Native Title Hot Spots

No.11, September 2004

Contents

Disclaimer

Recent Cases

New cases—Tribunal alert service

The Tribunal's library provides a regular service that alerts subscribers by email to unreported judgments and some other information dealing with native title and related issues. Hyperlinks are included. Subscribers will also be notified if and when judgments are reported. If you wish to subscribe, please email libraryperth@nntt.gov.au.

Determination of native title

Nangkiriny v Western Australia [2004] FCA 1156

North J, 8 September 2004.

Background

This is the second consent determination made by the Federal Court under the *Native Title Act 1993* (Cwlth) (NTA) recognising the Karajarri people's native title. The first was made in February 2002, covered 30,358 sq km in the Kimberley region of Western Australia and followed a full hearing of the claimants' evidence. The two stage approach was adopted because, after settling the terms of the first determination over unallocated Crown land not subject to any prior non-native title interests, a pastoral lease owned by a Karajarri association and land reserved for the use and benefit of Aboriginal people, the parties agreed to wait until the High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1 before dealing with the other areas claimed.

After that decision, the matter was referred to the Tribunal for mediation, as a result of which this consent determination was negotiated. The 5,647 sq km covered by this determination includes several non-exclusive pastoral leases (as defined in s. 248B), along with an area between the mean high water mark and the lowest astronomical tide (the intertidal zone), any other tidal waters in the determination area, several reserves and some areas of unallocated Crown land that were previously reserves. In reasons accompanying the determination, his Honour Justice North noted that:

> Today is the day of formal recognition under the laws of Australia…of the ancient rights and interests of the Karajarri people…I wish to express the hope that the events of today will be seen…as part of the tide of history which washed away the past injustices which…were visited upon the Karajarri people—at [16] and [19].

Appropriate to make the order—consideration of s. 87

Under s. 87, the court may make a determination of native title by consent (among other things) if it is satisfied that the orders are within its power and that it is appropriate to do so. In this case, North J was satisfied that the proposed determination complied with the requirements of s. 225 of the NTA and, therefore, that it was within the court's power to make of the order sought, relying on:

- primarily, the fact that the parties had freely agreed to the terms of the orders;
- the evidence before the court;
- the fact that each of the parties had the benefit of independent legal advice; and
- the fact that the State of Western Australia and Commonwealth actively participated in the proceedings in the interests of the community—at [8].

Comments on PBC and s. 87

It was submitted that the prescribed body coporate nominated under s. 56, the Karajarri Traditional Lands Association, was unable to carry out its statutory functions because of a lack of resources. North J was of the view that: 'There is a good argument that this is a

relevant factor in the Court's consideration of whether an agreement providing for such a PBC is appropriate for the purposes of s. 87'. However, his Honour accepted that, in this case, it was appropriate to make the determination because no party to the proceedings wanted the court to refuse to do so on that ground. However, the court did note that:

> It would be an absurd outcome if, after the expenditure of such large sums to reach a determination of native title, the proper utilisation of the land was hampered because of lack of a relatively small expenditure for the administration of the PBC—at [11].

The native title holder

The native title holder is the Karajarri Traditional Lands Association (Aboriginal Corporation) as trustee for the common law holders of native title, the Karajarri People: see ss. 55, 56, 57 and 224(a).

Compromise on extinguishment

Over several small areas of unallocated Crown land and two optical regenerator sites, it was agreed that native title was wholly extinguished. However, the applicants submitted this was 'a compromise [as a result of intensive mediation] on a number of issues where, in the absence of judicial pronouncements…, there remains a degree of uncertainty'. They also noted an undertaking by the state to grant title under the *Land Administration Act 1997* (WA) to six parcels of unallocated Crown land within the first determination area as one of the matters relevant to the position taken—at [6].

Native title rights recognised on non-exclusive pastoral leases, reserves and USL

Over areas subject to non-exclusive pastoral leases, unvested reserves and unallocated Crown land that was previously reserved, it was determined that native title consisted of the non-exclusive right to use and enjoy those areas as follows:

- enter and remain on the land and waters;
- camp and erect temporary shelters;
- take flora and fauna from the land and waters;
- take other natural resources of the land such as ochre, stones, soils, wood and resin;
- take the waters (as defined in the determination), including flowing and subterranean waters;
- engage in ritual and ceremony;
- care for, maintain and protect from physical harm, particular sites and areas of significance to the Karajarri people.

Native title rights recognised in intertidal zone and tidal waters

In the area between the mean high water mark and the lowest astronomical tide and in any other tidal waters, the court recognised the non-exclusive right to use and enjoy those areas as follows:

- access the land and waters
- take fauna, flora, fish and other traditional resources;
- take the waters, including flowing and subterranean waters;
- engage in ritual and ceremony;
- care for, maintain and protect from physical harm, particular sites and areas of significance to the Karajarri people.

Must be exercised traditionally for non-commercial purposes and subject to law

All the rights recognised in the determination must be exercised in accordance with the traditional laws and customs of the Karajarri people for personal, domestic and non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes) only. Further, the native

title rights and interests are subject to, and exercisable in accordance with, the laws of the state and the Commonwealth, including the common law.

Relationship between the native title rights and interests and the other interests

The other interests in the determination area were noted, including those of the public to fish in, and navigate over, tidal waters, along with any public rights of access to waterways, beds and banks or foreshores of waterways, coastal waters and beaches and stock routes (see s. 212). Generally speaking, the relationship between the native title rights and interests and the other interests in the determination area is described in similar terms to ss. 23G and the state analogue, 44H and s. 238 of the NTA, except in the case of public rights, which are simply said to coexist with native title rights and interests.

