issue in *Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Western Australia/Holocene Pty Ltd* (2009) 232 FLR 169, [2009] NNTTA 49 at [46].

McKerracher J held (among other things) that:

- the fact that an international instrument 'has not been incorporated into Australian domestic law does not necessarily mean that its ratification holds no significance for Australian law';
- a court will presume Parliament did not intend to abrogate or suspend human rights and fundamental freedoms 'unless Parliament makes unmistakably clear its intention' to do so;

- if a statute contains 'a relevant ambiguity' (i.e. two or more competing interpretations), the interpretation that 'most accords with ... Australia's obligations under international instruments' should be favoured—at [100] to [106], referring to *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, *Coco v The Queen* (1994) 179 CLR 427, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

However, in this case:
- no ambiguity was identified by the native title party and, in absence of an ambiguity, there was 'no scope to consider the relevance of international instruments';
- even if there was some unidentified ambiguity, there was no explanation of how the Tribunal's interpretation (assuming it adopted one) was inconsistent with the ICCPR—at [107] to [108].

Therefore, grounds 2 and 3 failed.

No compulsory acquisition

According to the court, the native title party contended that if Tribunal's determination under s. 38 was allowed to stand, the Commonwealth would (via ss. 38 and 39):

> [E]ffect a compulsory acquisition of traditional rights and interests on terms which, having regard to the sacred and religious character of those rights and interests, is unjust and contrary to s 51(xxxi) of the *Constitution*—at [112].

In summary, the submission was that:
- giving s. 51(xxxi) of the Constitution a liberal construction involved (among other things) 'looking to the practical effect of the relevant law';
- the provisions of the NTA pursuant to which the Tribunal made its decision, together with the application of the 'non-extinguishment principle', constitute a 'circuitous device';
- if allowed to stand, the Tribunal's determination would effectively strip the Yindjibarndi of their rights to manage the land and the sites thereon and to freely exercise their right to carry out their religious observances;
- while Pt 2, Div 5 of the NTA set up a scheme for compensation, the acquisition of rights of this kind could neither be replaced 'nor readily compensated by the payment of money', which would constitute a breach of s. 51(xxxi) of the Constitution—at [113] to [115], referring to Justice Kirby in *Wurridjal v Commonwealth* (2009) 237 CLR 309 (*Wurridjal*) at [307] to [308].

After pointing out that Kirby J was in dissent in *Wurridjal*, his Honour noted (among other things) that the assertion was that the relevant rights and interests have been compulsorily acquired as a matter of fact but there had been no determination recognising the existence of those rights and interests—at [118] to [119].

However, even if it was assumed that the Yindjibarndi did hold the relevant native title rights and interests (or other rights and interests) as a matter of fact, his Honour was of the view that:
- there had not yet been any effect on those rights and interests, i.e. any rights and interests they may hold 'have not been extinguished, diminished or affected in any way';

- it was only the act of granting the mining leases that would affect those rights and interests;
- in any event, that was not a taking of the rights and interests concerned but merely the application of the 'non-extinguishment principle' and the application of that principle "will not amount to a 'compulsory acquisition'"—at [121].

It was noted that the grant of the mining leases will be valid 'subject only to compliance as necessary with subdivision P', i.e. the right to negotiate regime. In this case, subdivision P would apply because the grant of the mining lease involves the creation of a right to mine—see ss. 24MD(1), 25(4), 26(1)(c)(i) and 28(1).

A determination under s. 38 that the future act may be done, with or without conditions applying, was one of the ways to comply with subdivision P. As was noted:

> By itself, a determination [under s. 38] has no effect on native title, though if the act in question is done the effect of the determination will be to engage s 24MD(l) so as to ensure the validity of the act. A determination therefore provides a mechanism for the State to grant a mining lease of full force and effect notwithstanding the protection given to native title by the NTA, especially s 11(1). A determination, however, does not affect the legislative power of the States in any way—at [124].

Since the determination of itself has no effect on native title, it 'cannot ... contravene' s. 51 (xxxi). It was found that:

> For a Commonwealth law to contravene this provision, some form of 'property' or property rights must be 'acquired' on other than 'just terms'. Assuming that native title rights and interests are a form of 'property' that can be 'acquired' within the meaning of s 51(xxxi), there has been no acquisition of any nature here. In particular, the native title rights and interests (if indeed they exist and are held by the Yindjibarndi) have not been extinguished, adversely affected, or in any way transferred to the Commonwealth or to any other person.
>
> The NTA is not directed towards compulsory acquisition and so is not affected by s 51(xxxi) of the Constitution—at [124] to [125].

Therefore, this ground failed.

No erroneous inferences from erroneous findings

The Tribunal had before it three reports from archaeological surveys which were prepared for the grantee party with assistance from the native title party, along with native title party reports on the area and affidavit evidence. The native title party contented that the Tribunal:

- erred in finding the grantee party had conducted comprehensive surveys of the land in respect of Aboriginal sites and artefacts;
- erred in law in finding that the destruction or interference with sacred stones was highly unlikely;
- erred in inferring that the sacred stones 'appear to be scattered at random across the landscape';
- erred in rejecting a submission that a statement that the sacred stones had to be collected annually from specific areas for specific purposes was, implicitly, a statement that they were required to be collected from those areas and no other areas;
- erred in its findings about the future protection of Aboriginal sites—at [128], [130], [133] and [136].

At [141], McKerracher J noted that erroneous inferences and erroneous findings can constitute an error of law in very limited circumstances, referring to *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355 to 356. However, in this case, the ground of appeal failed, essentially because:

- the allegedly erroneous findings were not expressed in terms of a finding made without evidence;
- the court was effectively being asked to weigh evidence, which was not permissible on an appeal confined to a question of law;
- there was no irrationality or unreasonableness demonstrated in the way the Tribunal made its decision—at [142], [147] to [148] and [153] to [154].

No failure to afford procedural fairness

The Tribunal withdrew a condition it initially intended to impose relating to the protection of the four ochre sites after receiving information from its geospatial staff indicating that those sites were outside the area to be covered by the proposed grants. On appeal, it was alleged the Tribunal did not afford the native title party an opportunity to provide information to locate the ochre sites, thereby failing to afford procedural fairness.

McKerracher J held that there was no denial of procedural fairness because the native title party had ample opportunity to put its case. However, it was noted that if the Tribunal was considering amending the conditions it was intending to impose on the doing of a future act, the better course of action would be to notify all parties in advance and to offer all of them opportunity to be heard. According to the court:

> Given that the Tribunal is always in a position to seek its own evidence, it would not be every instance in which it did so that a further opportunity to be heard would be necessary in order to afford procedural fairness. Even if that be the preferable course, in this instance, the substantive outcome would not have been affected in light of the Tribunal's satisfaction that the risks of which the Yindjibarndi complained were remote in prospect—at [171].

Decision

The native title party failed to establish any basis on which the Tribunal erred on any question of law in either of the determinations. Therefore, both appeals were dismissed.

Dismissal under s. 190F(6) may affect future act agreements

Sambo v Western Australia (No 2) [2010] FCA 927

McKerracher J, 26 August 2010

Issue

The issue in this case was whether a claimant application made on behalf of the Central West Goldfields People should be dismissed pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). In circumstances where it was found the application was unlikely to achieve its purpose (i.e. a determination on native title) and all of the conditions for dismissal were

met, the fact that doing so might stop payments under a future act agreement did not provide any 'other reason' not to dismiss—at [47].

Background

The Native Title Registrar had considered the claim made in this application three times. Initially, in October 1999, it was accepted for registration. However, it was not accepted when re-tested in September 2006 and again failed to meet the requirements for registration in September 2008. No steps were taken to seek review or reconsideration of the Registrar's decision, primarily because of a deadlock between Sue Wyatt and Victor Cooper and the rest of the members of the claim group. The dispute centred on how future act matters had been handled and on the connection of the immediate families of the Cooper claim group members to the Central West claim group. Justice McKerracher had already considered dismissing the proceedings pursuant to s. 190F(6) in *Sambo v Western Australia* [2009] FCA 940 (summarised in *Native Title Hot Spots* Issue 31) where:

- it was submitted that considerable resources had been put into preparing the claim and the expert reports filed gave 'weight to the notion that the claim is serious, proper and deserving of further attention';
- the applicant's solicitors indicated a claim group meeting was needed to reactive the claim and it was likely the composition of the claim group would change if such a meeting were held;
- the indications were that, if issues as to claim group membership could be resolved, the claim would be re-registered—at [14] to [16].

Therefore, the court allowed the applicant time to hold a claim group meeting given there might be 'a reasonable and relatively imminent possibility of that' it would be held. However, it was not and so the court advised the parties it would again consider dismissing the application pursuant to s. 190F(6) of its own motion—at [17] to [18].

Statutory framework

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

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

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

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

In the Explanatory Memorandum to the Native Title Act Amendment Bill 2006 (EM), it was said that the proposed power to dismiss was intended to:

> [P]rovide a greater focus on the responsibility of applicants to take steps to improve the quality of their claims, recognising that poor quality claims are a burden on the native title system—EM at [4.331].

However, as his Honour noted, the EM also indicated that an application should not be dismissed if there was a good reason for it remaining in the system despite being unregistered, e.g. because it was close to resolution—at [9].

Not likely to be amended to lead to a different outcome

At the outset, his Honour noted that: 'The history of this matter does not inspire confidence as to the likelihood of an amended claim being filed and accepted for registration'—at [34].

While there had been progress recently (e.g. the applicant now had funding to hold a claim group meeting) and 'considerable resources have been utilised to conduct the necessary anthropology and to progress the claim to its current point', this did not 'go to the question' the court had to consider, i.e. whether it was likely the claim would be amended so as 'to overcome its previous defects'. The applicant's evidence was that, in addition to properly authorising the applicant, amendments were needed to:

- include all of the descendants of named apical ancestors that had previously been excluded from the claim group description (this exclusion was one of the reasons the claim was not accepted for registration);
- remove apical ancestors and their descendants 'where there is insufficient material to establish a connection; and
- remove an overlap with another native title claim—at [36].

There was no 'clear evidence' that holding a claim group meeting would result in an amended application being filed, 'let alone one that would lead to a different outcome once considered by the Registrar'. Rather, the evidence highlighted 'the difficulty, if not impossibility, of the formation of a cohesive claim group to authorise the amendments that would lead to the acceptance of the application'—at [37].

Alternatives, such as contingent orders, were not seen to be useful given 'the persistent deadlock between the members of the claim group'. It was clear that:

> The claim does not have the support of all the persons holding Native Title rights and interests and that all of the people holding Native Title rights and interests will not participate in the authorisation process—at [39].

It was found it was not likely the application would be amended in a way that would lead to a different outcome once considered by the Registrar—at [40].

Affect on payments under future act agreements not 'other reason'

The applicant claimed that dismissal could result in payments under a future act agreement between Cliffs Asia Pacific Iron Ore (Cliffs) and both the Ballardong and Central West claim groups ceasing and that this provided the court with a reason not to dismiss, as contemplated by s. 190F(6)(b). The applicant for each claim filed an affidavit addressing this issue. According to the court:

> The meaning of 'dismissed', and the means of disposal of monies in the event of dismissal, are now topics of dispute between the Central West Goldfields people and the Ballardong people—at [44].

However, the fact that dismissal pursuant to s. 190F(6) may affect certain provisions in a trust deed entered into following Supreme Court proceedings in relation to future act matters was not 'a reason to decline to dismiss a native title determination application' pursuant to s. 190F(6)(b) because:

> The purpose of a native title determination application is to seek determination on native title. If an application reaches a condition where it is unlikely to ever achieve that purpose, as this one has, then it should be dismissed and not used for purposes pertaining to the independent financial affairs of various persons or groups—at [47].

Decision
The application was dismissed because his Honour was satisfied that, for the purposes of s. 190F(6):

- it has not been amended since it was considered by the Registrar;
- it is not likely to be amended in a way that would lead to any different conclusion by the Registrar;
- there is no other reason why it should not be dismissed—at [50].

It was noted that evidence gathered to date 'will not be destroyed by ... dismissal'. It could be used 'to take such action as ... may be advised in relation to the bringing of a fresh application'—at [51].

Objection under *Mining Act*–registered native title claimants should be heard

BHP Billiton Minerals Pty Ltd v Martu Idja Banjima People [2010] WAMW 1

Warden Calder SM, 10 July 2010

Issue
The case concerned an objection by the Martu Idja Banjima People (MIB) to applications for the grant of 22 mining leases under the *Mining Act 1978* (WA) (Mining Act). The applicant submitted MIB should not be heard on the objections or, if MIB was heard, that there should be limits on evidence. It was decided MIB should be heard on all of the issues raised by the objection.

Background
Application for the grant of the mining leases was made by BHP Billiton Minerals Pty Ltd and others (BHP). All of the proposed tenements affected land subject to exploration licences (ELs) held by BHP. Accordingly, s. 67(1) of the Mining Act applied, i.e. subject to the Mining Act and any conditions imposed on those ELs, while the licences continued in force, BHP had:

> [T]he right to apply for, and subject to section 75(9) to have granted pursuant to section 75(7), one or more mining leases or one or more general purpose leases or both in respect of any part or parts of the land the subject of the exploration licence[s].

The registered native title claimant in a claimant application made under the *Native Title Act 1993* (Cwlth) (NTA) on MIB's behalf objected to the grant of the leases. The main grounds of objection related to Aboriginal heritage, the environment and the effect of the proposed grants on MIB's registered native title rights and interests—at [1].

Submissions

Among other things, s. 111A(1) of the Mining Act provides that the relevant minister may either terminate an application for a mining tenement before it is dealt with by the mining registrar or warden or refuse the application if the minister is satisfied on reasonable grounds in the public interest that the land should not be disturbed or the application should not be granted.

MIB submitted it was in the public interest, as contemplated in s. 111A, that all of BHP's applications be refused or, alternatively, that the mining leases should only be granted if they were subject to conditions relating to assessment, monitoring, management and mitigation of mining impacts. The objection was based on the alleged adverse effects of mining operations that had already impacted on, and would in the future impact on, the exercise of MIB's registered native title rights and interests. Further, according to MIB, BHP had no definite plans to mine the land, no plan to assess, monitor, manage or mitigate impacts of future mining and associated activities on the land and the applications were lodged merely to take advantage of the provisions of the Mining Act applying at the time, which did not require that an application be accompanied by a mining proposal or a statement with a mineralisation report, as is now the case.

BHP argued that the MIB should not be heard because none of the grounds of objection were sufficient to give rise to the minister being required to consider exercising the discretion under s. 111A to terminate or refuse the applications. BHP suggested two alternatives:

- the warden should recommend the review by the minister of submissions by both parties; or
- if there was a hearing of the objections, it should be limited so that experts reports provided by MIB were excluded.

Warden Calder noted three preliminary issues to be resolved before the primary issue of whether the MIB, as objectors, should be heard was determined:

- whether BHP was correct in saying s. 75(7) of the Mining Act left no discretion to refuse a mining lease application other than in cases where the minister was satisfied on reasonable grounds in the public interest that the land should not be disturbed or the application should not be granted (the public interest matters);
- whether any of MIB's grounds of objection could (if established) satisfy the minister as to the public interest matters;
- if the objections did require ministerial consideration as to whether to exercise the s. 111A discretion, whether the warden should hear MIB or must simply refer to the objections in requisite report to the minister without given the objector the opportunity to be heard—at [9] to [11].

Objectors should be heard

It was found (among other things) that the intention of s. 111A was that:

> [I]n an appropriate case a relevant public interest will prevail over the private interests that the applicant has in becoming the holder of a mining tenement over the ground the subject of the mining lease application— at [12].

The objective behind s. 75(7) was said to be to encourage expenditure, discovery and 'ultimate exploitation of the mineral resources' by giving an applicant for a mining lease a priority for the benefit of both the tenement holder and the State of Western Australia generally. However, it was noted that the exclusive right of the holder of an exploration licence to apply for the grant of a mining lease under s. 67(1)(a) of the Mining Act was expressly subject to the Mining Act and to s. 75(9), which states that s. 75(7) does not apply to an application for a lease over certain reserved lands—at [13] to [14].

It was also noted that:

> Subsection 75(4) ... requires ... a hearing of an application for the grant of a mining lease that has been objected to. There is no express limitation upon the scope or subject matter of the hearing the Warden is to conduct—at [15].

After considering the relevant case law, Warden Calder decided:

> [T]he objectors should be heard as to whether or not it was the intention of Parliament that in no circumstances but those which attract the provisions of s. 111A could the Minister refuse to grant an application where the initial formal application requirement have been complied with—at [18].

Minister may be required to consider exercising s. 111A discretion

Warden Calder rejected BHP's submission that it was not open to the warden or the minister 'to take into account any existing cumulative impact of mining activities in other parts of the objectors' native title claim area' or 'any potential additional cumulative impact that may flow from the grant of the ... leases'. In any case, BHP had not identified 'when where or how any mining activities will be undertaken'. This made it 'virtually impossible for MIB to be specific as to either places or effects of mining activities'. In the circumstances of this case, the absence of particularity could not 'effectively be allowed to result in an objector [who was also a registered native title claimant] ... being unable to object ... or ... endeavour to rely' on s. 111A or deny the objector an opportunity to present evidence or submissions—at [21] to [22].