Areas excluded from the determination area

As in *Neowarra v Western Australia* [2004] FCA 1092 (summarised in this issue), areas subject to previous exclusive possession acts were specifically excluded from the determination area on the basis that they had been excluded from the claimant application: see ss. 23B, 23C and 61A of the NTA and ss. 12I and 12J of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (the state analogue). These were all reserves vested under various land Acts. On this point, see comment in *Daniel v Western Australia* (2004) 208 ALR 51, summarised in this edition.

Neowarra v Western Australia [2004] FCA 1092

Background

This is the determination of native title reflecting the reasons for decision given in *Neowarra v Western Australia* [2003] FCA 1420, summarised in *Native Title Hot Spots* Issue No 8 and Issue No 9. It was made in accordance with s. 225 of the NTA. As the determination runs to more than 41 pages, this summary merely notes the major aspects.

When handing down of the determination on Mt Barnett station in the Kimberley, his Honour Justice Sundberg noted that:

- while the case was 'hard fought on all sides…[O]nce the outcome was known, the parties co-operated splendidly in settling the Determination and the maps';

- the area covered by the determination 'may not seem much to those who live in Western Australia. But to those…from more modestly constructed States, it is a vast expanse. The size of the whole of Tasmania.'

The native title holders

Native title was found to be held by the Wanjina-Wunggurr Community for their respective communal, group and individual rights and interests in the determination area. 'Determination area' was defined to exclude certain areas where native title was found to be extinguished that were also found to have been excluded from claimant applications considered in this case. On this point, see comment in *Daniel v Western Australia* (2004) 208 ALR 51, summarised in this edition.

Exclusive native title to some areas

Over areas where it was found that there had been no extinguishment of native title and areas where any extinguishment must be disregarded because ss. 47A or 47B apply (essentially, these are areas already either held for the use and benefit of Aboriginal people and some areas of unallocated Crown land), native title was found to consist of an entitlement against the whole world to possession, occupation, use and enjoyment of those areas.

Native title rights recognised on non-exclusive pastoral leases

In relation to current and historical pastoral lease areas (other than areas where any extinguishment must be disregarded), the native title holders were recognised as having the right to engage in specified activities, namely to:

- camp;
- access painting sites in order to freshen or repaint images there and use land adjacent to those sites for the purpose of engaging in that activity;
- use traditional resources for the purpose of satisfying their personal, domestic or non-commercial communal needs;
- conduct and take part in ceremonies;
- visit places of importance and protect them from physical harm;
- manufacture traditional items (such as spears and boomerangs) from resources of the land and waters for the purpose of satisfying personal, domestic or non-commercial communal needs;
- access;
- hunt for the purpose of satisfying their personal, domestic or non-commercial communal needs;
- gather and fish for the purpose of satisfying their personal, domestic or non-commercial communal needs.

The right to pass on and inherit these native title rights was also recognised in the determination area.

Limits on exercise of right to hunt

The native title right to hunt may only be exercised on pastoral leases:

- if hunting is conducted with rifles or other firearms, in areas where stock are not present; and
- if the pastoral lessee or a person otherwise responsible for the management of the pastoral lease is given sufficient advance notice of the intention to hunt in order that safety issues can be addressed.

Limitation as a result of enclosure/improvement

Note that the native title holders' right to access (insofar as it is exercised for the purpose of seeking sustenance in their traditional way), hunt, gather and fish can only be exercised over:

- unenclosed and unimproved parts of land that is or has previously been the subject of a pastoral lease granted after 1934; or
- unenclosed or enclosed but otherwise unimproved parts of land that is or has previously been the subject of a pastoral lease granted before 1934.

Comment

This limitation is a result of Sundberg J's earlier finding that certain native title rights and interests were inconsistent with 'rights' of the pastoralist under the reservation to prevent Aboriginal people from taking sustenance in their traditional manner in enclosed and/or improved areas: *Neowarra v Western Australia* [2003] FCA 1402 at [476]. As noted in *Native Title Hot Spots* Issue No 9, this finding appears to conflict with what was said in the joint judgment in *Western Australia v Ward* (2002) 213 CLR 1:

> [U]pon the happening of the contingency of enclosure or improvement contemplated by the reservation or provision, those who would enter *or use* the land as native title holders could continue to do so—at [186], emphasis added.

Later, Gleeson, Gummow, Gaudron and Hayne JJ noted that:

> The right to control access apart, many other native title rights to use the land the subject of the pastoral leases probably continued unaffected. For example, the native title right to *hunt or gather traditional food* on the land would not be inconsistent with the rights of the pastoral leaseholder—at [192], emphasis added. See also *Daniel v Western Australia* [2003] FCA 666—at [426].

Note that in the *Nangkiriny v Western Australia* [2004] FCA 1156 summarised in this issue, this limitation is not recognised, i.e. the parties

have apparently agreed to take the approach taken in *Daniel* rather than *Neowarra*.

Native title rights recognised over unvested reserves

In relation to unvested reserves, the native title holders have the right to do the same activities as on non-exclusive pastoral leases (see above). However, as there is no equivalent to the reservation found in a pastoral lease applying to these areas, rights to access, hunt, gather and fish are not restricted.

Native title rights recognised over unvested reserves

In relation to reserves subject to by-laws made in 1963 under the *Parks and Reserves Act 1895* (WA), the native title holders have all the same rights as were recognised over unvested reserves, other than rights to do activities consisting of hunting, gathering, fishing or taking flora from those reserves. This is a result of his Honour's finding as to the extinguishing effect of the prohibition of these activities in the by-laws—see *Neowarra v Western Australia* [2003] FCA 1402 at [636].

Native title rights recognised seaward of the high water mark

In areas seaward of the high water mark, the native title holders have the right to do all the same acitivies as was recognised over unvested reserves, other than the following acitvities, which were found not to be applicable to an area of water:

- camp;
- visit places of importance and protect them from physical harm.

The right to move freely through and within these areas was also recognised.

All subject to other laws

All of the native title rights and interests are subject to and exercisable in accordance with:

- the laws of the state and the Commonwealth, and
- traditional laws acknowledged and traditional customs observed by the native title holders.

Other interests recognised

The other interests in the determination area were noted, including those of the public to fish in, and navigate over, any waters seaward of the high water mark, along any with rights of access to the determination area provided by a law of the state or the Commonwealth in force on the date of the determination.

Relationship between the native title rights and interests and other interests

Generally speaking, the relationship between the native title rights and interests and the other interests in the determination area is described in similar terms to ss. 23G and the state analogue, 44H and s. 238 of the NTA. It was also determined that both sets of rights must be exercised reasonably. On the doctrine of 'reasonable user', see *Western Australia v Ward* (2000) 99 FCR 316 at [312] to [315] and [329].

Determination of native title—settlement of terms

Daniel v Western Australia (2004) 208 ALR 51; [2004] FCA 849

RD Nicholson J, 2 July 2004

Issues

There were a number of issues before the Federal Court relating to a case where two groups—the Ngarluma and the Yinjibarndi—were found to hold native title. This summary deals with the main issues, which relate to the court's powers in relation to both the form and content of a native title determination and the determination of prescribed bodies corporate.

Background

This decision addressed the settlement of a determination of native title, a draft of which was handed down in *Daniel v Western Australia* [2003] FCA 666, summarised in Native Title Hot Spots Issue No 6. See also

Daniel v Western Australia [2003] FCA 1425, summarised in *Native Title Hot Spots* Issue No 8.

Principle and subsidiary determinations required

His Honour Justice RD Nicholson held that:

- there should be a determination in relation to the determination area, which included within it a determination of who holds common or group native title rights and interests;
- two levels of determination were required—the principal determination as to whether native title exists in relation to a particular area and subsidiary determinations of the matters set out in ss. 225(a) to (e) of the NTA;
- where, as in this case, different groups were found to hold different native titles, there was a requirement for more than one subsidiary determination;
- the fact that there was an overlap in a geographical area was relevant only to the extent of the rights of each group in that area and there was no need to make a separate determination in respect of any so-called overlap area—at [5] to [7] and see ss. 61, 223 and 225.

Prescribed body corporate determination

It was held that there was nothing in the NTA to inhibit nomination of more than one prescribed body corporate in respect of native title rights in the determination area where that:

- was supported by, and followed from, the findings of fact made with respect to the holding of such rights in that area by different groups; and
- accorded with the intention of each of them—at [23].

His Honour:

- disagreed with the first applicant's submission that the native title holders should be able to nominate a prescribed body corporate without any opportunity arising for other parties to object or otherwise make submissions; and
- held that a determination in relation to a prescribed body corporate should only be made when it can take effect unconditionally and not contingently upon determinations under s. 56(2) or s. 57(2)—at [36], [37] and [38].

Areas where native title has been extinguished

The court had to consider whether the determination area, as defined in s. 225, could include areas where native title had been extinguished. The first applicant argued that areas where native title had been extinguished were not the subject of an application before the court, based on the fact that the application specifically excluded areas subject to previous exclusive possession acts (see s. 61A(2), which prohibits the claiming of such areas) and also any other area where native title had been extinguished (see s. 190B(9)(c), one of the conditions of the registration test). Almost all claimant applications exclude these areas.

His Honour held that:

- the difficulty with this argument was that whether particular interests fall within s. 61A(2) or s. 61A(3) was an issue which must await the time at which the court is in a position to make a principal determination. (With respect, as s. 61A(3) does not require the exclusion of any area, but merely limits the native title rights and interests that can be claimed on any area subject to a previous non-exclusive possession act, there was no question of these areas being excluded from the area covered by the application, or the determination area); and
- the court was required by s. 225(c) to include any area subject to a previous exclusive possession act or previous non-exclusive possession act within the terms of s. 61A(2) or s. 61A(3) in the principal determination as 'other interests' in the determination area. Accordingly, the determination under s. 225 must address

the totality of the extinguishment areas—at [31] and [32].

In making this finding, his Honour appears to have drawn a distinction between the 'claim area' and the 'terms of the claims [made in the application] themselves'—at [32]. Compare *Harrington-Smith v Western Australia (No 5)* [2003] FCA 218 at [12] to [15], summarised in *Native Title Hot Spots* Issue No 5.

Cooper J appears to take the same view on this point in *Lardil Peoples v Queensland* [2004] FCA 298 but Sundberg J appears to have taken a different view (although no reasons were given), e.g. *Neowarra v Western Australia* [2003] FCA 1402 at [581], [593] to [596], [627] and [653]. Both are summarised in *Native Title Hot Spots* Issue No 9 and see also Order 12 and Schedule 2 of the determination made in *Neowarra v Western Australia* [2004] FCA 1092, summarised in this issue.

The Wong-Goo-TT-OO

In *Daniel v Western Australia* [2003] FCA 666, it was found that the third applicant, the Wong-Goo-TT-OO, did not hold native title rights in the proposed determination area except where they may do so as Ngarluma or Yindjibarndi people and that their application required dismissal. The third applicant submitted that the determination of native title should refer to them as a sub-group of the Ngarluma or Yindjibarndi people. While conceding that the determination could note that the dismissal of the Wong-Goo-TT-OO application was 'without prejudice to any rights the third applicant may have as Ngarluma or Yindjibarndi people (and not as Wong-a-too)', it was found that no reference should be made to them as being a sub-group as that would go beyond the reasons previously delivered—at [42].

Strike-out of claimant applications under s. 84C

Briggs v Minister for Lands (NSW) [2004] FCA 1056

Moore J, 18 August 2004

Issues

In this application for strike-out, the main issue was whether a claimant application lodged before commencement of the new Act and amended after commencement of that Act must comply with ss. 61 and 62 of the new Act, with the question of the description of the claim group being at the heart of the proceedings. The question of using the membership of an Aboriginal corporation to describe a native title claim group was also in issue.