After considering the case law relevant to s. 111A, Warden Calder concluded that:

> What the MIB, [sic] want to have undertaken by both the Warden and the Minister is a weighing of benefits and detriments to both the applicant and the objector. In my opinion that would not be adequately achieved by denying an opportunity to be heard in these proceedings—at [27].

It was found that the provisions of the *Environmental Protection Act 1986* (WA) and the *Aboriginal Heritage Act 1972* (WA) were not 'of themselves sufficient to ensure so adequate a protection of the actual and potential rights ... of the objector as would justify' a conclusion that the minister was not required 'to turn his mind to the exercise of his discretion' under s.

111A of the Mining Act. Nor did the fact that the NTA deals with the rights and interests of registered native title claimants lead to a conclusion that those rights and interests may not require the minister 'to give consideration to the exercise of the ... discretion under' s. 111A. The Warden was satisfied that, prima facie, the objections had the capacity to require the minister to give, or to justify the minister giving, consideration to the exercise of the discretion under s. 111A—at [28] to [29].

Evidence should not be limited
Warden Calder then considered whether or not the objector's evidence should be limited. It was decided that, given the lack of particularity provided by BHP in respect of its future plans, it was potentially procedurally unfair to do so in the manner BHP suggested. Nothing had been put before the court to justify any limitation—at [31].

Section 33 not considered
It was not necessary to determine whether or not MIB should be treated as if they were owners or occupiers of private land for the purposes of s. 33(2) of the Mining Act, and so entitled to be heard in relation to the applications on that footing, because it had been established that the MIB had standing to be heard on other grounds—at [32].

Decision
It was determined that MIB should be heard in respect of all of the issues raised by MIB in the proposed amended grounds of objection.

Determination of native title - no right to sustainable benefit clause

Brown v South Australia [2010] FCA 875

Mansfield J, 13 August 2010

Issue
In this case, the Federal Court decided that respondents with mining interests could not insist, as a matter of law, on the inclusion in a native title determination of a term as to how any compensation they were required to pay be applied. His Honour also expressed the view that it may be a breach of an obligation to negotiate in good faith to use 'the carrot of consent' to a determination recognising native title as 'leverage to secure agreement on other matters', although that was not the case here—at [38] and [42].

Background
This question arose in relation to a claimant application made under ss. 13 and 61 of the *Native Title Act 1993* (Cwlth) (NTA) on behalf of the Antakirinja Matu-Yankunytjatjara native title claim group (AMY application). An application for a consent determination in accordance with s. 86G of the NTA was likely to be made relatively soon. Coombedown Resources Pty Ltd (Coombedown) and Scorpion Exploration Pty Ltd (Scorpion) (the mining respondents) hold mining interests granted under the *Mining Act 1971* (SA) (Mining Act). Pursuant to Part 9B of that Act, they must not carry out mining operations that will affect the

continued existence, enjoyment or exercise of native title rights and interests unless there is either:

- a registered indigenous land use agreement (ILUA) that provides that the right to negotiate is not intended to apply to those mining operations; or
- an agreement or determination authorising them to carry out those mining operations under Part 9B of the Mining Act.

In this case, there was neither a registered ILUA between the applicant and the mining respondents nor any agreement or determination under Pt 9B of the Mining Act in evidence—at [5].

Question

The mining respondents sought an order made in the following terms:

> Any compensation subsequently payable in respect of the extinguished native title rights and interests shall be held and applied by the prescribed body corporate for the purposes of benefiting the existing members of the native title holders and their descendants.

The question was reframed in two parts. Question 1 was whether 'a term requiring the sustainable or equitable application of compensation payments by a prescribed body corporate' (a sustainable benefits term) was 'capable of inclusion' in a consent determination. Among other things, the mining respondents argued that s. 94A required that a determination of native title set out the details of the matters mentioned in s. 225 and that a sustainable benefits term fells within s. 225(d) because it encompassed the relationship between the mining respondents and the native title holders, including those 'whose interests are to receive some benefit from compensation monies paid to existing holders through their prescribed body corporate'. It was also argued that the amendments to s. 87 made by the *Native Title Amendment Act 2009* (Cwlth) (the 2009 Amending Act) allowed for the making of such an order because the court now had power 'to make orders beyond, or instead of, a determination of native title'—at [10] to [12].

Question 2 was whether the mining respondents were entitled 'as a matter of law to require a sustainable benefits term [be included] in a consent determination directing the use of compensation payments payable to the claim group'. Among other things, they argued that:

> [B]ecause a prescribed body corporate may be required to hold such monies on trust, it is implicit that the prescribed body corporate should have a responsibility to future generations of the native title holders ... . If [this is so] ... they may insist upon a sustainable benefits term as a condition of consenting to the proposed consent determination, because the Court has power to make such an order (the answer to question (1) for which they contend) and should do so as that is simply the enunciation of the obligation of the prescribed body corporate—at [13].

The applicant, the State of South Australia and the Commonwealth opposed the making of the order.

Four steps to answering the question

Mansfield J identified 'four steps to be considered in addressing the particular question':

- whether the court had power when making a determination of native title (whether by consent or otherwise) to include a sustainable benefits term if this was not agreed by the parties;

- where the parties were agreed, whether the court had power under ss. 86G or 87 to include a sustainable benefits term as one of the agreed terms ;
- even if the parties agreed upon a sustainable benefits term, whether it was appropriate to do so 'having regard to' other provisions of the NTA, the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cwlth) (the Regulations) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cwlth) (CATSI Act); and
- whether a respondent 'may require agreement on a sustainable benefits clause as a condition of it otherwise agreeing to the terms of a proposed consent determination', i.e. whether respondents may 'withhold ... consent in circumstances where there is no genuine or bona fide dispute about the terms of the proposed consent determination'—at [16].

Step 1 - no power where no agreement

His Honour thought it was 'clear' that s. 94A of the NTA did not 'provide a foundation' for the court 'having power to include a sustainable benefits term in the determination' because, among other things:

- section 94A requires a determination of native title to set out details of the matters mentioned in s. 225;
- the wording of s. 225(d) does not 'encompass ... a sustainable benefits term' because such a term 'would not address the relationship between the interests' of the mining respondents and the native title holders as required by s. 225(d);
- whether or not compensation is payable as a result of any extinguishment of native title and, if so, the quantification of that compensation are 'further and separate' steps;
- still more remote is the step that a party is 'entitled to insist upon orders as to how the native title holders whose rights have been extinguished should apply any compensation, once there is an entitlement to it and it is quantified'—at [17] to [21].

Step 2 - court has power under ss. 86G or 87 if there is agreement

Again, Mansfield J thought the answer to this question was 'clear'. The court's powers under ss. 86G and 87 are 'extensive'. For example, s. 87 gives the court power to make 'orders which do not relate directly to the determination of native title rights and interests'. In this case:

> No party argued that, if the parties are agreed, they could not include a sustainable benefits term in the terms of the consent determination of native title rights and interests as a supplementary term pursuant to s 87 of the Act—at [24], referring to s. 87(1A).

However, as there was no agreement in this case, there was 'no basis upon which' the mining respondents were 'entitled as a matter of law to have such a term included in the proposed consent determination' under either ss. 86G or 87. 'In other words', the mining respondents 'may not insist upon such a term being included in the proposed determination where the applicant does not agree to it'—at [26].

Comment – use of s. 86G

It appears s. 86G has not been used previously in the manner contemplated by his Honour in this case. Subsection 86G(1) provides (among other things) that if a claimant application is 'unopposed', the court may make an order in or consistent with the terms of any order sought by the applicant without a hearing or without completing any hearing that has started. Subsection 86G(2) provides relevantly that an application is 'unopposed' if all of the

respondent parties give the court written notice that they do not oppose the making of the order. The footnote to s. 86G(1) states that the order 'would need to comply with s. 94A' if the 'application involves making a determination of native title'. Under both ss. 86G and 87, the orders must be within power and appropriate.

The main differences between these provisions seem to be that s. 87 involves making orders which reflect an agreement struck between the parties that has been filed in the court and (expressly) may include orders about 'matters other than native title'. On the other hand, s. 86G deals with circumstances where the applicant seeks the orders and the respondents do not oppose them being made. Therefore, s. 86G implies a more passive role for the respondents than that contemplated by s. 87. Further, there is no express reference to dealing with non-native title matters in s. 86G.

Step 3 – would it have been appropriate if agreed?
While it was not necessary to do so, Mansfield J considered the third step, noting that:

- when the court makes a native title determination recognising native title exists, it must also 'satisfy the requirements' of Pt 2 Div 6, which deal with the determination of a prescribed body corporate (PBC);
- section 55 (sic, actually s. 56) requires a determination as to 'whether the native title is to be held on trust, and if so by whom', with s. 56(2) setting out the process for nomination of the PBC by the common law holders;
- the determination 'will declare that the prescribed body corporate holds the rights and interests from time to time comprising the native title in trust for the holders of the native title rights and interests';
- a trustee PBC 'then holds the native title rights and interests in trust for those persons in accordance with the Regulations', which also 'enliven certain financial accountability obligations imposed' by the CATSI Act;
- otherwise, the powers and functions of a PBC are set out in ss. 56, 57 and 58 of the NTA—at [29] to [30].

Therefore, the NTA: '[E]stablishes a detailed regime under which the native title holders through their prescribed body corporate should hold the benefit of the native title rights and interests'. The mining respondents 'may wish to better secure for future generations of the native title holders the benefits of compensation' paid under the NTA or otherwise. However, importantly, a PBC 'is constrained by the provisions' of the NTA and the Regulations 'as to the application of any compensation entitlements'. Further:

> The future act regime itself under Div 3 of Pt 2 of the NT Act also does not expressly contemplate that those who may, by reason of a future act, be obliged to negotiate with the holders of native title rights and interests through the applicant authorised to bring the native title determination application, should apply those funds in a particular way—at [31].

In addition, the sustainable benefits term as drafted for the purposes of this case was not able 'to be readily understood of enforced'. Therefore, whether a PBC was complying with its terms would involve 'a matter of judgment', which was contrary to the notion that a court order:

- 'should convey clearly what it is that the entity subject to the order is required to do';

- 'be capable of being understood by those to whom it applies, and others who might be affected by their compliance', which in this case would include current and future native title holders—at [32], referring to the relevant authorities.

That said, his Honour repeated that 'the parties may agree upon a term of a determination such as the sustainable benefits term and the Court may include it in its orders'—at [34].

Step 4 – withholding consent where no dispute about consent determination
This question did not arise directly in this case because the mining respondents did not suggest that they could insist on such a term 'in the absence of genuine agreement'. However, his Honour indicated it would not be right for a respondent:

> [T]o endeavour to impede the proper recognition of native title rights and interests by seeking to secure agreement on an unrelated matter, such as a sustainable benefits term, when there was no bona fide dispute about the existence of the native title rights and interests asserted—at [36].

Mansfield J thought that a court 'might readily infer' a duty to negotiate in good faith the context of 'negotiations to reach agreement in relation to a matter concerning' recognition of native title under the NTA because (among other things):

> In mediation under the NT Act ... the parties are expected to mediate in good faith: s 94P(1) and 94Q. If there is no bona fide dispute about issues concerning a proposed consent determination, it would be a breach of any obligation to negotiate in good faith to use the carrot of consent to the determination as leverage to secure agreement on other matters such as a sustainable benefits term—at [38].

However, his Honour went on to point out that it may be 'entirely appropriate [for the parties to] negotiate for a mix of accepted native title rights and interests and other orders, or indeed for other non-native title outcomes'. According to the court:

> They will be doing so in good faith, having regard to their respective and real perceptions and undertakings about their strengths and weaknesses on the various matters under consideration—at [40].

Decision
For the reasons summarised about, it was found that the mining respondents could not, at law, insist on the inclusion of a sustainable benefits term and so the answer to the question posed was 'no'—at [41].

Comment on scope of s. 87 powers
In considering the question posed, his Honour commented that:

> [I]t is difficult to see that the parties to an application under s 61 *could not agree upon any of the matters encompassed within the coverage of an ILUA* ... Nor is there any apparent reason why the range of matters which may be the subject of an agreement incorporated into Court orders under s 87 is confined to those matters, although they are widely expressed. The only step the Court must take to include the terms of an agreement is to be satisfied that it is appropriate to do so—at [24] (emphasis added).

With respect, it should be noted that there may be occasions when the NTA will require either an ILUA or that the matter be otherwise be dealt with in accordance with Pt 2, Div 3 (the future act regime), rather than ss. 86G, 87 or 87A.

For example, if the parties want to ensure that a future act to which Subdiv P applies and that attracts the right to negotiate is valid, then one of the conditions in s. 28 must be met before that act is done. An order under s. 87 or 87A is not one of the s. 28 conditions. The only alternative means of ensuring validity is where the future act is covered by registered ILUA in which parties have given consent to it being done and which includes a statement that Subdiv P is not intended to apply—see s. 26(2). It is also of note that s. 24OA provides that, unless a provision of the NTA provides otherwise, a future act is invalid to the extent that it affects native title. It may be that Mansfield J takes the view that an order under ss. 87 or 87A is a provision of the NTA that 'provides otherwise'. However, whether or not this is the case remains to be determined.

Further, s. 24EC provides (in paraphrase) that government parties can make 'other agreements' (i.e. other than an ILUA) with native title holders that 'relate to their native title rights ... (other than agreements consenting to the doing of future acts)'. Sections 87 and 87A refer to orders being made in terms of agreements reached which, it seems, government respondents cannot make if doing so involves an agreement 'consenting to the doing of future acts'. (As noted earlier, s. 86G does not deal with agreements but with orders sought by the applicant that are not opposed.)

Finally, given that s. 11 provides that native title is not able to be extinguished contrary to the NTA, it may be that an area agreement or body corporate ILUA or s. 24MD(2A) agreement is required since it is only under these agreements that provision is made in the NTA for extinguishment via surrender. It also seems an ILUA would be required where the parties agree that the non-extinguishment principle should apply to a future act that would otherwise extinguish native title, since that principle is a creature of the statute.

Determination of native title – matters of form

Sampi on behalf of the Bardi and Jawi People v Western Australia (No 2) [2010] FCAFC

North and Mansfield JJ, 18 August 2010

Issue

This case deals with finalising the form of a native title determination following an appeal brought by the Bardi and Jawi People. The parties were mostly in agreement but the court was asked to determine how the right to care for, maintain and protect should be defined, how the area known as Brue Reef should be described and whether the location of a place that, under traditional law and custom, had to be avoided should be given in the determination.

Background

In March 2010, the Full Court handed down *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26 (*Sampi FC No 1*, summarised in *Native Title Hot Spots* Issue 32), indicating the Bardi and Jawi People's appeal would be allowed in part and the cross-appeals brought by the State of Western Australia and the Western Australian Fishing

Industry Council (WAFIC) would be dismissed. The parties were ordered to try to agree as to the form of the orders and the determination of native title reflecting the appeal court's decision or, if there was no agreement, to file submissions and proposed determinations. Agreement was reached on all but the issues noted earlier.

The right to care for, maintain and protect is non-exclusive

After some discussion, the Bardi and Jawi People sought to have this right recognised in the determination as follows:

> [T]he right to care for, maintain and protect those [identified] parts [of the determination area], but not including the following rights: (a) the right to access, move about in or on, and use those parts; (b) the right to hunt and gather in those parts; (c) the right to access, use or take any of the resources on those parts; (d) except in relation to any part of the feature known as Lalariny that extends above the mean high water mark – the right to exclude others from that part.

The State, the Commonwealth and WAFIC objected to (d), arguing that it amounted to an assertion of a right to exclude people from Lalariny, a right that was not argued on appeal and was not recognised by the Full Court in its reasons for judgment.

Justices North and Mansfield acknowledged that they did not 'explicitly' state that the right to care for, maintain and protect 'was non-exclusive'. However, 'the reasons make it clear that this is the intention'. As the right to protect 'does not amount to an exclusive right', it was found that proposed subclause (d) 'did not reflect the ... decision and should not be included' in the determination—at [9] to [10].

Brue Reef should be in schedule of 'no native title' areas

Brue Reef, which is around 12 nautical miles off the coast of the Dampier Peninsula, is an area where native title was not recognised. The State and the Commonwealth wanted Brue Reef expressly excluded. The court agreed with Bardi and Jawi People that:

- Brue Reef should be included in the schedule that identified areas over which no native title is recognised;
- an express exclusion was 'unnecessary and apt to confuse';
- this aspect of the determination should reflect the form of the determination made by the primary judge as it should, given Brue Reef was not an issue in the appeal proceedings—at [14].

Lalariny should be precisely located

The Bardi and Jawi People submitted that the determination should not give the exact location of the rock feature known as Lalariny because:

- the location of Lalariny was not given in the determination made by the primary judge and therefore should not be included in the appeal court's determination;
- it would be 'culturally problematic to disclose the precise location' of Lalariny—at [15].

If the court did not accept this, then they asked that it simply be identified by an arrow on the maps pointing to the general location of Lalariny. Given the significance of Lalariny to the Bardi and Jawi People, the court understood their concerns. However:

> [I]t would not be appropriate for the Court to avoid inclusion of the location of Lalariny in the Determination. ... [I]ts omission may create significant difficulties in both the enforcement of the

native title rights and interests in relation to it, and potentially in relation to any future act processes under ... the *Native Title Act 1993* (Cth)—at [17].