Background

Under the old Act, a claimant application was made on behalf of the 'Gumilaroi People of the New England Tablelands', later amended to be the 'Gumbangirri People of the New England Tablelands'. In 1999, after the new Act commenced, the application was amended to (among other things) clarify 'on whose behalf the application is brought'. The description of the native title claim group was amended to be the 'Members of the Dorodong Association Inc', an incorporated association. To be eligible for membership, a person had to be, among other things, 'an adult Aboriginal person who is a Traditional Land Owner'. From the evidence, it was clear that there were a number of people considered to be members of the claimant group who were eligible to become members of the association but who had not yet applied for membership.

Registration irrelevant

His Honour Justice Moore noted that the fact that the application had been accepted for registration under s. 190A did not preclude a finding that it had not been made on behalf of a properly constituted native title claim group: 'The actions of a delegate [of the Native Title Registrar] do not impact upon the role of the

Court'—at [26], citing *Landers v South Australia* (2003) 128 FCR 495 (Landers) at [28], summarised in *Native Title Hot Spots* Issue No 5, and *Phillips v Western Australia* [2000] FCA 1274.

Importance of claim group description

His Honour referred to the comment by his Honour Justice Mansfield in *Landers* at [35] that the proper identification of the native title claim group under the new Act was:

> [T]he central or focal issue of a native title determination application. It is the native title claim group which provides authorisation under s. 251B, and it is the group on whose behalf the claim is then pursued and, if successful, in whose favour a determination of native title is then made.

In relation to s. 61 of the old Act, Moore J noted that the description of a claim group by reference to membership of a body corporate had previously been found to give rise to uncertainties: see *Ford v Minister of Land & Water Conservation (NSW)* [2000] FCA 1913 at [23].

Old or new Act?

The NSW Native Title Services Ltd applied to strike-out the application pursuant to s. 84C(1) of the new Act on the ground that it did not comply with provisions concerning the identification of the native title claim group found in s. 61(4) of the new Act: see *Quall v Risk* [2001] FCA 378 (*Quall*) at [65]; *Dieri People v South Australia* (2003) 127 FCR 364 at [18]; and *Bodney v Western Australia* [2003] FCA 890 at [9] (summarised in *Native Title Hot Spots* Issue No 5 and Issue No 7 respectively). However, the court noted that *Quall* was not adopted without qualification in *Wharton v Queensland* [2003] FCA 1398 (*Wharton*, summarised in *Native Title Hot Spots* Issue No 8).

Further, as his Honour noted, two things emerged from the judgment of the Full Court in *Branfield v Wharton* [2004] FCAFC 138 (summarised in *Native Title Hot Spots* Issue No 10):

- 'fairly plainly…they [the Full Court] entertained doubts about whether it [*Quall*] had been' correctly decided on this point;
- whether regard is had to s. 61 in the old or new Act, the party seeking relief under s. 84C(1) bears the burden of establishing non-compliance—at [21].

Moore J adopted his Honour Justice Emmett's analysis in *Wharton*,, i.e. that s. 84C(1) directs attention to s. 61 of the old Act in relation to an application made under that Act unless the application has been amended and the application as amended can fairly be characterised as a fresh application.

Was this a fresh application?

In this case, Moore J considered that the amended application could be fairly characterised as a fresh application:

> Whatever may have been the outer limits of the claimant group described in the original application, the 1999 amendment transmogrified that group into an incorporated association. It is an admitted fact that the membership of the Association does not correspond with members of the claimant group…
>
> As is generally the case with any…association, the existing members from time to time determine…who else will be admitted to membership…Such an association does not provide a stable identification of a group on whose behalf a native title determination application is…made. The only common characteristic defining…the group should be that the members hold native title (…the old Act) or hold, according to their traditional laws and customs, the common or group rights and interests comprising the particular native title claimed (…the new Act). The other limits…imposed [on membership of an association]…are…alien to the notion of a group with a sole defining characteristic of sharing, having or enjoying native title—at [28] to [29].

Therefore, his Honour was of the view that the 1999 amendment 'created a group different in substance to that named in the original application' and, therefore, the provisions of the new Act applied.

Decision

His Honour considered the application did not, as required by s. 61(4)(b) of the new Act, describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons:

> Persons who are members of that group may be members of the Association. However, it does not follow…that the members of the Association exhaust…the class which is the native title group—at [29] to [30].

However, even if s. 61 of the old Act was the relevant provision, his Honour was of the view that 'for the same reasons the amended application does not describe or otherwise identify, in addition to the applicants, the persons who hold native title'—at [30].

Strike-out ordered

While it was not mandatory to do so, Moore J ordered that the claimant application be struck out in any case because:

- the matter had not progressed in any material way since it was filed in 1997; and
- it was 'problematic' as to how 'the vice… identified in the way the group is…described' could be removed—at [31].

If the members of the group wished to bring a fresh application, that was 'a matter for them'—at [31]. See also *Bodney v Bropho* [2004] FCFCA 226, summarised in this edition.

Williams v Grant [2004] FCAFC 178

North, Dowsett and Lander JJ, 7 July 2004

Issue

This case deals with an appeal to the Full Court of the Federal Court against an order made by his Honour Justice Wilcox dismissing an application to have a claimant application struck out under s. 84C(1) of the NTA. His Honour Justice Landers (with their Honours Justices Dowsett and North concurring) held that the appeal should be dismissed. Note that North J gave separate reasons but stated that, if his analysis was wrong, the appeal should be dismissed for the reasons give by Landers J.

Background

In February 2002, Florence Grant filed a claimant application in relation to an area in central west New South Wales in which it was stated that she was authorised by the Wiradjari Council of Elders to lodge the claim on its behalf, representing Wiradjuri People, and was entitled to make the application as an authorised representative of the Council of Elders.