Decision

Having resolved the outstanding 'minor drafting issues', the court made a native title determination 'in accordance with these reasons and the reasons given' in *Sampi FC No 1*. The court recorded its 'appreciation to the parties and their representatives for their assistance in the process of fixing the terms' of the determination —at [19] to [20].

Determination

Native title rights and interests were recognised in relation to parts of the determination area. Those rights and interests are held by the Bardi and Jawi People, described as the descendants of a number of named ancestors and the people adopted by those descendants in accordance with the native title holders' traditional laws and customs. Over those parts of the determination area where native title has not been extinguished to any extent and those areas where any extinguishment must be disregarded, the right of possession, occupation, use and enjoyment as against the whole world is recognised. It was determined that native title is extinguished over the remainder of the determination area.

Over parts of the determination area seaward of mean high watermark (other than Lalariny and Alarm Shoals), native title is comprised of the right to:

- access, move about in and on and use and enjoy those areas;
- to hunt and gather including for dugong and turtle;
- access, use and take any of the resources thereof (including water and ochre) for food, trapping fish, religious, spiritual, ceremonial and communal purposes.

Native title in relation to Lalariny and Alarm Shoals is comprised of the right to care for, maintain and protect those parts but does not include rights to access, move about in or on, and use those parts, hunt and gather on those parts or access, use or take any of the resources on those parts.

The native title rights and interests are exercisable in accordance with, and subject to, the traditional laws and customs of the Bardi and Jawi people and laws of the State and the Commonwealth, including the common law. There are no exclusive native title rights or interests in:

- waters which flow within any river, creek, stream or brook;
- any natural collection of water into, through, or out of which a river, creek, stream or brook flows; and
- waters from and including an underground water source.

The nature and extent of other rights and interests recognised in relation to the determination area are set out, as is the relationship between the native title rights and interests and those other interests. The areas where ss. 47A or 47B applies are identified.

Native title is to be held in trust by Bardi and Jawi Niimidiman Aboriginal Corporation.

Determination of native title

Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No 2) [2010] FCA 643

Finn J, 2 July 2010

Issue

The main issue before the Federal Court in this case was whether native title rights and interests should be recognised over an area of regional seas within the Torres Strait. Among others, this involved addressing the following questions:

- what is the society under whose laws and customs native title rights and interests are possessed?
- what is the geographic reach of the rights claimed or conceded?
- can native title be recognised in the Exclusive Economic Zone (EEZ)?
- can new rights, duties and interests be created in areas not yet subject to Imperial or Commonwealth sovereignty but which subsequently came under that sovereignty?
- could rights to take or trade for commercial purposes and take the water of the sea be recognised?
- had any commercial right to fish that existed at sovereignty been extinguished by fisheries legislation?
- was the claimant application under consideration duly authorised and, if not, how did that impact on the proceedings?

Justice Finn found that:

> There is a single Torres Strait Islander society to which the native title claim group belongs. Under that society's traditional laws acknowledged and traditional customs observed, the claim group holds native title rights and interests in the waters of Torres Strait with which I am presently concerned, save in those parts specified in my reasons.
>
> ...
>
> The native title rights I have found are the non-exclusive rights of the group members of the respective inhabited island communities first, to access, to remain in and to use their own marine territories or territories shared with another, or other, communities; and, secondly; to access resources and to take for any purpose resources in those territories. In exercising these rights the group members are expected to respect their marine territories and what is in them. Importantly, and this requires emphasis, none of these rights confer possession, occupation, or use of the waters to the exclusion of others. Nor do they confer any right to control the conduct of others—at [9] and [11].

Background

The Torres Strait Regional Sea Claim was filed on 23 November 2001. The area covered by the application excluded both the Prince of Wales group of islands and islands and reefs off the immediate east coast of northern Cape York. In 2008, both the Kaurareg and Gudang peoples filed separate native title claims, each of which overlapped the original application area. Finn J ordered the original application be split into Parts A and B, the latter consisting of the overlap area. This decision relates only to Part A. Please note that, due to the length of the decision, not all aspects of the court's reasons are summarised here.

What was the relevant society?

The court was asked to consider three different contentions as to the identifiable society defined by the traditional laws and traditional customs of the people of the Torres Strait. The State of Queensland contended there were 13 separate societies, each constituted by the islanders of an inhabited island. The Commonwealth contended there were four societies, each made up of a regional cluster group of islands. The applicant contended that there was a single Torres Strait Islander society to which the native title claim group belonged.

Finn J held that:

- the evidence supported the conclusion that there was a single society before sovereignty;
- the people of the Torres Strait 'did not act as an "integrated polity" ... but had no need to';
- what they did, 'island by island, was to observe and acknowledge a body of traditional laws and customs;
- this single body of traditional laws and customs 'admitted of some local difference' but these differences were not 'in the scheme of things, of real moment for present purposes';
- laws and customs 'had, and have, local application' and the 'exercise of local autonomy ought to be expected to have produced some variances in practices and understanding over time'—at [488].

The court emphasised that it was not only local applications of the body of laws and customs that were observed by the Islanders:

> The observance of those [laws and customs] that had inter-island applications has been well established. The two enduring symbols of the recognition of the bodies of laws and customs as such were the seeking of permission to take from another's land or marine territory and the practice of *ailan pasin* [Island fashion, island custom, the way Islanders have long done things]—at [489].

Prior to reaching these conclusions, Finn J made the following findings on the evidence:

- the laws and customs acknowledged and observed in Torres Strait 'are not wholly uniform' but have discernible differences in content or 'in understandings thereof';
- 'the precise manner in which rights and interests in land and waters (particularly near shore) are distributed varies across the islands of the Strait';
- the Islanders 'are not unified by a common mythology, a creation myth, or for that matter, a common traditional language';
- they 'self identify, and differentiate between themselves, by reference to their local communities'; and
- there was 'no traditional overarching authority or institution for the governance of the Strait as a whole';
- traditional governance 'is a local community matter'—at [441]

Finn J made (among others) the following observations in relation to law and custom:

- where there are dispersed groups who claim to make up a society, a 'significant extent of localised difference' should not only be tolerated, 'it should ... be expected';
- even though the laws and customs 'ordinarily' only have local application, 'most are common to the island communities of the Torres Strait', e.g. 'importantly, [those relating to] elders';

- where there were 'discernible differences' (mostly laws and customs relating to kinship, marriage and affinal relations and totems), they were 'not destructive of the one society case';
- there was 'an obvious commonality' in the laws and customs which regulated an Islander's rights and obligations *outside* of his or her own land or marine territory, e.g. those in relation to inter-island marriage and affinal relationships, hereditary friendships and *tebud* (trading relations), permission and *ailan pasin*;
- the evidence on shared land and marine areas was 'consistent only with common laws across the Strait applying principles of continued acknowledgment of prior occupation by ancestors and of descent and inheritance';
- it should be emphasised that the laws and customs accommodating sharing 'are not simply ones of individual island communities or of a cluster group'—at [456], [458] to [459], [463] to [464].

The court did not regard the basis upon which Islanders identify self and others, namely by island, as 'a useful indicator of a society' in this matter:

> [A] local community based "society" fails to accommodate the phenomenon of sharing island land and waters by two or more island communities. Further, accepting that infra-Island matters are characteristically settled by laws and customs having purely local application, the severing of Island communities for reason of identity ignores those laws and customs dealing with relationships between, and reciprocal obligations of, persons on different Islands. Such laws and customs ... are replicated across Torres Strait. Similarly it attributes no significance to laws and customs which, though local in operation (eg in relation to elders), are characteristic of all of the Island communities. Importantly, to use identity as the State proposes disregards context in a variety of ways—at [474].

The court held that to 'rend' close relationships between particular cluster groups islands for '*Yorta Yorta* purposes' would be to 'disregard shared histories, inter-connections of descent, marriage and, in the Eastern Islands, clans, and most importantly, the practical commonality of their respective laws and customs'. Finn J considered that 'the unities in Torres Strait were more pervasive than simply between the Islanders of the individual cluster groups'. Further, 'the laws and customs of each cluster group' were 'inadequate to describe the system of laws and customs in the Strait'—at [475] and [477], referring to *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*).

Territorial control

The applicant claimed traditional laws and customs existed which gave, and give, the claimants control of the relevant marine areas. There was some evidence of members of Island communities taking 'reasonable, measured and lawful steps' to protect their community's interests 'from the potentially adverse or, to the Islanders, objectionable conduct of others, be they outsiders, or Torres Strait Islanders from distant communities'. The applicant's submission was that territorial control was:

> [T]he 'ownership' law and custom which is the counterpart of the 'emplacement' law and custom. It is what permits the group of emplacement based rights holders to say "it is our, it belongs to us". That is what the territorial control law and custom is about.

If characterised in this way, the court was satisfied that 'territorial control' was 'an accepted consequential attribute of an area's being acknowledged as belonging to a community or a

number of communities' but, in the circumstances, it was 'unnecessary to deal further with this matter' because the applicant 'has not deemed it necessary to elaborate [this aspect of its case] in an ordered way'—at [286].

Language differences no barrier

On the issue of language differences, Finn J said that:

> Given the volume of evidence about trade, visits, cult connections, intermarriage, alliances, cultural exchanges etc between the two Island groups, language may have been a "difference" between East and West. I do not consider it constituted a pre-annexation barrier between them such as sharply to differentiate them despite their "great similarity in culture". The East's relationship with the Central Islanders was too close and too encompassing to justify such a conclusion simply on the basis of language. ... [T]here was considerable sharing of marine areas by Eastern and Central islands—at [486].

Totems and clans

In this case:

- reference to a totem is a reference to 'an animal or natural object with which a group of persons acknowledge a definite relationship'; and
- a 'totemic clan (or tribe) is a clan (or tribe) whose members possess in common a particular totem or set of totems'—at [320].

His Honour commented on 'the unsatisfactory way in which the issues here have come forward for resolution' but thought it 'fair to say' that:

> [T]otems were a small aspect of the Applicant's case and, to the extent that it was relied upon to illustrate the pleaded point, it satisfied that purpose. The most that the Applicant wished to derive additionally from it was ... that the situation today in relation to totemism has not changed its roots or origin and what remains visible is a set of customs and laws about totems that "are meaningful in accordance with the present state of their regional variations and which remain acknowledged and observed as such". The success enjoyed in demonstrating this was mixed to say the least—at [322].

However, totems and clans were significant to the 'one society' issue and drew 'considerable attention' from the state and the Commonwealth—at [323].

After a brief review of the evidence, Finn J found that:

- while the Eastern Islands had, and have, a system of tribal totems, the 'real issue is whether there is one or more systems of clan (or tribe) totemism in the Strait';
- if totemism was once 'a key system of social referencing', the Islander evidence 'now reveals clan totemism in varying states of degeneration and decay across the Strait';
- there was 'almost a complete absence ... of evidence of actual contemporary use of totems as a means to connect Islanders from different communities';
- the evidence did not permit 'a positive finding ... that there is today a shared and vital body of laws and customs relating to totem clans which are [sic] acknowledged and observed by the claim group';
- the lack of evidence also precluded 'a positive finding that there were differing systems of laws and customs relating to totems amongst the island communities ... that were so significant ... in the social organisation of each ... community as to negate any reasonable finding that there was one society ';

- what the evidence did demonstrate was 'a cultural orientation towards the sea'—at [330] to [331], [337], [356] to [357].

Permission requirement

Although the applicant made no specific submissions on this issue, his Honour thought it significant:

> [I]f only because, commercial activity apart, the receiving of "permission" when taking resources from another Island community's land or waters is the accepted commonplace for Islanders across Torres Strait—at [295].

Two 'rationales' for the permission requirement were identified:

- 'a community has the right to deny access to their marine territory'; or
- it is 'an expression of *gud pasin* – of courtesy and respect'—at [297].

It was noted that recognition of the permission requirement had been negatively impacted by the commercial marine industries in the area. However, Finn J was satisfied that:

- the requirement 'still has purchase in relation to non-commercial takings by Islanders';
- seeking permission 'can properly be seen as acknowledging laws and customs that relate to another's land and marine territories';
- the permission requirement did not cease 'to be embodied in the Islanders' laws and customs because it is disregarded by, and cannot be enforced against, strangers to their society'—at [299].

Elders

On the evidence, the court was satisfied that: '[T]here is a body of traditional laws and customs relating to elders. It is common across Torres Strait. And ... it supports the Applicant's case'. Among other things, it was noted that:

- the 'phenomenon of "elders" was, and is to be found on each inhabited island community' and 'elderhood is a status' which is esteemed;
- it did not necessarily mean specifically elder but, rather, 'big or great person', i.e. 'social importance and individual strength of character were also determining factors';
- authority structures for each island depended 'on two cross-cutting aspects of social organisation', i.e. family identities and elders;
- the evidence overwhelmingly established that elders are the authorities who, to the extent necessary, interpret, apply and give effect to the laws and customs of their particular communities—at [303] to [305] and [309].

Geography – the reach of the marine territories

According to Finn J:

> The great difficulty in dealing with the Applicant's case is that it has been over-conceptualised and divorced from the environment to which it relates. What needs to be emphasised is that the issue of ownership and inheritance concerns marine areas not simply land. Notions of occupation and use have to accommodate themselves appropriately to that environment. Equally, the Islander relationship with their respective marine areas is not, and need not be, "primarily a spiritual affair" ... . Yet it has no less a reality to them for that, as the Islander evidence attests. The Islanders clearly have a deep and historically laden knowledge of their respective marine environments. These permeate their songs and dances. The Applicant in oral submissions contends that "occupation" in Torres Strait ties up a people's history and locates their identity as well as simply reflecting present

use by a present generation. It entails a "cultural occupation". There is justice in this characterisation. Distinctly, the Islanders actual use and occupation of their areas has in very large measure been purposeful – to hunt, gather etc. It has varied, and I anticipate will continue to vary, over time ... . It has to be seen and evaluated in that light. Equally their need to roam distantly has been tempered by what was available close to hand. So, for example, when Sophie Luffman from Mabuiag was asked whether she had ever needed to go to Gebar to fish, she replied she did not: "[b]ecause our reefs are plentiful"—at [251].

The court also noted that:

- the depth of the marine knowledge of the Islanders 'cannot be understated particularly in respect of areas falling within a particular Island community's own marine territory and, often, its cluster group's territory'; and
- it was appreciated that the Islanders' knowledge of the sea, along with their long and continuing occupation and use of islands and the sea, represented what they would say were their 'credentials of ownership'—at [380].

In a 'précises' of the 'geography issue', Finn J noted that:

- 'each island community has rights over resources that occur in its specific reef and water areas';
- Islander claims to traditional marine territories 'are founded on their long term occupation and use (referred to in evidence as 'prior occupation of ancestors') of the islands and waters of the Strait;
- in 'delimiting the traditional marine areas of a community (and of its members), pragmatic rules and compromises have been employed', e.g. principles of 'adjacency and proximity' or 'spatial projection' as an explanation of 'ownership rights extending from the shore';
- while 'historic placenames attached to particular islands, reefs, cays and rocks do not of themselves prove ownership of a place', there was evidence suggesting 'they may well in their context confirm ancestral connections with such places';
- there was 'both a large body of historical evidence of traditional Islander use ... and occupation of the marine areas ... and the continuation, albeit diminished, of such use and occupation in modern times'—at [253].

Finn J was satisfied that 'the territorial extent of native title ... was, and is, determined both through the Islanders' laws and customs and by criteria and indicia which emanate from, and effectuate, those laws'. It was found that the 'fundamental criteria of ownership of a place' is 'ancestral occupation and use of that place and subsequent continuing Islander acceptance thereof'—at [598] and [611].

The following matters were said to be 'beyond serious question', including:

- the 'primary holding groups of marine estates are the group members of the individual island communities';
- these estates 'are held severally by an island community or, for certain areas, shared' and 'radiate out' from the inhabited islands 'which provide the primary point from which the extent of the estates are respectively measured';
- on the evidence, there is 'no land-sea dichotomy', i.e. the estates are 'spatially projected out from the shores; they do not stop at the edge of fringing reefs or when deep waters are met' and 'deep waters are claimed and used' just as the shallows are;

- 'save for the extremities of the claim area, a "tenure blanket" covers the Torres Strait', i.e. each estate 'extends outwards until it meets the estate of another community in what characteristically is a shared area', there are no 'gaps' between the marine estates and everything 'is considered to be owned';
- there is 'no "commons" open to all' but 'certain areas may be widely shared', either via shared ownership or 'more commonly, shared use by a number of communities';
- the Island communities 'have had, and do have, differential regard for the areas of their marine estates as they radiate outwards', i.e. the nearer to shore, the 'greater the intensity of feeling about defending one's estate' whereas the further from shore, the more easily overlapping or shared rights are accepted—at [638] to [640], [642].

Ancestral occupation

'Emplacement' (or ownership) rights require prior ancestral 'occupation', a concept that gave rise to some obvious difficulties when used in its conventional sense in relation to sea areas. However, Finn J was satisfied that: 'The meaning to be given this term has to be related to the marine context in which it has to do its work'—at [645].

Connection

Finn J found that the requirements of s. 223(1)(b) of the NTA were satisfied because:

> [T]he Islander's have acknowledged and observed their laws and customs since annexation and moreover have substantially used and exploited their respective areas since annexation—at [656].