Neville Williams (the appellant in this case) was an applicant in an overlapping claimant application brought on behalf of the Mooka People, a sub-group of the Wiradjuri People. In August 2002, he brought an application for an order under s. 84C(1) of the NTA striking out the claimant application made by Ms Grant.

Application for strike-out

The matter determined by Wilcox J was whether, at the time of the hearing of the strike-out application, Ms Grant was authorised, within the meaning of s. 251B of the NTA, to bring the claimant application: see *Grant v Minister for Land and Water Conservation NSW* [2003] FCA 621, summarised in *Native Title Hot Spots* Issue No 6. The application for strike-out was supported by a number of affidavits, some of which were sworn well before the application was made.

In the claimant application, Ms Grant was said to have been authorised to bring the application at meetings held in December 2001 and January 2002 (the earlier meetings). However, in her affidavit material, Ms Grant referred to authority given to her on 22 and 23 June 2002, some months after the claimant application was lodged in February 2002, and made no mention of the earlier meetings.

At first instance, Wilcox J accepted (on the basis of what was said to be unchallenged affidavit evidence) that Ms Grant was authorised to make the claim in accordance with the traditional decision-making process of the Wiradjuri People, thus satisfying the requirements of s. 61(1) and, therefore, dismissed the strike-out application.

Power under s. 84C(1) to be used sparingly and with caution

The Full Court held that:

- an application under s. 84C(1), if successful, had the very serious consequence that the native title application would be struck out, which was akin to a proceeding being summarily dismissed or, at least, dismissed before any hearing on the merits;
- no proceeding should be summarily dismissed except in a very clear case;
- an application under s. 84C(1) should be treated no differently from any other application to dismiss a claim summarily, therefore;
- the court's power should be exercised sparingly and with caution;
- the person seeking strike-out must discharge a 'heavy onus', making out a clear case that the applicant has not complied with the relevant section and cannot, by amending the application, so comply—Landers J at [48] to [49] and North J at [4].

'Considering' v 'determining' a s. 84C(1) application

Under s. 84C(2), the court 'must, before any further proceedings take place in relation to the main application, consider the application under subsection (1)'. Landers J:

- drew a distinction between 'considering' and 'determining' the strike-out application and concluded that s. 84C(2) did not require a court to *determine* the application before any further steps are taken;
- noted that it would be appropriate to determine the application at the same time as it was considered in circumstances where either the application to strike-out was obviously without merit or it was clearly a case that called for relief under s. 84C(1); and
- held that it may sometimes be appropriate to hear and determine a strike-out application under s. 84C at the same time as the main application, e.g. where it was difficult to determine whether a person had been authorised by a native title claim group under traditional laws and customs—at [55] to [60] and see *Bodney v Western Australia* [2003] FCA 890 at [45], summarised in *Native Title Hot Spots* Issue No 7.

His Honour did, however, repeat that the NTA gives priority to the strike-out application—at [60].

Merits of the appeal

Landers J held that it was necessary for Wilcox J to determine whether either Ms Grant's assertions or the contrary assertions by Mr Williams were correct—at [74].

Having considered the affidavits in support of Mr Williams' case, their Honours could not agree with Wilcox J's finding that there was no challenge to Ms Grant's affidavit evidence. On the contrary, the court found that Mr Williams' evidence did challenge Ms Grant's claim of authorisation—at [83].

However, it was held that:

- Mr Williams had the onus and responsibility of establishing that Ms Grant was not authorised by the native title group to bring the claim;
- while there was undoubtedly great confusion as to who was authorised to bring the claim and on behalf of whom, Mr Williams had not discharged the onus of establishing that the claimant application did not comply with s. 61;
- Mr Williams should have identified Ms Grant's claim of authorisation in the

claimant application and then dealt with that claim by direct evidence to establish a want of authority and, if Ms Grant claimed a source of authority apart from that contained in the claimant application, he also needed to address that claim;

- because of the unsatisfactory nature of his evidence, Mr Williams' application was bound to fail—at [50] to [51] and [84] to [86].

Tender of fresh evidence

On appeal, Mr Williams sought permission pursuant to O 52 r 36 of the Federal Court Rules to tender fresh affidavit evidence. Their Honours held that Mr Williams should not be entitled to tender fresh evidence in the appeal proceedings because, while there were no fixed rules governing the exercise of the discretion, certain matters were usually relevant, e.g. whether the applicant exercised due diligence in attempting to procure the evidence before trial but the evidence was not available at trial and, if the evidence had been available at trial, the opposite result would have been obtained. In making this ruling, the court noted (among other things) that the additional evidence was always available to Mr Williams and that he had not given any explanation as to why he failed to adduce it before Wilcox J—see [37] to [39] and [45] to [47].

Decision

The court held that the appeal should be dismissed.

Thomas v South Australia [2004] FCA 951

Mansfield J, 22 July 2004

Issue

The issue in these proceedings was whether or not a claimant application should be struck out because the applicant was not authorised pursuant to s. 251B(a) to make the application as required under s. 61(1) of the NTA.

Background

A claimant application, brought under the old Act by Roger Thomas and Daniel Clifton on behalf of the Kokatha People, was amended on 30 March 1999, after the new Act commenced. Subsection 61(1) of the new Act (if it applied) required Mr Thomas and Mr Clifton to be authorised by the native title claim group to bring the application. Such authorisation was said to have been given via resolutions passed at a meeting convened by the Aboriginal Legal Rights Movement Inc (ALRM), the representative body for the area, on 30 and 31 January 1999 (the Stirling North meeting).