As was noted:

> Islander knowledge of areas, when coupled with the deep and transmitted sea knowledge that many of them possess, is itself a potent indicator of connection, and continuing connection at that, to their marine estates – the more so because under their laws and customs they have, and do exercise, traditional rights to use and forage there ... , albeit they do not do so in all parts of it. ... . A community's ownership of the resources of its area is limited to what is within, or is caught within, that area. There was much evidence relating to this, to the obligation of *gud pasin* that can arise if a dugong or fish is taken in another's area, and to obligations not to waste, and to conserve, marine resources. ...
>
> Even more compelling, knowledge of the boundaries of one's estate and knowledge of the areas of shared ownership or use with others marks out where one can go as of right and where one needs permission. The laws and customs on permission and, relatedly, on *ailan pasin* in its marine aspects, connect Islanders directly to their own estates and, in the case of permission, constitutes an acknowledgement of what is required if another's community's estate is to be used in accordance with laws and customs. The observance of these laws and customs involves "the continuing internal and external assertion by [the claimant community] of its traditional relationship to the country defined by its laws and customs"—at [649] to [650], referring to *Sampi v Western Australia* [2005] FCA 777 at [1079].

The state's contention that the evidence of use did not address connection to distant areas was rejected, with Finn J finding (among other things) that:

- there was 'a very significant body of evidence of use of areas quite distant from inhabited islands but within what are claimed to be owned or shared areas';
- the Islanders' laws and customs, and the exercise of rights and interests possessed under them, 'are markedly utilitarian in character';

- in this case, the laws and customs are 'premised upon the "essentially maritime character" of the Islander's occupation of their respective marine areas';
- 'in some measure', those laws and customs 'address the Islanders' use and exploitation of their own and others' areas (thus connecting them to their areas)';
- however, the laws and customs do not prescribe the actual places of use for the utilitarian reasons noted, i.e. the Islander's 'sea knowledge, their needs, the marine technology available to them, etc will dictate the patterns of use of their estates from time to time'—at [652] to [655].

Claim area extremities

There was a difficulty in defining the extent of the coverage of the rights and interests at the extremities of the claim and:

> The matter is further complicated ... because some, though not all, of the problem areas lie beyond the Seabed and the Fisheries Jurisdiction Lines agreed in the PNG Treaty. In consequence, I need here to differentiate between the areas in which native title can be recognised under the NT Act, and the relevant island communities' marine estates under their laws and customs—at [660].

[The 'PNG Treaty' is the *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters*.]

The second issue (i.e. the relevant island communities' marine estates under their laws and customs) was dealt with first on a region by region basis. After dealing with these 'problem areas' at the perimeter of the claim, his Honour created a map (Attachment 8 to the reasons for judgment) to identify, in a 'necessarily' inexact manner, 'the exclusive and shared marine estates of the individual island communities', with 'the balance of the locations of the claim area's perimeters is indicated there'. The court conducted the exercise to ensure the 'tenure blanket' covering the Strait was 'intact'—at [641], [659] to [685].

Sovereignty and recognition of native title

In relation to 'the factual foundation of this issue', it was noted that:

- British sovereignty was acquired over all islands lying within 60 miles of the coasts of Queensland and over their respective three nautical mile territorial seas in 1872 and then, in 1879, sovereignty was acquired over the remaining islands relevant to this case and the territorial waters of those islands;
- sovereignty over the territorial seas passed to the Commonwealth on federation;
- the baselines from which the territorial seas surrounding the islands is measured were extended by the Commonwealth in 1983 and again in 2006;
- in 1990, the territorial sea was extended from 3 nautical miles to 12 nautical miles;
- therefore, there were five separate dates spanning over 130 years in which British (then Australian) sovereignty was 'acquired over distinct areas of territorial seas, the airspace over them and their respective seabeds and subsoil';
- in 1985, the PNG Treaty came into effect, thereby 'settling the seabed boundary lines between the two countries' and (among other things) providing for Australian fisheries jurisdiction;
- in July 1994 a proclamation under the *Seas and Submerged Lands Act 1973* (Cwlth) (SSL Act) set the outer limits of the EEZ—at [686] to [698].

It was also noted (among other things) that:

- the SSL Act and the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS), 'articles of which are implemented or otherwise given effect in the SSL Act', recognise and regulate Australia's sovereignty over its territorial seas, along with its sovereign rights and rights of control 'beyond those seas';
- by s. 10A of the SSL Act, 'the rights and jurisdiction' of Australia in its EEZ are 'vested in and exercisable by the Crown in right of the Commonwealth';
- sections 223 and 225 of the NTA indicate it is 'predicated' on 'the possibility that native title rights and interests may subsist in "waters"';
- section 253 of the NTA defines 'waters' to include 'the sea' and 'the bed or subsoil under, or airspace over, any waters' and 'coastal sea' to include 'the territorial sea of Australia ... and includes the airspace over, and the sea-bed and subsoil beneath, any such sea'—at [690], [694] and [702].

As a result of the 'progressive extension' of Australia's territorial seas and then the assertion of sovereign rights over the EEZ, the Commonwealth submitted that two issues were raised that were not 'covered directly by binding authority':

- whether the common law of Australia 'will only recognise native title rights and interests in water to the limits of the Territorial waters as they exist from time to time' and 'cannot recognise such rights and interests beyond that limit in the adjacent EEZ' (Issue 1);
- whether, when sovereignty was acquired over the Torres Strait Islands, the Islanders' traditional law-making system could thereafter 'validly create new rights, duties or interests in areas not yet subject to Imperial or Commonwealth sovereignty but which subsequently came under such sovereignty'(Issue 2)—at [703] to [705].

On the facts, it had been found that Islander marine estates extended into the Exclusive Economic Zone (EEZ) in two areas—at [712].

Issue 1 – territorial seas limitation

His Honour considered this question at length, noting (among other things):

- the sovereignty acquired over the territorial seas 'was the right and power to govern that part of the globe', an acquisition 'that occurred by operation of international law and was subject to such qualifications as were necessitated by evolving international law (in particular in relation to the right of innocent passage)';
- it was clear from the provisions of the NTA that Parliament contemplated native title might be recognised in the EEZ by the common law;
- this was reflected in (among other things) s. 6, which extended the provisions of the NTA 'to any waters over which Australia asserts sovereign rights' under the SSL Act, which in turn followed from the rights in the EEZ vested in the Commonwealth by s. 10A of the SSL Act, which UNCLOS described as 'sovereign rights'—at [714] to [716].

In relation to the EEZ:

- it is well-accepted that the EEZ regime is *sui generis*, i.e. it is not an extension of the territorial sea, full sovereignty was not given to the coastal States and it is not 'a modified version of the high seas regime';
- as a result, UNCLOS indicates that the EEZ is subject to 'the specific legal regime' established in Part V of that convention, the complexity of which has been noted;

- while there is some tension in relation to that regime, what was important 'for present purposes' is that it has led to almost exclusive access to resources and regulation being based on coastal State jurisdiction—at [719].

In particular, the fact that whether or not the costal State jurisdiction was attracted depended largely on the particular maritime activity involved under the regime established in Part V of UNCLOS was emphasised by Finn J, with his Honour going on to say that:

> [T]he native title rights and interests ... are for presently relevant purposes, rights to access and take marine resources. That activity falls squarely within one of the forms of marine activity which are the subject of Australia's sovereign rights under Art 56(1)(a) of ... [UNCLOS], ie "exploiting ... the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil"—at [721].

It was then noted that 'international law has not devolved .... the authority for regulating' the EEZ 'entirely to coastal States'. Unlike the sovereignty acquired over the territorial seas, this was not 'the right and power to govern' the EEZ and UNCLOS reflected a balancing of interests and a qualification of power in relation to the EEZ—at [722].

Were it not for the fact that s. 6 of the NTA 'extended explicitly to any waters over which Australia asserted 'sovereign rights' under the SSL Act, Finn J thought there might have been 'some ground for saying that the EEZ regime did not provide a welcoming environment for the recognition of native title rights'—at [723].

However:

> While the clear legislative intent of s 6 was to make such rights [i.e. the sovereign rights vested in the Commonwealth by s. 10A of the SSL Act] susceptible to a claim of native title rights and interests – at least to the extent that the [native title] rights claimed fell within the ambit of, and were consistent with, the sovereign rights acquired – a claim to native title still had to satisfy the requirements of s 223(1) of the NT Act and, in particular, common law recognition. To reiterate, native title rights find their origin in pre-sovereignty law and custom which are recognised by the common law, not rights and interests which are the creature of the Act—at [724].

It was found that:

- the Islander society's laws and customs were, and are, acknowledged and observed in areas of the EEZ;
- Australia's acquisition of sovereign rights in those parts of the claim area brought about 'an intersection of traditional laws and customs with the common law';
- no less so 'than on a change of sovereignty ... native title rights and interests in the claim area will not be recognised by the common law if inconsistent with the sovereign rights acquired' in the EEZ—at [725], referring to *Fejo v Northern Territory* (1998) 195 CLR 96.

In relation to the parts of the three marine estates that are within the EEZ, the non-exclusive native title rights to 'access, use and take the marine resources of an island community claim group's own and shared areas' are 'acknowledged by the common law ... in Australian territorial waters'. His Honour found that those rights could also be 'acknowledged in relation to the EEZ'. As was noted in coming to this conclusion, rights to use not involving the right to take raised no issue because they 'are not inconsistent with Australia's sovereign rights'. The right to access and take resources, while 'possibly more problematic', was not

exclusive and therefore 'not inconsistent with Australia's sovereign rights'. It also involved 'maritime activities' that fell 'within the ambit of' the sovereign rights already noted—at [727] to [728] and [731].

According to Finn J, the 'potential complication' arose because, while Art 56(1) of UNCLOS gave 'sovereign rights to exploit the natural resources both of the superjacent waters and of the seabed and its subsoil', Art 56(3) required that 'the rights with respect to the seabed and subsoil be exercised in accordance with the Part VI', which relates to the continental shelf. 'Significantly', UNCLOS makes the right to exploit the natural resources of the shelf exclusive 'in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State'. In this context, 'natural resources' includes:

> [N]on-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil—at [728] .

It was found that taking marine resources 'from the superjacent waters of a community's estate in the EEZ would raise no issue of inconsistency for the common law'. Taking resources from the seabed or subsoil might appear to be beyond the scope of recognisable rights and interests, because of the 'apparently "exclusive right"' given to the Commonwealth by UNCLOS. However, that provision was 'in the nature of an emphatic affirmation of the extent of a coastal State's rights of control over its continental shelf'. It was intended 'to affirm the extent of' the Commonwealth's sovereign power. 'It does not address property rights as such. Hence it does not raise any issue of inconsistency of rights'. Nor did it 'extinguish native title rights to take from the sea bed and subsoil of the continental shelf'—at [730] to [731].

His Honour concluded that:

> [N]ative title rights and interests can properly be found to exist in waters over which Australia asserts sovereign rights under the SSL Act. This may be a consequence not contemplated by the Convention [UNCLOS]. It was contemplated by the Australian Parliament—at [732].

Issue 2 – Progressive sovereignty and the creation of new rights

The court considered whether it was possible for new native title rights to be created in areas beyond the territorial sovereignty of Australia from time to time. Finn J held that is was possible, noting that:

- in *Yorta Yorta*, it was held that the new native title rights could not be recognised over areas where 'territorial sovereignty had previously been acquired';
- that case did not address the 'capability of a system of laws and customs' that subsisted prior to the assertion of sovereignty 'to create new rights and interests in areas beyond the territorial sovereignty of Australia from time to time'—at [735] and [737].

His Honour went on to say that:

> It would be anomalous and unprincipled ... for the common law to require an Aboriginal or Islander society to be faithful to their laws and customs from the time sovereignty was first acquired over some part of their territory if they are to be found today to have rights and interests

> under those laws and customs in that part, but to refuse to acknowledge a subsequent accretion to those rights and interests in an area not hitherto the subject of Australian territorial sovereignty ... . If the existence of native title in that later acquired area has to be determined at the time sovereignty is asserted over it, that determination should be made by reference to the situation existing at that time—at [738].

Rights are not held communally

The court held that:

- 'while all of the claim group members are, *in aggregate*, the holders of all the native title rights in the Part A claim area, they do not communally hold those rights and interests';
- while it was convenient to call this a *communal claim*, it was 'inaccurate and not required' by the NTA to 'describe the rights claimed as the "communal rights" of the claim group';
- an 'inference of communal ownership of rights derived from the Islander society's laws and customs' was 'unsustainable';
- in this case, the laws and customs 'determine which "sub-sets" of the wider Islander society' have interests in particular areas;
- 'by those laws and customs, those "sub-sets" have a connection' to their own respective areas—at [542], referring to *Bodney v Bennell* (2008) 167 FCR 84 and *De Rose v South Australia (No 2)* (2005) 145 FCR 290, emphasis in original.

If it was necessary to classify the nature of the native title rights and interests, Finn J would 'put the matter inexactly' by describing them as group rights and interests, with the group in respect of a particular area being 'comprised of the claim group members of the island community – or communities in the case of shared areas – which has emplacement based [ownership] rights in that area'—at [543].

Rights and interests in 'owned or shared' marine territories

The court held that the group members of the respective individual island communities had the following traditional rights in their owned or shared marine territories:

- the rights to access , remain in and use those areas; and
- the right to access resources and to take for any purpose resources in those areas—at [540].

His Honour held that none of those rights conferred possession, occupation or use of the waters to the exclusion of others, nor any rights to control the conduct of others—at [540].

Reciprocal rights were not rights 'in relation to land or waters'

Finn J was satisfied that there were, under Islander laws and customs, status-based relationships giving rise to rights and obligations that are 'reciprocal in character in the sense that they would be enjoyed and discharged by one or other of the parties as the situation requires'. However, it was found that these were not rights 'in relation to land or waters' but, rather, 'rights in relation to persons'. Therefore, reciprocity based rights such as these were not native title rights for the purpose of s. 223(1) of the NTA—at [507] to [509].

Right to trade or use for commercial purposes recognised

The Commonwealth contended that any 'right to trade' or 'to use for commercial purposes' could not be recognised by the common law because such a right presupposed exclusive possession of the area concerned.

The Islander evidence was that marine products were and are taken for exchange and sale. His Honour recognised that 'there may be some disagreement about the use of the word "commercial" in this setting'. However, the evidence established 'beyond question' that:

> [T]he Islanders sold marine resources for money – the sea provided their "income" – and after the advent of the marine industries, for some number of the Islanders, this was done regularly and systematically. And it was positively encouraged by the Queensland Government ... . The Islanders were, and are, trading fish.
>
> The point to be emphasised is that the fundamental resource-related right of use ... was the right to take. Use of what was taken was unconstrained, save by considerations of respect, conservation and the avoidance of waste—at [528] to [529].

Finn J was unable to accept that, on principle, the common law would not recognise a right to take for trading or commercial purposes absent a right to exclusive possession 'if it purports to state a rule of universal application'. While it was true that a right to exclusive possession 'may carry with it the right to exploit the area's resources in trade and commerce', it was 'by no means apparent' to His Honour:

> [A]t least in relation to the sea – and particularly in waters with the abundant resources Torres Strait has – ... absent a legislative regime to the contrary, why marine resources may not be exploited by those who care to do so for trading and commercial purposes, though they lack entirely any exclusive right to possession of the area or do not purport to assert any such right—at [752].

The contention that exclusive possession was required to support such a right was 'belied by the common law experience in this country'. Prior to federation, only the Imperial Crown made any assertion of sovereignty over the area beyond low-water mark but, as was noted in *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [59]: '[A]t no time before federation did the Imperial authorities assert any claim of ownership to the territorial seas or sea-bed'. Still, 'marine resources of the territorial seas were ... exploited for commercial and trading purposes ... without ... the need to have, exclusive possession of the areas exploited'. Further, no restrictions on the quantity or size of fish that could be take under the common law public right to fish were imposed—at [753] to [754], referring to various authorities.

It was noted that:

> The Islander's laws and customs regard the waters and resources of the marine areas as belonging *in situ* to the respective groups of native title holders. I need not consider here the extent to which the common law would not recognise this claimed ownership as such. No such native title right is claimed here. What is claimed is a non-exclusive right to take—at [756].

On that basis: 'The common law would have recognised the claimed [non-exclusive] right to take' for trading or commercial purposes—at [755].

Right to take resources, as applied to sea water, could be recognised

It was contended that, while taking or using the waters of the sea for domestic, non-commercial purposes may not be problematic, the waters of the sea, like all flowing waters, could not be owned at common law. Finn J held that the Islanders' native title right to take 'resources', as applied to waters, was not inconsistent with the common law because:

- the proposition that flowing waters are 'not the subject of property' was flawed because much of the common law concerned inland waters and so was 'complicated' by riparian rights;
- those complications did not exist here because the Islanders' 'land and marine estates ... are seamlessly joined';
- it was not suggested that, at the time of annexation, the native title holders committed any actionable wrong by taking sea water; and
- the Imperial authorities did not, at the time, assert any claim of ownership to the territorial waters or the seabed—at [759] and [760].