ALRM certified the application under the provisions operative at the time pursuant to which a representative body must not certify unless it was of the opinion that the applicant had the requisite authority. The certificate stated that ALRM was of the opinion that authorisation had been given in accordance with s. 251B(a), i.e. according to a process of decision-making that, under the traditional laws and customs of the claim group, must be complied with in relation to authorising things of that kind. The certificate described the Stirling North meeting and a series of public notices given prior to that meeting. It stated that the approximately 150 persons present at the meeting were representative of the key family groups that made up the claim group. That opinion was based upon a report by Ms Hodgson, an anthropologist engaged by ALRM.

In November 2003, Ningal Richard Reid made an application under s. 84C(1) to strike-out the claimant application on the basis that Mr Thomas and Mr Clifton were not authorised under s. 251B(a). Evidence before the court indicated that Mr Reid was recognised as a senior traditional elder of the native title claim group.

In bringing the strike-out application, Mr Reid contended that:

- at no time did Ms Hodgson consult him and, without consulting him, she could not have formed a reliable anthropological opinion about the traditional decision-making process of the native title claim group; and

- the Stirling North meeting was a democratic process that involved a vote by show of hands and not one made pursuant to the traditional laws and customs of the native title claim group, as required under s. 251B(a).

Evidence adduced by ALRM in opposition to the strike-out application included an affidavit of Parry Agius, the Executive Director of ALRM, asserting that the native title claim group authorised Mr Thomas and Mr Clifton to bring the claimant application. The affidavit exhibited a confidential draft report by Ms Hodgson which stated that the 'constitution and carriage of the community meeting held in January 1999 where applicants were authorised to proceed reflects traditional decision making practices'. As the report was heavily edited, his Honour Justice Mansfield concluded it could not be given too much weight without knowing what the deletions were.

Other evidence adduced in opposition included an affidavit in which Mr Thomas deposed to having been present at the Stirling North meeting and stated that:

- the resolution authorising him and Mr Clifton to bring the claimant application was passed without dissent; and

- because Kokatha law men, as well as law men from remote communities with responsibility for Kokotha laws and customs (including Mr Reid) were present, the authorisation was provided by a process of traditional decision-making.

The onus is on the applicant

Mansfield J noted that:

- the onus on a party seeking to strike out a native title determination application under s. 84C(1) is the same as under O 20 r 2 of the Federal Court Rules, i.e. the court's power should be exercised sparingly, with caution and only when the court is satisfied that the person seeking strike-out has made out a very clear case that the applicant has not complied with the relevant section and cannot, by amending the application, comply—at [2], [17] and [18], applying the decision in *Williams v Grant* [2004] FCFCA 17 at [48] to [49] (summarised in this issue);

- unless it appeared from the face of the application and supporting affidavits filed in accordance with s. 62, there would rarely be a circumstance in which the onus could be discharged—at [12].

His Honour found that it was not a function of the court upon an application under s. 84C(1) to determine the reliability of competing evidence and where the truth lies in relation to some disputed question of fact. Therefore, this decision did not reflect a decision whether in fact the claimant application was authorised in accordance with s. 251B(a) of the NTA—at [12], [16] and [24].

Decision

It was held that, while the evidence did show that there was a real and serious issue about authorisation, it did not demonstrate clearly that:

- the respondent was not authorised in accordance with s. 251B(a) to bring the native title application; or

- the evidence relied on by the claimants and ALRM to show authorisation was erroneous—at [16].

Therefore, Mansfield J was not persuaded to the necessary degree that the claimant application was not authorised as required by s. 61(1) and so dismissed the strike-out application.

Bodney v Bropho [2004] FCAFC 226

Spender, Branson and Stone JJ, 24 August 2004

Issues

This decision relates to whether the judge at first instance properly exercised the discretion available under s. 84C of the NTA to strike-out certain claimant applications on the basis of a failure to comply with the requirements of s. 61. The Full Court considered whether:

- the trial judge erred in exercising his discretion under s. 84C by not allowing opportunity to amend the applications to meet the requirements of s. 61(3) of the old Act;

- an application made under the old Act and amended under the new Act is required to satisfy s. 61 of the new Act on an application under s. 84C.

Background

This was an appeal from the decision of his Honour Justice Wilcox striking out five claimant applications made by the appellant, Mr Bodney (the Bodney applications): see *Bodney v Western Australia* [2003] FCA 890, summarised in *Native Title Hot Spots* Issue No. 7. Note that there was an overlap between these applications and others that were part-heard.

Three of the Bodney applications were made under the old Act and had not been amended since the new Act commenced (the unamended applications). The other two applications, known as the Hartfield application and the Main application, were made under the old Act and amended after the new Act commenced (the amended applications).

In summarising his conclusion to strike-out the applications, Wilcox J stated he had 'reached a clear conclusion that each of the Bodney applications fails to comply with the requirements of the relevant form of s. 61. The situation cannot be cured by further evidence; the deficiencies are contained in the applications themselves'.

Lead judgment

Their Honours Justice Spender and Branson agreed with the reasons for judgment of her Honour Justice Stone, except that Branson and Spender JJ considered it unnecessary for the appellate court to decide whether the primary judge was right to conclude that the amended applications were required to comply with s. 61 of the new Act—see below.

Strike-out applications generally

Referring to relevant extracts from the Senate debate relating to the proposed insertion of s. 84C, Stone J found that strike-out applications under s. 84C(1) should be approached in the same way as applications under O 20 r 2 of the Federal Court Rules. Her Honour held that:

- an application under s. 84C should be approached with caution and allowed only where a clear case for summary dismissal has been made; and

- the court has power to defer determining a strike-out application in an appropriate case—at [46] to [54], referring to *Williams v Grant* [2004] FCAFC 17, summarised in this issue.

Primary grounds of appeal

The principle grounds of appeal related to:

- the way in which Wilcox J dealt with the evidence concerning the alleged inadequacies of the Bodney applications and their failure to comply with the relevant form of s. 61 of the NTA; and

- Wilcox J's failure to give Mr Bodney the opportunity to amend the applications on the basis of an unwarranted assumption that he would not be able to amend the applications to comply with the NTA or obtain legal assistance to do so.