Right to 'enter and remain and to use' recognised

The court upheld the state's objections to the claim of a right to 'enter and remain and to use and enjoy' in part. Finn J held that the use of the composite formula 'use and enjoy' might be taken to signify 'possess and occupy'. However, his Honour held that: 'Shorn of the words "and enjoy"', the description of the right was both 'apt and unobjectionable'—at [522].

Right to a livelihood

Finn J rejected the applicant's claim to a right to a livelihood right based upon accessing and taking marine resources because it was 'no more than a doubtless legitimate hope or expectation founded upon the traditional rights to access and take – rights the fragility of which were exposed by annexation'—at [530].

According to his Honour:

> "Livelihood", [as addressed in the evidence] ... reflects a particular conception of place and being – or, to put it crudely and inexactly, a particular Islander psyche. It is an informing or animating principle for what may on fuller analysis be seen to be laws and customs for Native Title Act purposes. But it is not itself a law or custom. Still less is it a right possessed under laws and customs—at [293].

'Protect rights' inconsistent with common law, incomprehensible in court

The claimed non-exclusive rights to protect resources, protect 'the habitat of resources' and to protect places of importance were found to have 'a predominantly control rationale'. As such, they were inconsistent with public rights at common law and so could not be recognised in a native title determination. However, ultimately, the 'protect rights' had not been 'sufficiently identified as rights possessed under the Islanders' laws and customs, let alone ones that could be translated into terms comprehensible in the courts'—at [279], [535], [539] and [761] to [762].

The 'fundamental' objection to the recognition was that:

> [A] native title right which will not be recognised because of inconsistency with a common law right, cannot be saved by the bare expedient of acknowledging the common law right and by qualifying the native title right by making it subject to the common law right. ... [T]he protect rights, in the broad terms in which they have been cast, still have the purpose of control at their core, notwithstanding that illustrations may be able to be given of their being able to be used in some situations consistently with the common law ... . It is for this reason that the Applicant has not been able to give a coherent account of "the class of non-exclusive protect rights—at [762].

However, his Honour did not want to be misunderstood on this issue:

> It may be .... that, separate from protect rights ... premised upon the exercise of direct or indirect control of access and use by others, there are rights in relation to the marine area which are wholly consistent with the common law public rights, and are ones which could be recognised. The Applicant has not ... sought sufficiently to unbundle the rights possessed under the Islanders' laws and customs and to separate out those which could be so recognised—at [538].

Fisheries legislation merely regulates the native title commercial right to fish

The question here was whether the non-exclusive native title right to take marine resources 'can still be used for commercial purposes'. The respondents argued it was extinguished by the relevant statutory fisheries regime. His Honour disagreed, finding that:

> [T]he legislative regimes of the State since 1877, and of the Commonwealth since 1952, concerning fisheries, while of evolving complexity, were regulatory and not prohibitory in character. They were not directed at the underlying rights of the native title holders who were to comply with the regulatory measures imposed if they were to enjoy their native title rights. The various Acts severally or together did not, and do not, evince a clear and plain intention to extinguish in the Part A claim area native title rights to take fish for commercial purposes. They did not abrogate those rights and create new statutory rights to fish—at [765].

Principles applied in relation to extinguishment

His Honour went on to set out the legal principles in relation to extinguishment.

The first was that relevant principle of statutory interpretation in this case was whether or not the legislation said to extinguish the non-exclusive native title right to take manifested 'a clear and plain intent to do so ... either by express provision in the statute or by necessary implication'—at [768].

Second, his Honour expressed the view that, in the light of the significance now given to 'context' in statutory interpretation:

> [W]here the extinguishment is said to have resulted directly from legislation itself without, for example, the conferral of inconsistent rights on a third party... the absence in contextual material of any indication of a purpose to override native title rights, could ... be of some significance in the interpretation of a statute enacted after the decision in *Mabo [No 2]*—at [770].

Third, a law that merely regulated the enjoyment of native title rights and interest or established a 'regime of control' consistent with the continued enjoyment of those rights and interests does not manifest the requisite intention. Indeed, the regulation of how a right may be exercised presupposes that the right exists—at [771] to [773], referring to *Yanner v Eaton* (1999) 201 CLR 351.

Fourth, and 'importantly ... for present purposes', s. 211(2) of the NTA did not cover hunting, fishing and gathering for *commercial* purposes in the exercise of native title rights and interests, i.e. a native title holder wanting to undertake commercial activities (whether in exercise of a native title right or not) would be required to hold whatever authority 'as may be statutorily prescribed'—at [775].

Fifth, the inconsistency of incidents test was to be applied to determine whether or not the native title rights are inconsistent with rights conferred by statute. There are 'no degrees of

inconsistency'. Where there is inconsistency, native title is extinguished to the extent of that inconsistency—at [776].

Sixth, because the 'common law right of fishing in the sea and in tidal navigable rivers' is a public (rather than a proprietary) right, it is 'freely amenable to abrogation or regulation by a competent legislature—at [777] to [778], referring (among others) to *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 and *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24.

The statutory context

Finn J conducted an extensive survey of the 'interlocking and complicated legislative regimes that apply to the Torres Strait' by breaking it into:

- state legislation up until 1994;
- the Commonwealth's legislation from 1952 to 1991, excluding the *Torres Strait Fisheries Act 1984* (Cwlth);
- the Commonwealth's and the state's Torres Strait Fisheries Acts 1984, which 'had its provenance in the PNG Treaty'—at [779] to [842].

His Honour then 'confined' his attention in considering these regimes 'in two respects:

- while the applicant's concept of marine resources was 'more extensive that which is connoted by "fish" ... , the almost exclusive focus' had been on fishing and so 'consideration was limited the legislation' dealing with fishing i.e. 'fishing for commercial purposes is, on the evidence, the matter of present controversy';
- the primary focus was on the Commonwealth's *Fisheries Act 1952* and *Torres Strait Fisheries Act 1984* (1984 Act) because, excluding 'a narrow area of internal water' and 'possibly the coastal waters around the islands to the north of the Seabed Jurisdiction Line' [as defined in the PNG Treaty], the law in relation to fisheries that currently applies to the area in which native title rights were found to exist is the *Torres Strait Fisheries Act*—at [843].

Finn J noted seven matters that *were not* in issue:

- it was not contended that the native title right to take marine resources (leaving aside the commercial issue) had been extinguished;
- it was not contended that native title holders were or had been 'legislatively precluded from applying for licences to fish ... for commercial purposes';
- the court was merely asked to note statutes prohibiting native title holders 'absolutely from taking particular marine resources' and that s. 211 had no application in relation to them;
- it was not contended that native title was extinguished by the grant of leases or licences under Queensland statutes that attached exclusive rights to those grants;
- it was not argued that the right to fish for particular marine species for commercial purposes had been extinguished and replaced by a statutory fishing right;
- it was not argued that Islanders may be able to fish for commercial purposes under the Torres Strait Fisheries Act 'to the extent that such fishing was "traditional fishing"', i.e. that it was 'for use in the course of ... traditional activities', referring to PNG Treaty Art 1(l) and (k);

- it was not disputed that Islanders wanting to fish for commercial purposes in the Protected Zone and 'the declared near adjacent areas ... must secure' the required licences and 'if they fish without such licences, they are liable to prosecution'—at [844].

This left 'a narrow and seemingly barren question', which was:

> Notwithstanding that the Islanders can, by seeking the necessary licences, avail of the present fisheries regime operative in the Part A claim area to fish for commercial purposes, have they nonetheless lost a native title right to fish for commercial purposes because of the extent of the rights of regulation and control the Crown in its State and Commonwealth manifestations has progressively arrogated to itself over a more than 130 year period?—at [845]

Distinction between commercial and non-commercial exercise of right

His Honour found that, while the native title right to access and take marine resources was not 'circumscribed by the use to be made of the resource taken':

- for 'present purposes', it was accepted that 'a right to take resources for trading or commercial purposes – whether exclusive or non-exclusive – is a discrete and severable characteristic of a general right to take resources';
- the 'distinction between engaging in an activity for commercial purposes or for non-commercial, private or other purposes ... was from the outset, and remains, a characteristic of the fisheries legislation considered in this matter' and it is also 'reflected in the differentiation of purposes' in s. 211 of the NTA—at [847].

Features of fisheries legislation – public interest and ministerial discretion

There two 'very discernible and evolving features of the fisheries legislation over time', which were 'clearly enough', interrelated were:

- the 'expansion of the particular public interests' taken into account in 'the design and implementation of legislative schemes to regulate and control fisheries'; and
- the 'changing character of the discretions given in the grant (or refusal) of leases and licences under such legislation'—at [848].

Over time, the legislation became 'increasingly comprehensive – and ... sophisticated – management regimes which had and have as a principal focus, the control and management of commercial fishing'—at [848].

The 'question of interpretation raised ... was whether ... [these regimes] disclosed a clear and plain intent to extinguish native title'. Alternatively, did these regimes:

> [D]o no more than bring Islander fishing for commercial purposes into an aspect of the regulatory regime applied to commercial fishing – ie was the legislative intent it implemented simply to extend the control of commercial fishing ... and not to define "underlying rights"?—at [850].

Finn J decided that the appropriate 'constructional choice' was the one 'more favourable to the retention of the right to fish for commercial purpose .... , there not being a clear and plain intention to extinguish it' given that:

- the 1984 Act did not, 'of its own force seek directly to deny Islander fishing rights for commercial purposes, hence its creation of the community fishing category (although the Act did envisage such fishing might later be subject to licensing requirements'; and

- one of the objectives of that Act was to 'acknowledge and protect, as a management priority, the traditional way of life and *livelihood* of traditional inhabitants, including their rights in relation to traditional fishing'—at [851], emphasis in original.

Further, 'in the distinctive setting' of 1984 Act and assuming, as his Honour did, that native title rights subsisted in Torres Strait when it was enacted:

> [I]t would require particularly strong indications in the Act itself that existing rights were intended to be extinguished, given the markedly beneficial and protective intent of the PNG Treaty and of this Act—at [851] and [852], referring to the Second Reading Speech on the Bill for the 1984 Act.

For example, the requirement under s. 17 of the 1984 Act that, for the first time, Islander boats used for community fishing had to be licensed for commercial fishing did not abrogate the native title right to fish for commercial purposes. Rather, it was 'a measure taken for reasons of fishery management' and was, according to *Yanner* at [115], 'consistent with the continued existence of that right'—at [853].

As to the Queensland legislation, his Honour was satisfied on the evidence that:

> [F]rom 1877 onwards, Queensland fisheries legislation curtailed ... [the public right to fish in territorial waters] in relation to commercial fishing. What it did not do, is extinguish the "commercial fishing" incident of the native title right, save probably in those instances where grants were authorised to be, *and were*, made of particular types of exclusive lease or licence in particular areas [but] ... I have no evidence of such grants in Torres Strait. Judged against the "clear and plain" intention test, I am satisfied that such exclusive grants apart, the structure and character of the management and control scheme of Queensland's legislation was similar to that of the Torres Strait Fisheries Act, save that it did not have the same beneficial aspiration for the traditional inhabitants of the Strait. The Queensland legislation raised, and raises, the same constructional choices as the Torres Strait Fisheries Act does. That choice should be answered in the same way as for that Act—at [857], emphasis in original.

Further, provisions in the state's legislation creating 'specific purpose water reserves for Islanders' did not have 'any real bearing on the extinguishment question [and] ... within their respective provinces were not inconsistent with the native title rights ... found'—at [858].

Conclusion - commercial right to fish survives subject to regulation

It was found that the legislative regimes of the state and the Commonwealth concerning fisheries 'did not, and do not, severally or together evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes'. However:

> To the extent that those regimes regulate the manner in which, and the conditions subject to which, commercial fishing can be conducted in a fishery in the native title holders' marine estate, or prohibits qualifiedly or absolutely particular activities in relation to commercial fishing in the fishery in that estate ... the native title holders must, in enjoying their native title rights, observe the law of the land. This is their obligations as Australian citizens. But complying with those regimes provides them with the opportunity – qualified it may be – to exercise their native title rights—at [861].

Navigation aids were public works

Finn J considered the impact on native title of fourteen navigation aids. Seven were constructed prior to 23 December 1996 and seven after that date. The applicant contended that none of the aids constructed prior to 23 December 1996 amounted to the construction or establishment of any public work and so were not 'previous exclusive possession acts' under s. 23B(7) of the NTA. The contention was, 'remarkably ... whether any of these structures constitute fixtures for the purposes of the ... definition of "public works"' in s. 253. His Honour noted that there was no indication in the NTA that 'fixture' had anything more that the normal common law meaning and that:

> For present purposes it is sufficient if I say of the common law that its concern is with when material objects, physically attached to land, are regarded as having in law become land by annexation to it—at [875]

Further:

> The term "fixture" ... must be construed purposively paying due regard to the fact that the "structures" to which the s 253 definition refers are public ones; are likely to have some degree of permanence *in situ*; and serve public purposes—at [879].

In determining whether the navigation aids were fixtures, it should (to the extent possible) be borne in mind that they were 'manifestly' intended to 'promote a significant public purpose'—at [880].

It was 'well accepted' that whether an object became a fixture by annexation depended on 'the degree of annexation and the object (or purpose) of the annexation', which turned on 'the particular circumstances of each case'. Finn J acknowledged that this was not always the most helpful of tests. However, this was 'a plain case'. Applying the principles of degree and object of annexation to the navigation aids led 'inevitably to the conclusion' that they 'had the characteristics of fixtures' i.e. each was firmly affixed to rocks, reefs and the like and each was likely to remain in place for 'an indefinite or substantial period'. This, whether they were owned by the Commonwealth or the state, was 'sufficient' to support a finding that they were public works—at [881] to [883].

Extended definition of a public work – s. 251D

The parties were in dispute as to what might constitute 'any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the aids to navigation' pursuant to s. 251D of the NTA. Finn J accepted that a '150 metre' rule espoused by an expert witness for the Commonwealth seemed reasonable for navigation aids constructed on the seaward side of the highest, or where applicable, lowest astronomical tide prior to 24 December 1994—at [891].

However, his Honour was not prepared to apply this approach to those situated above the highest astronomical tide (referred to as the 'dry site' aids) because, while these may have been situated outside the claim area, use of 'adjacent sea areas seaward of the mean high water mark' was required 'for their construction, operation and maintenance' and so 'native title rights were extinguished in nearby sea areas of each site'. However, Finn J was 'in no position to determine those areas' and the matter was 'complicated by the consideration that

the seaward-side extinguishment could well have been – and for at least three probably was – an extension of landside extinguishment':

> Yet, I am informed that in the three land consent determinations [adjacent to the dry site aids] no account appears to have been taken of this. For this reason it would seem appropriate that, if the area of seaside extinguishment is to be examined in the future, so also should the landside question, the consent determinations notwithstanding. It may well be the case that the consent determinations extend to areas in which extinguishment has occurred and which ought not have been included in any claimant application—at [899], referring to ss. 13(4), 13(5) and 61A(2).

Non-extinguishment principle has 'spatial and temporal' dimensions

His Honour noted that the effect of the seven navigation aids constructed or established after 23 December 1996 was governed by the future act regime (i.e. s. 24KA for those on an onshore place and s. 24NA for those on an offshore place). Acts falling within the scope of these provisions are 'deemed to be valid' and the non-extinguishment principle found in s. 238 applies to them—at [901] and [904].

The Commonwealth argued that for the purposes of s. 238, the creation and operation of the navigational aids was 'of necessity' wholly inconsistent with the continued existence, enjoyment or exercise of native title rights and interests in the areas occupied by the navigational aids and so native title would be wholly suppressed—at [907].

Finn J disagreed, finding that: 'Section 238 has both a spatial and a temporal dimension'. In this case, the application of the non-extinguishment principle meant that:

> [T]he native title rights cannot be exercised in the area taken up by the footprint and vertical mass in the water of the ... [navigational aid] itself for as long as it is *in situ*; they cannot be exercised in the area necessarily required for the construction of the ... [navigational aid], but can be after the construction area has been cleared; they will not be able to be used when a vessel is anchored adjacent to the site as part of the ... maintenance/repair program or ad hoc, but can be once it sails on completion of its task—at [909].

It would, in his Honours view, 'be quite inconsistent' with the intention of s. 238 to sterilise native title rights over the operational footprint of the navigations aids 'indefinitely ... because that area is visited for maintenance purposes every two years'. This was 'a quite unreasonable construction' of s. 238 in that it converted 'a transitory inconsistency into an indefinite one'—at [910].

Finn J thought that 'a more sensitively calibrated approach to affection of native title ... should ... be taken to "future acts" for s 24NA purposes' than that expressed in 'public works extinguishment' i.e. the confirmation of extinguishment provisions such as s. 23B—at [[912].

Authorisation defective, s. 84D invoked

The State and the Commonwealth indicated that authorisation was an issue although made plain they did not want the claim fail on that account. The Torres Strait Regional Authority had, under ss. 203B(1)(b) and 203BE(1)(a) certified the application. However, neither the Form 1 nor the accompanying affidavits made it clear which of the two possible authorisation processes set out in s. 251B had been invoked. Finn J held that the applicant was not, on the facts, authorised as required by s. 251B—at [928] to [929].