Mr Bodney submitted that:

- in describing the amended applications as being made on behalf of a sub-group, Wilcox J misunderstood his evidence;

- he and his siblings and their descendants were now the only living descendants of a wider native title group—at [70] to [72].

Nature of the appeal

Her Honour noted that an appeallate court is not entitled to substitute its discretion for that of the primary judge unless the primary judge has made an error as described in *House v The King* (1936) 55 CLR 499 at [505]:

> If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of discretion is reviewed on the ground that a substantial wrong has in fact occurred—at [73].

Citing relevant authorities, her Honour also noted that, where the decision relates to a matter of practice and procedure (as in this case), an appellate court should exercise particular caution and grant relief sparingly—at [74].

Findings on the unamended applications

Stone J, with Spender and Branson JJ agreeing, held the primary judge was correct in finding that the claim group description in the unamended applications was not sufficient to comply with s. 61(3) of the old Act. However, the question was whether Mr Bodney could have amended the applications so that they complied with s. 61(3) and, if so, whether the appellant should have been permitted to amend—at [75].

Her Honour:

- accepted Mr Bodney's contention that the various descriptions of the persons whom he claimed held native title referred to the same body of people, such that it was possible for Mr Bodney to amend the applications to comply with s. 61(3) of the old Act;
- found, by inference from the principles in *House v The King* set out above, that the primary judge had failed to properly exercise his discretion.

In so finding, Stone J noted that:

- the primary judge had dismissed the applications without any overt consideration of whether leave to amend should be given;
- Mr Bodney was an unrepresented litigant in part-heard proceedings where considerable evidence concerning the substantive applications had already been taken, and that evidence would not be before the court in any fresh claimant application Mr Bodney might file following dismissal of the subject applications; and
- the evidence on which Wilcox J relied was seriously disputed and the witnesses whose evidence was contrary to Mr Bodney's position were not cross-examined—at [76] to [77].

Findings on amended applications

Item 21 of Schedule 5 of the *Native Title Amendment Act 1998* (Cwlth) (the transitional provisions found in Table A of the notes to the NTA) states that:

- section 84C applies irrespective of whether the main application was made before or after the section commenced;
- if the main application was made before s. 84C commenced, the reference in s. 84C to s. 61 or s. 62 'is a reference to s. 61 or s. 62 of the old Act'.

Her Honour noted his Honour Justice O'Loughlin's view in *Quall v Risk* [2001] FCA 378 (*Quall*) that, for the purposes of s. 84C,the new Act will apply to an old Act application amended after the new Act commenced if the amendments changed 'the composition of the claimants' or 'the particularity of the claimants'.

However, it was also noted that it was not entirely clear what was meant by 'changing the

composition of the claimants', a difficulty that was 'enhanced' by the expression, 'changing the particularity of the claimants'. In any event, Stone J found that:

- the provisions of the new Act and the transitional provisions do not require 'a reading of item 21 that departs from its clear and unambiguous terms';
- there may be some justification for treating an application purporting to be made on behalf of a native title claim group different in substance from the group named pursuant to s. 61(2) of the old Act as a fresh application;
- if there was an amendment to that effect, the application as amended might fairly be characterised as a fresh application, i.e. the change would need to be such that the claim group was 'different in substance' from the group originally named;
- however, an amendment that provided further particulars of the claim group, as opposed to one that changed the composition of the claim group, would not justify departing from the clear words of item 21 of Schedule 5—at [79] to [86], agreeing with his Honour Justice Emmett in *Wharton v Queensland* [2003] FCA 1398.

Her Honour acknowledged that, in this case as in others, it may be difficult to tell whether the amendments resulted in a change in the composition of the claim group or merely refined the description of that group and provided additional detail. However, given the principle cited above, she was not prepared to interfere with Wilcox J's findings, i.e. that, on the evidence, Mr Bodney's amendments changed the composition of the claim group and did not merely particularise that group. Therefore, because no error of the kind descibed in *House v The King* was apparent, Branson J agreed with his Honour's conclusion that the amended applications were required to comply with s. 61 of the new Act—at [87] to [88].

Note that while both Spender and Branson JJ found it was unnecessary, in this case, to decide whether the amended applications had to comply with s. 61 of the old or new Act, both went on to state their opinion on the matter. Spender J was of the view that:

> [T]he strike-out application in each of the five applications fell to be determined by the requirements of s. 61 under the old Act. This conclusion gives efficacy to Item 21 in Schedule 5 of the amending Act. In my opinion, this case is indistinguishable from *Wharton*.

Branson J expressly disagreed with Wilcox J's finding that, where an applicant chooses to amend a native title determination application made under the old Act by changing the composition of the claimants, the amended application must comply with s. 61 of the new Act:

> At least so far as any application under s 84C…is concerned, the position is governed by item 21 of Schedule 5…[which]…indicates that the question turns on when the main application was made—at [21].

Amended applications—authorisation issue

Stone J found no reason why the problem with the description of the claim group could not have been cured by amendments that may have resolved the authorisation issue. It was noted that:

- for the purpose of a strike-out application, resolving the authorisation problem would not necessarily involve Mr Bodney proving that such authorisation had been granted but would involve a coherent claim having been authorised; and
- the 'intrinsic unlikelihood' of Mr Bodney's submission that the only living members of the wider claim group were his family was not relevant to the issue of whether the appellant should have been given leave to amend the applications—at [90] to [91].

Spender J found that:

- there would be no difficulty in amending to address any deficiency in the claim group description in the circumstances; and
- Wilcox J's finding of fact that the applications were made by a subgroup, in particular on disputed evidence untested by cross examination, was not a basis upon which an application asserting such a claim group should be struck out—at [6] to [12].