Earlier, it had been noted that s. 84D was introduced by the *Native Title Amendment (Technical Amendments) Act* 2007 (Cwlth) because:

> While proper authorisation was "very important", there could be circumstances in which it could be in the interests of justice for the Court to continue to hear and determine a defectively authorised application. A relevant factor in deciding so to continue would be that the application had already progressed to trial—at [918].

His Honour was satisfied that this claim 'had been prosecuted to all but finality and successfully so'. In those circumstances: 'Justice would be denied if this matter did not proceed to a determination'. Therefore, while the applicant was not, in fact, authorised as required, for the purposes of s. 84D it was in the interests of justice that the application be determined despite the defect in authorisation—at [15], [926] to [933].

The PNG parties

The court made various findings in relation to the PNG parties, including that some should cease to be parties pursuant to s. 84(8) because they no longer had interests that might be affected by a determination in the proceedings. In other cases, it was found there was no basis to conclude that a particular family had any customary rights and interests in the claim area—at [963], [966], [968] to [970] and [985] to [986].

Orders

Finn J ordered an agreed draft determination giving effect to the reasons of the court should be filed or, absent agreement, a draft determination should be filed by the applicant, with the respondents file submissions. The proceedings were adjourned to 30 July 2010 for the making of final orders.

Postscript

When the matter came before the court on 30 July 2010, no agreed draft determination had been reached. Finn J made directions for further drafting and mapping to be undertaken and provided to the court. A native title determination was eventually made on 23 August 2010.

Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory [2010] FCA 911

Collier J, 7 September 2010

Issue

The main issue in this case was whether the Federal Court should make a determination of native title by consent pursuant s. 87 of the *Native Title Act 1993* (Cwlth). Justice Collier decided to do so because the orders sought were within power and it was appropriate to make them.

Background

The determination made in this case relates to a claimant application made on behalf of the Akwerlpe-Waake, Ileyarne, Lyentyawel Ileparranem and Arrawatyen People in relation to an area in the Northern Territory, 110km south of Tennant Creek and 310 kilometres north of Alice Springs. The area is subject to a perpetual pastoral lease. In July 2010, joint submissions

in support of a minute of a proposed consent determination, a statement of agreed facts and a minute of proposed consent determination of native title pursuant to s. 87 of the NTA were filed. All parties to the minute acknowledged that the claim group should be recognised as the native title holders for the determination area. Therefore, the issues for the court were:

- whether orders in, or consistent with, the minute of proposed consent determination of native title were within power; and
- whether it was appropriate for the Court to make the orders sought—at [7], referring to ss. 87(1) and (2).

On the material before the court, Collier J was satisfied of both of these matters for the reasons summarised below, including that:

- an expert anthropological report was completed by Ms SD Donaldson in December 2006, which the parties accept was written following 'detailed field work ... in and around the determination area';
- the anthropological analysis and findings set out in the report had been confirmed at a meeting of the claimant community in March 2006;
- the solicitor for the Northern Territory advised the applicant that the material in the report 'provided a proper basis for the making of a consent determination'—at [8] and [14] to [15].

Evidence before the court

There was a 'considerable volume of material' before the court to support the application 'in both its original and amended forms', particularly anthropological and affidavit evidence 'produced and filed to substantiate the claim of the applicant that the native title claim group has native title rights and interests in respect of the determination area'. Her Honour canvassed the anthropological evidence, noting it indicated (among other things) that:

- the native title claim group is part of a broader Kaytetye community living in the region in which the determination area is located;
- that community constitutes a society whose members continue to acknowledge and observe a common body of traditional law and custom;
- the determination area lies within the four Aboriginal territories or estate areas known as *Ileyarne*, *Akwerlpe-Waake*, *Lyentyawel Ileparranem* and *Arrawatyen* and the native title claim group is comprised of four landholding groups named after the four estate areas;
- the earliest contact between the ancestors of the claim group and Europeans appeared to be during the 1860 expedition undertaken from Adelaide by John McDouall Stuart, who noted evidence of Aboriginal occupation;
- throughout the 1860s and 1870s, Europeans described evidence of occupation, ceremonial preparations, weaponry, art and activity by the inhabitants and the later records (which followed the arrival of pastoralist and miners) indicated that 'station life ... allowed for the continuation of a traditional lifestyle during the time of the year when people were not needed for station work';
- ethnographic records since 1901 in the region described the people of the area and their beliefs, practices, social organisation and lifestyle;
- the *Altyerre* or 'The Dreaming' or 'Dreamtime' covers a range related concepts and rules governing the social order 'which affect the everyday life of members of the Kaytetye society, [and] continues to underpin the everyday lives of the native title claim group';

- descent 'is the most important basis for acquiring rights and interests in land' but people 'without a descent connection to an estate may satisfy certain non-descent based criteria regarding their connections with the estate, and acquire rights in or over the estate';
- people from other tribes must ask persons with specific roles in the society, namely the *apmerek-artwey* (those affiliated with an estate through father's father) and *kwertengerl* (those with affiliations through mother's father) before drinking from sacred water sources, rock holes and swamps—at [26] to [30] and [32] to [33].

According to her Honour:

> It is important to note that, in Ms Donaldson's expert opinion, while the native title claim group is made up of the four landholding groups, they consider themselves interconnected because they jointly hold knowledge relating to the application area and acknowledge themselves to be "all one family"—at [31].

The evidence also addressed the specific rights claimed, e.g. the report said that:

> The right to live on the land, and for that purpose, to camp, erect shelters and other structures, and to travel over and access any part of the determination area is possessed under traditional laws and customs, including those concerning mourning, social organisation (including marriage, kinship and subsection systems), access to land, the protection of sites and the use of resources.

It was noted that the way in which claimants continued to acknowledge and observe the Kaytetye traditional laws and customs that give rise to rights and interests in the land was also addressed—at [36] to [37].

Affidavits and witness statements from 10 of the claim group members were also before the court which attested to 'the basis of the witness' membership of their respective landholding groups ... and to their connection with the claim area under traditional laws and customs'. They made 'compelling reading' and her Honour set the detail of that material out at some length—at [41] to [53].

Conclusion

Collier J concluded that:

> [A]n order in, or consistent with, the terms of the consent orders proposed by the parties is within the power of the Court. In particular, I am satisfied that the material filed by the parties in these proceedings evidences native title rights and interests in the claim group as defined by s 223(1) ... .
>
> Material in the anthropological report filed by Ms Donaldson, in addition to material in affidavits and witness statements before the Court, supports the conclusion that the applicant, on behalf of the native title claim group, has native title rights and interests in the determination area—at [53] to [54].

Appropriate to make the orders?

After setting out some of the case law on point, her Honour noted that the fact that 'an order recognising native title is good as against all third parties, and not only the specific parties to the application' was 'an important factor in determining whether an order is appropriate' for the purposes of s. 87. In this case, it was 'clear from the evidence ... that the applicant has "native title rights and interests" as defined in s 223(1)'. Further:

- all parties were legally represented and so had had 'the benefit of legal advice in reaching a consent position';
- the Northern Territory had 'played an active role in the negotiation of the proposed orders';
- joint submissions filed by the parties stated that, in so doing, the territory '(acting on behalf of the community generally) having regard to the requirements' of the NTA 'and having conducted a thorough assessment process ... is satisfied that the determination is justified in all the circumstances';
- 'the inevitable inference to be drawn' by the absence of the pastoral lease holder was that this was 'dictated by choice, rather than circumstance';
- there were 'no other proceedings' before the court relating to native title determination applications that covered any part of the determination area—at [56]

Removal of deceased person from group constituting the applicant
One of the persons comprising the applicant was deceased. On 21 July 2010, the applicant applied to 'further amend the amended application by the removal of the name' of the deceased person 'as an applicant'. The application was not opposed. Her Honour made an order to that effect 'without the need for a further authorisation meeting of the native title claim group pursuant to s 251B or an application pursuant to s 66B to replace the applicant'. In doing so, Collier J 'respectfully applied the reasoning of Mansfield J' in *Lennon v South Australia* [2010] FCA 743 (*Lennon*)—at [17] to [18]. See *Native Title Hot Spots* Issue 33 for a summary of *Lennon*. Note that the Commonwealth is seeking leave to appeal against the judgment in *Lennon*.

Decision
In the circumstances summarised above, her Honour was satisfied that 'an order in the terms proposed by the parties is appropriate within the meaning' of s. 87 of the NTA.

Determination
It was determined that native title exists in the parts of the determination area described in Schedule A and mapped in Schedule B. Native title does not exist in the parts of the determination area described in Schedule C. The persons who hold the common or group rights comprising the native title are the Aboriginal persons who are:
- members of one or more of the *Akwerlpe-Waake*, *Ileyarne*, *Lyentyawel Ileparranem* or *Arrawatyen* landholding groups by virtue of descent, including adoption, through father's father, father's mother, mother's father and mother's mother; or
- accepted as members of one or more of the landholding groups by the senior members of a landholding group, referred to in subparagraph (a), by virtue of non-descent connections to an estate.

The native title rights and interests are the rights possessed under, and exercisable in accordance with, the native title holders' traditional laws and customs, including the right to conduct activities necessary to give effect to them, being:
- the right to access and travel over any part of the land and waters;
- the right to live on the land, and for that purpose, to camp, erect shelters and other structures;
- the right to hunt, gather, take and use the natural resources of the land and waters, including the right to access, take and use natural water resources on or in the land;

- the right to access, maintain and protect places and areas of importance on or in the land and waters;
- the right to do the following activities (including the power to regulate the presence of others at any of these activities on the land and waters): engage in cultural activities, conduct ceremonies, hold meetings, teach the physical and spiritual attributes of places and areas of importance, participate in cultural practices relating to birth and death including burial rites;
- the right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves as governed by Aboriginal traditional laws and customs and who acknowledge the traditional laws and customs of the native title holders;
- the right to share and exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources.

The other interests in the determination area are also noted and the relationship between those interests and the native title rights and interests is set out as required under s. 225. The native title rights and interests are subject to, and exercisable in accordance with, valid territory and Commonwealth laws. There are no native title rights and interests in minerals as defined in the *Minerals Acquisition Act 1953* (NT), petroleum as defined in the *Petroleum Act 1984* (NT) and prescribed substances as defined in the *Atomic Energy Act 1953* (Cwlth) and the *Atomic Energy (Control of Materials) Act 1946* (Cwlth).

'Natural resources' is defined to mean animals, birds, fish, plants including timber, wax, resin and gum, and surface soils, clays, stone, rocks and ochre, but does not include minerals, petroleum and prescribed substances. 'Natural waters' includes springs and rockholes.

The native title is not to be held on trust. Mpwerempwer Aboriginal Corporation is to be the agent prescribed body corporate for the purposes of s. 57(2) (b) and will perform the functions set out in s. 57(3) once it is a registered native title body corporate.

Public works and pastoral improvements – liberty to apply
The determination area does not include any land or waters on which a public work is or has been constructed or established. The parties have liberty to apply to precisely establish:
- the location and boundaries of any public works;
- the location of the boundaries of land on which the pastoral improvements have been constructed and any adjacent land or waters the exclusive use of which is necessary for the enjoyment of the improvements; and
- whether any of those pastoral improvements have been constructed unlawfully.

Brown (on behalf of the Ngarla People) v Western Australia (No 3) [2010] FCA 859

Bennett J, 6 August 2010

Issue

The question in this case was whether the Federal Court, having determined the extinguishment issue that arose in these proceedings, should make a determination of native title in the form proposed by the parties and whether the Wanparta Aboriginal Corporation should be determined to be the prescribed body corporate in relation to that determination.

Background

In *Brown (on behalf of the Ngarla people) v Western Australia* [2007] FCA 1025 (*Brown No 1, Brown No 2*, summarised in *Native Title Hot Spots* Issue 25), a determination was made recognising native title existed over part of the area covered by a claimant application made on behalf of the Ngarla people (Area A). The remainder of the area (Area B) included the area considered in *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* [2010] FCA 498 (*Brown No 2*, summarised in *Native Title Hot Spots* Issue 32), where the court determined that native title was extinguished over parts of the area covered by mining tenements known as the Mt Goldsworthy leases. Subsequently, the parties filed proposed determination of native title reflecting the reasons for decision in *Brown No 2*.

In order to have the issue of extinguishment dealt with in *Brown No 2*, the parties agreed that, subject to questions of extinguishment, the same native title rights and interests as had been recognised in *Brown No 1* existed in relation to the area covered by the Mt Goldsworthy leases. The evidence in support of that agreement included the State of Western Australia's connection assessment process. Having determined the extinguishment questions, Justice Bennett was satisfied that 'the applicant is entitled to a determination in terms of the proposed orders'.

Pursuant to s. 56(2) of the *Native Title Act 1993* (Cwlth) (NTA), the Ngarla applicant nominated the Wanparta Aboriginal Corporation (WAC) as the PBC to hold native title on trust following the determination in *Brown No 1*. The court was satisfied that the requirements of both the NTA and of the *Native Title (Prescribed Bodies Corporate Regulations 1999* (Cwlth) (PBC Regs) were met and so determined it should hold the determined native title in trust for the native title holders pursuant to s. 56(2) of the NTA.

In this matter, the applicant submitted the NTA and the PBC Regs were 'sufficiently satisfied to allow' the court to determine that WAC is to hold the native title in trust pursuant to s. 56(2)(b) in this case. In *Brown No 1,* the applicant had filed:

1. a notice of nomination of WAC as a PBC pursuant to s. 56(2)(a)(i);
2. the written consent of WAC to be the PBC pursuant to s. 56(2)(a)(ii).

It was found these documents were 'applicable for a determination made in respect' of these proceedings and that the requirements of NTA and PBC Regs were met in respect of the WAC 'for the purposes of these proceedings'.

Decision
A determination of native title was made in terms agreed by the parties. WAC is to hold native title in trust. There was no order as to costs.

Determination
Native title was recognised over parts of the determination area. It was determined that native title does not exist in relation to the parts of the determination area where it was found to have been extinguished in *Brown No 2*. The native title holders are:

> [T]hose persons who refer to themselves as Ngarla, being persons who ... are the cognatic descendants of persons recognised under traditional laws and customs to be members of the Ngarla language group (including persons who have been adopted into the group according to those laws and customs), in particular the descendants of the following individuals ... [gives a list of names]; and
>
> [Those persons who] have been incorporated into the Ngarla group under traditional laws and customs, in particular [names two individuals].

The native title rights and interests are to be held in trust by WAC. As it is registered on the National Native Title Register, WAC is now the 'native title holder' in relation to the relevant area, pursuant to s. 224.

The non-exclusive native title rights and interests recognised are rights to:
- access, and to camp on, the land and waters;
- take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land and waters;
- engage in ritual and ceremony; and
- care for, maintain and protect from physical harm, particular sites and areas of significance to the native title holders.

The native title rights and interests are exercisable in accordance with the laws of the State and the Commonwealth, including the common law, and the traditional laws and customs of the Ngarla People 'for their personal, domestic and non-commercial communal purposes (including cultural or spiritual purposes)'. They do not include any rights in relation to minerals, petroleum or geothermal energy as defined in the relevant legislation.

The nature and extent of the other interests are recognised in the determination, as is the relationship between native title rights and those other interests. In this case, that is qualified by the fact that it was found in *Brown No 2* that the future exercise of the right to mine under the Mt Goldsworthy leases will extinguish native title.

Gangalidda and Garawa People v Queensland [2010] FCA 646

Spender J, 23 June 2010

Issue
The issue in this case was whether the Federal Court should make two determinations of native title pursuant to s. 87A of the *Native Title Act 1993* (Cwlth) (NTA) recognising the Gangalidda People as holding native title. Each determination related to part only of the relevant claimant applications, which cover part of the southern Gulf of Carpentaria and are

brought on behalf of the Gangalidda and the Garawa Peoples. The court decided to make the determinations.

Background

The first application was filed in May 2004 and the second in March 2005. The Gangalidda and Garawa people were described in identical terms in each. Notice was given in accordance with s. 66 and each application was then referred to the National Native Title Tribunal for mediation. With the Tribunal's assistance, the parties reached agreement on a proposed determination of native title over part of the area covered by each application (the Prioritised Areas) and applied to the court in March 2010 for orders pursuant to s. 87A(4) 'in, or consistent with, the terms' of the proposed determinations. The Prioritised Areas fell within two proposed determination areas. The first included four pastoral holdings (Troutbeck, Bundella, Brokera and Tarrant) and the area known as Old Doomadgee reserve, which are areas where each party that held an interest (the relevant parties) had agreed that s. 47A applied. The parties agreed that exclusive native title rights and interests could be recognised in relation to these areas. It also included part of a fifth pastoral holding (Escott) where it was agreed that non-exclusive native title rights and interests could be recognised. The second proposed determination included another part of the Escott pastoral holding and the whole of the Cliffdale pastoral holding as areas where the parties had agreed that non-exclusive native title rights and interests could be recognised. The court had to be satisfied that it had the power to make orders in terms of those sought by the parties and that it was 'proper to do so'—at [10].

Court's powers

Justice Spender noted that the conditions of s. 87A(1) were met, including that:

- there were proceedings 'in relation to an application for determination of native title' on foot, namely two applications made pursuant to ss. 13 and 61;
- after the close of notification, the relevant parties had negotiated an agreed proposed determination of native title in relation to an area included in the area covered by each application—at [11] to [13].

However, as his Honour noted:

> The exercise of power by the Court is also subject to the Court being satisfied that it is appropriate for the Court to make the orders sought ... and, as with any order of the Court, being satisfied that the proposed orders are unambiguous and certain as to the rights declared—at [16].

Material considered

In *Lardil, Yangkaal, Gangalidda and Kaiadilt People v Queensland* [2008] FCA 1855 (*Lardil No 2*), Spender J made orders by consent recognising (among other things) the Gangalidda People's native title rights and interests in relation to certain islands. In considering whether it was appropriate to do so, the court had the benefit of 'a significant amount of evidence from witnesses and experts', much of which had been collected for *The Lardil Peoples v Queensland* [2004] FCA 298 (*Lardil No 1*). The evidence relied on in both of those matters 'as it relates to the Gangalidda People' was relevant in this case. As Spender J noted:

> Given that the Gangalidda claim group in these proceedings is the same as before Cooper J [in *Lardil No 1*], and having regard to the power in section 86 of the Act to take into account evidence

in other proceedings, it is appropriate that the Court also has regard to that evidence in this matter in analysing the history of the claim groups and their connection with the land—at [19].

Section 47A

The applicants' submissions addressed the elements of s. 47A and the court was satisfied that the requirements of s. 47A were met. Among other things, Spender J considered the material in relation to Old Dumaji (Old Doomadgee reserve), which is held by the Gurridi Traditional Land Trust as 'Trustee for the benefit of Aboriginal people and their ancestors and descendants and under the Aboriginal Land Act 1991'. His Honour was satisfied that the reserve is held in trust 'for the benefit of Gangalidda People and their ancestors and descendants'. There was evidence that certain pastoral properties are held by the Carpentaria Land Council Aboriginal Corporation (CLCAC) for the benefit of Gangalidda People. His Honour was satisfied that the Gangalidda People are in occupation of those pastoral holdings and s. 47A 'will also apply to these areas'—at [34] to [36].

Subsection 223(1)

In its submissions, the State of Queensland confirmed it was satisfied the applicants had met the requirements of s. 223 (1). In these proceedings, the claim group was comprised of Garawa and Gangalidda People. After considering the evidence and the findings in *Lardil No 1*, Spender J was satisfied that:

> [T]he members of the claim group who identify as Gangalidda in these proceedings are descended from Indigenous people who were in occupation of the Determination Area, at sovereignty—at [42].

In addition to demonstrating 'a continued physical connection' with the area, Spender J was satisfied on the evidence that:

> [T]he Gangalidda people have maintained a spiritual connection with the land and waters the subject of the Proposed Determinations, and that the body of their traditional laws and customs support the rights and interests that are recognised in the Proposed Determination[s]—at [45].

His Honour was also satisfied that the material relied upon allowed the court to recognise the right to possession, occupation, use and enjoyment to the exclusion of all others of the areas to which s. 47A applied and the other 'non-exclusive' rights set out in the proposed consent determinations—at [46] to [48].

Spender J concluded that:

> It is clear ... that the Gangalidda members of claim group has established and maintained a system of laws and customs over Gangalidda country – the land and waters the subject of the Determination Areas – sufficient to satisfy the requirements of the Act—at [49].

It was noted that the rights and interests of the Gawara People 'will be dealt with in the balance of the claims'—at [50].

Sections 94A and 225

Pursuant to s. 94A, a determination of native title must 'set out details of the matters mentioned' in s. 225 which are, in paraphrase, whether or not native title exists in relation to a particular area and, if it does:

- who holds the common or group rights comprising the native title;
- the nature and extent of the native title rights and interests in the determination area;
- the nature and extent of any other interests in that area;
- the relationship between those rights and interests;
- whether there is 'exclusive' native title in relation to any part of the determination area that is subject to a non-exclusive pastoral lease or a non-exclusive agricultural lease.

His Honour found that the material before the court satisfied these requirements—at [53] to [61].

Prescribed body corporate
Pursuant to s. 55, if the court proposes to make an approved determination of native title that native title exists, then it must 'at the same time' make a determination in relation to a prescribed body corporate pursuant to ss. 56 and 57. His Honour was satisfied the proposed determinations met the requirements. In this case, the Gangalidda and Garawa Native Title Aboriginal Corporation, incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cwlth), is the prescribed body corporate.

Decision
Spender J was satisfied that the court had power to make the determinations in the terms proposed by the parties and that it was appropriate to do so 'to give effect to the parties' agreement without a full hearing' of the claim. His Honour hoped these orders will 'bring the promise of a brighter future to the Gangalidda People who have had an ongoing relationship with their country since ancient times'—at [64] to [66].

Eden Local Aboriginal Land Council v NTSCORP Limited [2010] FCA 745

Jacobson J, 15 July 2010

Issue
The issue before the Federal Court was whether to make a determination under the *Native Title Act 1993* (Cwlth) (NTA) on a non-claimant application that native title did not exist in relation to a block of land in Bega Valley Shire, New South Wales.

Background
The non-claimant application was supported by an affidavit of Oswald Cruse, Chairperson of the Eden Local Aboriginal Land Council (Eden LALC). In it, he deposed to the fact that he is 77 years of age and has been acquainted with the land for most of his life. Mr Cruse said he was not aware of any hunting, fishing or food gathering, or the exercise of native title rights, by Indigenous people on the land concerned. The court was satisfied that Eden LALC was the registered proprietor of the land and that it had a non-native title interest in relation to it. A copy of the title search for the area comprised in NSW Department of Lands Certificate of Title folio identifier 98 of Deposited Plan 1036338 was annexed to Mr Cruse's affidavit—at [20].

Justice Jacobson had made two previous native title determinations in relation to nearby land—see *Cruse v New South Wales Native Title Services Ltd* [2006] FCA 1124 and *Eden Local Aboriginal Land Council v Minister for Lands* [2008] FCA 1934.

Proposed use of the land

Eden LALC proposed to lease part of the land to Telstra Corporation Limited (Telstra) for three years. At an extraordinary general meeting of Eden LALC in July 2008, it was decided the land was not of cultural significance to the Aboriginal people of the area and the lease of the land to Telstra was endorsed. While there was some doubt as to whether Telstra wished to proceed with the lease, Eden LAC wished to proceed with the non-claimant application.

Relevant provisions of the *Aboriginal Land Rights Act 1983* (NSW) (ALR Act)

In *Hillig v Minister for Lands for New South Wales* [2005] FCA 1713 (*Hillig*), Bennett J explained that:

> [T]he effect of Schedule 4 Part 9 cl 51 of the *Aboriginal Land Rights Act* as in effect from March this year, is that the present application is governed by the provisions of ss 42 and 42E of the *Aboriginal Land Rights Act* rather than the repealed provisions of ss 40 and 40AA, even though the present application was made before the new provisions came into force—at [10].

Jacobson J found similarly, i.e. that ss. 42, 42E and 42G of Pt 2, Div 4 of the ALR Act applied in this case. A determination under s. 61 of the NTA was a prerequisite to the NSW Aboriginal Land Council (NSWALC) dealing with the matter. Eden LALC was preparing an application for approval from NSWALC in accordance with s. 42G of the ALR Act for the proposed land dealing with Telstra—at [10] to [16] and [18].

Consideration

The court was satisfied that:

- the requisite notices under s. 66(3) of the NTA had been given and that the notice period had expired;
- no native title claimant sought to appear or notified an interest;
- a search of the National Native Title Register confirmed there was no determination of native title over the area within the meaning of s. 13(3) of the NTA;
- the application was unopposed by the respondents within the definition in s. 86G(2) of the NTA;
- the court had power to make the orders sought and the jurisdiction under s. 81 of the NTA to hear and determine the application—at [21] to [29].

It was noted that orders of the kind sought were made in *Hillig*, *Deniliquin Local Aboriginal Land Council* [2001] FCA 609 and *Kennedy v Queensland* [2002] FCA 747.

Decision

The court determined that native title does not exist in relation to the relevant land—at [30].

Eden Local Aboriginal Land Council v NTSCORP Limited [2010] FCA 746

Jacobson J, 15 July 2010

Issue
The issue before the Federal Court was whether to make a determination under the *Native Title Act 1993* (Cwlth) (NTA) on a non-claimant application that native title did not exist in relation to a block of land in Bega Valley Shire, New South Wales.

Background
The application was, subject to one exception, identical to that in *Eden Local Aboriginal Land Council v NTSCORP Limited* [2010] FCA 745, summarised in *Native Title Hot Spots* Issue 33. The difference was that, if this application was approved, the Eden Local Aboriginal Land Council (Eden LALC) proposed to subdivide and possibly sell all or part of the land concerned. Negotiations between Eden LALC and the Bega Valley Shire Council regarding subdivision had not yet culminated in a final proposal. However, in the court's view, this was no impediment to making the orders sought—at [6].

The application was governed by the provisions of the *Aboriginal Land Rights Act 1983* (NSW) (ALR Act). The Eden LALC could not deal with the land except in accordance with an approval given by the New South Wales Aboriginal Land Council (NSWALC) under s. 42G of the ALR Act. The making of the orders sought satisfied the prerequisite for a determination by NSWALC and would be sufficient for NSWALC to deal with the land once the final form of the proposal for subdivision and sale was finalised. There had been no previous determination that native title existed in relation to the area.

Decision
Justice Jacobson made an order that native title does not exist in relation to the area concerned—at [8].

Party status

QGC Pty Limited v Bygrave [2010] FCA 659

Reeves J, 23 June 2010

Issue
The issue in this case was whether Queensland South Native Title Services (QSNTS) should be joined as a party to an application for judicial review of a decision by a delegate of the Native Title Registrar not to accept an application for the registration of an Indigenous Land Use Agreement (ILUA). The application for review was brought under s. 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (AD(JR) Act) and s. 39B of the *Judiciary Act 1903* (Cwlth).

Background

QGC Pty Limited, the applicant in the review proceedings, negotiated an agreement with the Iman People in relation to the whole of the area subject to a claimant application made on their behalf (the Iman People # 2 application). An application under s. 24CG of the *Native Title Act* 1993 (Cwlth) (NTA) to have the agreement registered on the Register of Indigenous Land Use Agreements was made to the Native Title Registrar in March 2010. The agreement was signed by eight of the persons comprising the registered native title claimant for the Iman People # 2 application. A ninth person refused to sign.

A delegate of the Registrar found the agreement did not comply with the requirements of s. 24CD(1) of the NTA, one of the requirements an agreement must meet in order to be an ILUA pursuant to s. 24CA. Subsection 24CD(1) provides that: 'All persons in the native title group ... must be parties to the agreement'. QGC challenged the correctness of the delegate's decision. QSNTS applied to be a party to these proceedings.

Did QSNTS have a sufficient interest?

Justice Reeves held (among other things) that:

- cases dealing with the nature of a relevant interest to become a party under s. 84(5) of the NTA do not assist in determining what is a sufficient interest for the purposes of s. 12 of the AD(JR) Act;
- taking into account the breadth of the term 'interest' as used in s. 5 of the AD(JR) Act, QSNTS, in its capacity as the 'recognised representative body' (see comment below) under the NTA with responsibilities for the agreement area had a 'sufficient interest in the decision to which these proceedings relate';
- these matters gave QSNTS a 'demonstrable and direct interest' that went beyond 'a mere emotional or intellectual concern in the decision the subject of these proceedings' and set QSNTS apart 'from an ordinary member of the public' or a mere busybody;
- the fact that this interest may not be peculiar to QSNTS, in that all other representative bodies may have a similar interest, did not detract from this conclusion—at [20], [23] and [26].

His Honour supported this decision by noting that the question of whether a majority of the native title group, as distinct from an unanimity of it, meets the requirements of s. 24CD(1) of the NTA 'is likely to affect the number and diversity of the native title holders, or groups of native title holders' QSNTS is 'required to represent'. Reeves J concluded that this, in turn, would have implications for how QSNTS discharged its functions under the NTA—at [24] to [25].

Comment – QSNTS is not a recognised representative body

Among other things, Reeves J noted that a failure by QSNTS to perform its functions is a ground under s. 203AH(2)(a) for Ministerial withdrawal of recognition as a representative body. However, since QSNTS is not a representative body but a body funded to perform the functions of a representative body, regard should be had to ss. 203FE and 203FEA instead. Nothing appears to turn on the distinction in this case.

Who was the solicitor on the record?

As QSNTS had a sufficient interest, the next question was whether Reeves J should exercise his discretion to make it a party to the proceedings and, in particular, whether joining

QSNTS would give rise to a conflict of interest. However, before determining that issue, his Honour had to identify the solicitor on the record in the Iman People #2 application. It appeared to be the person who held the position of Principal Legal Officer (PLO) at QSNTS rather than a particular solicitor described by name. His Honour noted that this did not amount the compliance with the *Federal Court Rules*:

> The Rules clearly require that the nominated solicitor's name, address, telephone number, facsimile number and email address must be provided: see O 4 r 4(1)(c) and (d) and O 9 r 4(1)(b). ... [E]xcept where there is some statutory provision to the contrary ... , I do not consider that a party will comply with these Rules by providing the solicitor's job title. The difficulties that arose in this case amply demonstrate the pitfalls in that approach—at [51].

After a factually complicated inquiry that 'demonstrated ... a disturbing lack of compliance' with the FCR, it was found that, in fact, the solicitor on the record for the Iman People # 2 application at all material times was Colin Hardie, a private legal practitioner retained to act in the role of PLO of QSNTS. Mr Hardie had not acted, and did not intend to act, for QSNTS in these proceedings. The solicitor on the record for QSNTS was Deanne Cartledge, who was also a private practitioner—at [43] to [44].

No actual or perceived conflict of interest existed

In considering whether the court should exercise its discretion to join QSNTS, Reeves J addressed whether this would give rise to a conflict of interest in relation to Mr Hardie's fiduciary duties to the applicant for the Iman People #2 application that told against doing so—at [58].

It was found (among other things) that:

- while Mr Hardie had concurrent 'fiduciary' engagements as a solicitor to the Iman People and as an agent to QSNTS as his principal, no situation was identified where the duties of loyalty owed were in conflict;
- Mr Hardie was not involved as a solicitor or otherwise in assisting QSNTS to pursue its interests in relation to the construction of s. 24CD(1) of the NTA;
- while this may involve QSNTS taking a position adverse to the interests of the applicant for the Iman People #2 application, there was nothing to suggest this would have any adverse effect on their claim or, more importantly, on Mr Hardie acting for them in that claim;
- the Iman People #2 application and these review proceedings were not sufficiently related to attract the extended application of the proscription against a solicitor acting both for and against a client in the same proceedings because the only common factor between the two proceedings was that the Iman People's native title rights and interests were involved in both—at [75] to [78] and [82].

Therefore, Reeves J did not consider that the 'circumstances of the adverse interests ... called for any intervention to ensure the due administration of justice'. According to his Honour:

> There is no suggestion that the credit or character of any of the second respondents [the applicant in the Iman People #2 application] will be attacked or questioned in these proceedings. Indeed, it seems to be common ground that there will be no dispute on the facts in these proceedings and they will be limited to a question of law. And, of course, there is no suggestion that Mr Hardie proposes to act for any other party in the Iman #2 claim and he has not acted for ... [QSNTS] in these proceedings, nor does he intend to do so. It follows that both the perception and reality is

that Mr Hardie will not be "changing sides" if ... [QSNTS] becomes a party to the proceedings—at [79].

The fact that there was no 'fully fledged contradictor' was also a relevant consideration. This was the result of the Registrar's delegate being limited by the principles set out in *R v Australian Broadcasting Tribunal, Ex parte Hardiman* (1981) 144 CLR 13 and the fact that the person who refused to sign the agreement was self-represented—at [83].

Decision
QSNTS was made a party because it had a sufficient interest in the decision the subject of these proceedings and no good reason had been advanced as to why the discretion to do so should not be exercised—at [82] and [85].

Murray on behalf of the Yilka Native Title Claimants v Western Australia [2010] FCA 595

McKerracher J, 11 June 2010

Issue
The main issues in this case were whether notices filed by Indigenous people pursuant to s. 84(3) of the *Native Title Act 1993* (Cwlth) within time that indicated they wished to be joined as a party to a claimant application complied with requirements as to form and whether the information provided in those notices could be supplemented. The court found that relevant regulations for giving notice pursuant to s. 84(3) were not prescriptive and that supplementary material could be considered.

Background
The claimant application relevant to these proceedings, brought on behalf of the Yilka native title claimants (the Yilka claim) in December 2008, covers the same area as was covered by a previous application (known as the Cosmo Newberry claim) that was dismissed by Lindgren J in *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 (*Wongatha*, summarised in *Native Title Hot Spots* Issue 24). Notice was given of the Yilka claim pursuant to s. 66(8) in September 2009.

Regulation 6 of the *Native Title (Federal Court) Regulations 1998* (Cwlth) provides that notice of intention to become a party for the purpose of s. 84(3)(b) 'may be' in accordance with Form 5, which in turn requires the person giving notice to state the basis on which that person wants to become a party.Within the period prescribed by s. 66(10), Form 5 notices were filed by (among others): Alison, Kathy, Daniel, Quinton, Michael and Fabian Tucker; Corina, Matthew and Lisa Bennell; Bessie, Jarred, Brett, Hilda, Shaun and Aaron Dimer; Shondelle Dimer/Garlett; Pearlie Wells; Lynnette Graham; Daisy Doolkie Rundle; Ron Harrington-Smith; Laurel Cooper; Lorraine Griffiths (the Form 5 applicants). The applicant for the Yilka claim (the Yilka applicant) objected to the Form 5 applicants having party status.

NTA framework
Subsection 84(3) relevantly provides that, in addition to the applicant, another person is a party to a claimant application if:

- the person is covered by any of ss. 66(3)(a)(i) to (vi); or
- the person claims to hold native title in relation to land or waters in the area covered by the application; or
- the person's interest, in relation to land or waters, may be affected by a determination in the proceedings; *and*
- the person notifies the Federal Court, in writing, that the person wants to be a party to the proceeding within the period specified in the notice under section 66.

As Justice McKerracher noted:

> The provisions of the NTA make it clear that a person is a party to a proceeding by operation of s 84(3) if the person notifies the Federal Court in the manner prescribed by s 84(3)(b) and also the notice itself identifies the person as someone to whom any of the paragraphs of s 84(3)(a) apply—at [12].

In addition, s. 84(5) provides that the court may join any person as a party to the proceedings at any time if it 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'.

Pursuant to s. 84(8), the court may at any time order that a person (other than the applicant) cease to be a party to the proceedings. Under s. 84(9), the court is to consider doing so if it is satisfied that (among other things) the person never had, or no longer has, interests that may be affected by a determination in the proceedings.

The issues

The 'crux of the matter' was that (with three exceptions) none of the Form 5 applicants included the term 'native title' or any equivalent in their Form 5. The Yilka applicant argued that such a claim was 'essential to trigger the operation of s. 84(3)(a)(ii)'. Nor was any other kind of interest 'in relation to land or waters' for the purpose of s. 84(3)(a)(iii) or s. 84(5) identified in the notices. In two cases, the person was said to have given evidence in *Wongatha* that contradicted or was inconsistent with what was stated in the relevant Form 5.

In the three exceptional cases, it was asserted in the Form 5 that 'I have registered native title right and interest in the land'. The Yilka applicant argued (among other things) that this could not mean pursuant to an entry on either the National Native Title Register or the Register of Native Title Claims. Therefore, it was submitted the reference to 'registered' rights and interests did not satisfy s. 84(3)(a)(ii) and, even if did, the lack of any substantiation as to what was meant provided grounds for dismissal as a party under s. 84(8). It was also argued that these three Form 5 applicants had 'dissociated' themselves from the Cosmo Newberry claim in *Wongatha* and so, even if there were parties by operation of s. 84(3), they should be dismissed under s. 84(8) on the basis that that they never had a relevant interest.

Two of the Form 5 applicants (Bessie Dimer and Daisy Doolkie Rundle) were members of the Yilka claim group because they were the daughters of a listed apical ancestor. The Yilka applicant argued the discretion under s. 84(5) should not be exercised because there was nothing to indicate a need for them to be joined as respondents, e.g. that they were not adequately represented by the Yilka applicant. In relation to s. 84(3), as with the other Form 5 applicants, the complaint was that since mere assertions of 'connection' were not sufficient,

neither ss. 84(3)(a)(ii) nor (iii) applied and so they were not made claimants by operation of s. 84(3).

Consideration

His Honour found that:

- Reg 6 is permissive (rather than prescriptive) as to the form of notice required;
- while only a person who satisfies the requirements of s. 84(3) becomes a party by operation of that provision, 'the precise content of the notice is of less significance';
- there was no reason why a challenge to the notice should not be brought but, equally, no reason that evidence and submissions should not be provided to expand upon or clarify the content of the notice;
- nothing in s. 84(3) binds the court to limit itself to the form or content of the notice to be given under s. 84(3)(b) in order to determine whether the person giving the notification has 'the necessary qualifications to do so as required' by s. 84(3)(a);
- whether or not the interests alluded to in the Form 5 notices in this case fell within the category of 'persons claiming to hold native title' in s. 84(3)(a)(ii), they comprised 'an interest which may be affected by a determination in the proceeding' for the purposes of s. 84(3)(a)(iii)—at [92] to [93].

Further:

> The omission of the expression 'native title interests' in the descriptive words used in the Form 5 documents does not necessarily mean that what is claimed is not native title. Where there is doubt as to compliance with s 84(3)(a)(ii) NTA by what is contained in the Form 5 notifications, then it is appropriate to consider such further evidence as may be provided to it on a challenge—at [93].

In this case, the court was satisfied that there was 'some force to the applicant's complaints as to the content of the Form 5 applications'. However:

- there was no 'statutory imperative' precluding the court from taking into account further evidence that clarified the nature of the claim described in a Form 5 if it is challenged;
- this did not render the time limits imposed under s. 84(3) 'inutile' because, unless a challenge was 'very much delayed, the position should be clarified reasonably promptly'—at [95] to [96].

Decision

The Form 5 applicants who filed submissions and provided a basis on which they are entitled to be recognised as parties to the application (even where the Form 5 was arguably inadequate or defective) were joined. However, as was noted:

> [T]hat is purely a prima facie basis as the justification for it will need to be tested as events unfold. ... . At this early stage, ... consistent with conventional strike out principles, it would be too severe a sanction when there is at least some basis in each instance for the inclusion of the remaining Form 5 applicants in the proceeding to, in effect, shut them out—at [97].

McKerracher J saw no reason why those who did not file additional material and did not respond should be parties to the proceedings 'if they ever were' but they were given leave to apply to be joined pursuant to s. 84(5) within 21 days 'should they be so advised'. Given 'so many different entities [are] purporting to stake a claim in the application', specific directions will be made that 'one person only represent each of the respective groups who have responded to this motion'. Further, given the 'valid criticisms of the illusory

descriptions of the claims as presently articulated', the Form 5 applicants who are parties are to amend their Form 5 to articulate the interest claimed 'with greater precision'—at [98] to [100].

His Honour asked the relevant parties to try to agree on orders reflecting the court's findings and, if that was not possible, to file short submissions to allow orders to be made on the papers. Orders was also sought as to costs: see *Murray on behalf of the Yilka Native Title Claimants v Western Australia (No 2)* [2010] FCA 926, summarised in *Native Title Hot Spots* Issue 33.

Atkinson on behalf of the Gunai/Kurnai People v Victoria [2010] FCA 904

North J, 16 August 2010

Issue

The question in this case was whether the Australian Deer Association (ADA) should to be joined as a respondent to a claimant application made on behalf of the Gunai/Kurnai People (GK # 2). The application for joinder was dismissed because ADA was in default and, in any case, had not demonstrated an interest of the kind required.

Background

The ADA applied to be joined pursuant to s. 84(5) of the *Native Title Act 1993* (Cwlth) which 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.

ADA wanted to become a party because much of the area covered by the application was public land used by ADA's members and others for recreation purposes. ADA said it had 'several serious concerns about the rights and interest of the claim that it regards as racist and divisive to the wider Victorian community'. Justice North noted that ADA rejected the notion that:

- one section of the community should have exclusive possession and use of public land especially when the granting of the exclusive use would be in the hands of those benefiting from it;
- ownership of public land be wholly transferred to Aboriginal Traditional Owner Groups.
- one section of the community is allowed exclusive rights to natural resources;
- natural resources can be owned by one section of the community and traded to the rest of the community for profit and benefit of one single group;
- one group should have sole right to make decisions over the use of public land other than organisations that come under control of the Parliament of Victoria;
- permission for access of public land be vested with a single entity other than organisations which come under the control of the Parliament of Victoria.

Dismissed for default

ADA was given notice of the hearing but did not appear. It was found that this amounted to a default within the meaning of O 35A r 2(f) of the Federal Court Rules, i.e. ADA was in

default because it failed to 'prosecute the proceeding with due diligence'. Pursuant to O 35A r 3(a), where an applicant is in default, the court may order that 'the proceeding be stayed or dismissed as to the whole or any part of the relief claimed by the applicant'. The application for joinder was dismissed because of the 'non-appearance' of ADA—at [4] to [6].

Did not satisfy s. 84(5)
It was also found that the application did not satisfy the requirements of s. 84(5) in that ADA did not have an interest of the kind identified in *Byron Environmental Centre Incorporated v Arakwal People* (1997) 78 FCR 1 (*Byron*). According to North J, ADA had given 'no indication ... of the extent of the use by members of the ADA of the area in question, either by reference to the area of use, or the frequency of use'. GK # 2 was filed to claim some areas that were 'overlooked in bringing the original application'. North J thought that:

> It would be surprising if the ADA had an interest in the area covered by this application. In the absence of further particularisation, it is not possible to determine what, if any, interest the ADA might have in the application area—at [8].

Further, ADA's concerns were emotional or philosophical:

> General concerns about the native title system or philosophical objections to native title rights and interests which might be afforded to native title applicants to the exclusion of the general public do not amount to interests which ground an application to become a party to a native title application—at [9] to [10] referring to *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530 and *Byron* at 33.

Decision
The application for joinder was dismissed.

Atkinson on behalf of the Gunai/Kurnai People v Victoria (No 2) [2010] FCA 905

North J, 16 August 2010

Issue
David James Baldwin, the holder of a grazing licence, applied to be joined as a respondent to the Gunai/Kurnai #2 claimant application pursuant to s. 84(5) of the Native Title Act 1993 (Cwlth). The application for joinder was dismissed because Mr Baldwin was in default and, in any case, had not demonstrated an interest of the kind required.

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.

Mr Baldwin claimed an interest as a primary producer and holder of a water frontage licence on the Mitchell River. He was given notice of the hearing but did not appear. It was found that this amounted to a default within the meaning of O 35A r 2(f) of the Federal Court Rules, i.e. he was in default because he failed to 'prosecute the proceeding with due diligence'. Pursuant to O 35A r 3(a), where an applicant is in default, the court may order

that 'the proceeding be stayed or dismissed as to the whole or any part of the relief claimed by the applicant'. The application for joinder was dismissed because of the 'non-appearance'—at [3] to [6].

Further, the Victorian Department of Sustainability and Environment indicated Mr Baldwin's grazing licence was not within the area covered by Gunai/Kurnai #2. It was within the area covered by Gunai/Kurnai #1. Therefore, that licence did not provide a basis for the application to be joined—at [7].

Decision
The application for joinder was dismissed.

Atkinson on behalf of the Gunai/Kurnai People v Victoria (No 3) [2010] FCA 906

North J, 16 August 2010

Issue
William Maxwell Rheese applied to be joined as a respondent to the Gunai/Kurnai #2 claimant application pursuant to s. 84(5) of the *Native Title Act 1993* (Cwlth) on the basis that he was a recreational user of public lands subject to that application. The application for joinder was dismissed because Mr Baldwin was in default and, in any case, had not demonstrated an interest of the kind required.

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.

Mr Rheese attested to his use of public land in part of claim area for bushwalking, hunting and camping. His evidence was that he had done so extensively since 1972, typically 10 to 12 times a year for two to four days at a time and often with friends. Mr Rheese was given notice of the hearing but did not appear. It was found that this amounted to 'a default within the meaning' of O 35A r 2(f) of the Federal Court Rules, i.e. he was in default because he failed to 'prosecute the proceeding with due diligence'. Pursuant to O 35A r 3(a), where an applicant is in default, the court may order that 'the proceeding be stayed or dismissed as to the whole or any part of the relief claimed by the applicant'. The application for joinder was dismissed because of the 'non-appearance'—at [3] to [6].

It was also found that the application did not satisfy the requirements of s. 84(5) in that ADA did not have an interest of the kind identified in *Byron Environmental Centre Incorporated v Arakwal People* (1997) 78 FCR 1 (*Byron*). The 'particular land on which the activities are undertaken' was not identified, which meant that 'the detail is insufficient to base a claim to become a party, with all the attendant participation in the application which would be the result'. Further, Mr Rheese had not 'made clear that the activities undertaken would be affected in a demonstrable way by a determination in relation to the application'—at [7] to [8].

Decision
The application for joinder was dismissed.

Atkinson on behalf of the Gunai/Kurnai People v Victoria (No 4) [2010] FCA 907

North J, 16 August 2010

Issue
Colin Francis Wood applied to be joined as a respondent to the Gunai/Kurnai #2 claimant application pursuant to s. 84(5) of the *Native Title Act 1993* (Cwlth) on the basis that he was a recreational user of public lands subject to that application. The application for joinder was dismissed because Mr Baldwin was in default and, in any case, had not demonstrated an interest of the kind required.

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.

In his application, Mr Wood stated he hunted, fished and otherwise used parts of the claim area for recreational purposes. Mr Wood was given notice of the hearing but did not appear. This was found to amount to 'a default within the meaning' of O 35A r 2(f) of the Federal Court Rules, i.e. he was in default because he failed to 'prosecute the proceeding with due diligence'. Pursuant to O 35A r 3(a), where an applicant is in default, the court may order that 'the proceeding be stayed or dismissed as to the whole or any part of the relief claimed by the applicant'. The application for joinder was dismissed because of the 'non-appearance'

It was also found that Mr Wood's application did not satisfy the requirements of s. 84(5) because:

> The details of his interest claimed ... are insufficient to support his application, with all the attendant participation in the application which would be the result, as they do not indicate with sufficient detail the location of his activities, nor the frequency of them. Further, it is not made clear that the activities undertaken would be affected in a demonstrable way by a determination in relation to the application—at [7] to [8], referring to to *Byron Environmental Centre Incorporated v Arakwal People* (1997) 78 FCR 1.

Decision
The application for joinder was dismissed.

Costs – opposition to party status

Murray on behalf of the Yilka Native Title Claimants v Western Australia (No 2) [2010] FCA 926

McKerracher J, 26 August 2010

Issue

The question in this case was whether a costs order should be made in relation to an application opposing a number of people becoming parties to a claimant application made under the *Native Title Act 1993* (Cwlth) (NTA).

Background

In *Murray on behalf of the Yilka Native Title Claimants v Western Australia* [2010] FCA 595 (*Yilka*, summarised in *Native Title Hot Spots* Issue 33), the applicant for the Yilka native title claimants asked the court not to accept as parties 22 people who had filed notices of an intention to become a party. It was found that six of the 22 should not become parties. However, the court was not satisfied the other 16 should be 'precluded from becoming parties'. The legal representatives for those who made submissions were asked to agree to orders reflecting the decision made in *Yilka* or (if they could not agree), to file submissions. Agreement was reached on all issues except costs—at [1] to [5].

Statutory framework

Pursuant to s. 81 of the NTA, the Federal Court has 'exclusive jurisdiction to hear and determine applications ... that relate to native title'. In this case, the notice of motion filed by the Yilka applicant opposing party status related to a claimant application pending before the court. Therefore, Justice McKerracher was satisfied that s. 85A applied in relation to costs. Subsection 85A(1) provides that, unless the court orders otherwise, each party must bear his or her own costs. Without limiting the court's power under that provision, s. 85A(2) provides that a party may be ordered to pay some or all of any costs incurred by another party as a result of 'any unreasonable act or omission' of the first party. As noted, s. 85A(2) of the Act 'does not in any way limit' the discretion available under s. 85A(1) 'to order a party to pay the costs of an opposing party'—at [6] to [11].

Consideration

Those seeking costs argued it was not for the Yilka applicant to challenge the Form 5 notices and that, in doing do, the Yilka applicant caused they to incur extra costs in making submissions in response to that challenge. McKerracher J disagreed, noting that the challenge succeeded in six cases and, where it failed, it could not be said that bringing the challenge was unreasonable 'within the meaning' of s. 85A(2):

> I do not accept that the motion was totally without merit or that the applicant was acting unreasonably by putting comprehensive submissions before the Court. I do not consider the circumstances warrant a departure from the presumption that parties should pay their own costs—at [13].

Decision
There was no order as to costs. His Honour went on to make orders to reflect the reasons given in *Yilka*.

Access to affidavit denied

Quall v Northern Territory [2010] FCA 417

Mansfield J, 21 April 2010

Issue
The issue in this case was whether the Federal Court should accede to an oral request by a respondent party in one matter for access to a person's affidavit apparently filed in a different matter.

Background
Victor Collins was a respondent party to the Howard Springs claimant application, one of a number of such applications made by Tibby Quall (the Quall applications) which had been dismissed. He sought access to the affidavit of John Hicks but made no formal application and did not support his oral application by affidavit. Mr Collins acknowledged that he could not use his status as a respondent to the Howard Springs application for some extraneous purpose, such as the acquisition of information for use in a different proceeding, but maintained the material would assist Mr Quall, the applicant in the Howard Springs application. The court refused his application on the grounds that:

- Mr Quall did not attend, did not seek the material and did not indicate that he supported Mr Collins seeking it on his behalf;
- 'more importantly', it was inappropriate to consider the application while the Quall applications stood dismissed;
- no real purpose would be served in terms of benefitting Mr Quall in the Howard Springs application unless and until the High Court heard and favourably determined his application for special leave to appeal and, if leave was granted, the appeal—at [4] to [7].

Decision
The application was refused but leave was granted to renew it if the Howard Springs application was subsequently 're-enlivened'—at [8].

Postscript – special leave refused
On 30 July 2010, Justices Hayne, Crennan and Bell refused to grant Mr Quall special leave to appeal—see *Quall v Northern Territory* [2010] HCATrans 186.