Branson J found that:

- the issue of whether the small group on whose behalf Mr Bodney made the applications was also the whole native title group need not be determined on the appeal;
- any defect or error capable of being corrected by amendment should ordinarily be allowed to be corrected, particularly as the substantive proceedings were part heard and also to avoid multiplicity of proceedings;.
- Wilcox J allowed his views as to the merits of the respective applications made by Mr Bodney to influence his judgment on the strike-out motions;
- on remittal, the primary judge may need to decide whether it is necessary to determine whether either the old or the new Act permits the making of a claimant application by a subgroup—at [27] to [35].

Unrepresented litigant

A further ground of appeal was that Wilcox J did not take into account that Mr Bodney was semi-literate, had little education or knowledge of the law and was not represented. Stone J found this ground could not be sustained, stating that:

> While this position may impose on the Court an obligation to take particular care that the unrepresented litigant understands the proceedings…there is no obligation on the Court, indeed it would be injudicious, to attempt to compensate fully for the disadvantage resulting from the lack of representation; there would be a grave risk of the Court being apparently or actually partisan. In any event, no evidence was brought to support this allegation. Indeed the nature of the proceedings…was such that the lack of representation was comparatively unimportant. The claim that the applications did not meet the requirements of s. 61…is something that his Honour could determine by his own examination of the applications as distinct from, for instance, a case that calls for forensic experience or skilled cross-examination—at [68].

Decision

The appeal was allowed, the orders of the primary judge set aside and the motions remitted to the primary judge for further consideration.

Strike-out of revision application under s. 84C

In re Yoren [2004] FCA 916

Beaumont J, 13 July 2004

Issue

Whether, where there are multiple registered native title bodies corporate (RNTBCs) in relation to an approved determination of native title (approved determination), only one of them can make an application for a revised determination of native title (revision application).

Background

The applicant, the Walmbaar Aboriginal Corporation (WAC), brought a revision application under s. 61(1) of the NTA for variation of the Hopevale native title determination: see s. 13(1)(b). The Hopevale determination was an approved determination, as defined in ss. 13 and 253. WAC was one of three RNTBCs in relation to the Hopevale native title determination.

Provisions for revision application

The NTA provides that an application may be made to the Federal Court to revoke or vary an approved determination if:

- events have taken place since the determination was made that have caused the determination to no longer be correct; or
- the interests of justice require the variation or revocation: see ss. 13(1)(b) and 13(5).

Section 61(1) provides that 'the registered native title body corporate' is one of the limited classes of persons who can make a revision application.

Strike-out application

The respondents, Cape Flattery Silica Mines Pty Ltd, applied for strike-out of the revision application under s. 84C(1) raising (among other things), as a preliminary point whether, as a matter of statutory construction, only one RNTBC could make a revision application when there were multiple RNTBCs in relation to the approved determination.

His Honour Justice Beaumont, having had regard to the evident purpose of s. 61(1) in limiting the scope of those who can make a revision application, held that the word 'the' in the expression 'the registered native title body corporate' in s. 61(1) does not mean 'any'; it must include the plural, i.e. s. 61(1) requires that all of the RNTBCs in relation to the approved determination must make a revised application under s. 61(1)—at [13].

Beaumont J stated:

> Where, as here, several bodies corporate hold the native title, it is plain that the evident object sought to be achieved by s. 61(1)(b) in not permitting any of them to move, on a free-standing basis, for a revision, is the fact that all of those bodies initially joined in, and together became, parties to the approved determination. On the face of it, it would be wrong for any one of them to proceed, independently, to apply to revise their joint determination, unless of course all of them later agree to join in the claim for revision. This accords with general (and universal) practice…that a person shall not be added as an applicant without consent— at [15].

Decision

His Honour concluded that the form of the revised application plainly failed to comply with s. 61(1) and that there was no indication that the other RNTBCs for the Hopevale determination wished to apply for a revision. The revision application was struck out. In the light of both the terms of s. 85A of the NTA and the novel circumstances of the application, his Honour found it was inappropriate to make any order as to costs—at [17].

Comment

With respect, his Honour's comment at [15] appears to misconstrue the procedure for determining prescribed bodies corporate. A PBC is not a party to a determination of native title. Where the court makes a determination that native title exists, a PBC is determined by the court under s. 56 (where the native title is held on trust) or s. 57 (where the native title is held by the common law holders).

Appeal filed

An appeal against Beaumont J's decision was filed on 20 July 2004.

Registration test decision review—authorisation

Evans v Native Title Registrar [2004] FCA 1070

Nicholson J 19 August 2004

Issues

The key issue in this case was whether the Native Title Registrar gave proper consideration to the issue of authorisation under one or other of the limbs of s. 251B of the NTA when deciding not to register a claimant application.

Background

This case relates to an application under s. 190D(2) seeking review of a decision under s. 190A not to accept a claimant application made on behalf by the Koara people for registration. The application was a combination of six applications. In March 1999, the combined application was accepted for registration. However, that decision was set aside and the application remitted to the Registrar: see *Western Australia v Native Title Registrar* [1999] FCA 1594.

In reconsidering the application, the Registrar's delegate raised issues relating to the satisfaction of various conditions of the registration test with the applicant's representative, the Goldfields Land Council. Between November 2001 and the making of the decision in August 2003, the delegate provided feedback, requested further information and gave several opportunities for either further information to be provided to satisfy the delegate that, in particular, the application was properly authorised or for the application to be further amended—at [10] to [15].

The evidence regarding authorisation

The application had not been certified by the relevant representative body pursuant to s. 190C(4)(a) and, therefore, it fell to be considered under s. 190C(4)(b). Section 190C(4)(b) requires the Registrar to be satisfied that the applicant has been authorised by the native title claim group to make the application and deal with matters arising in relation to it. Section 190C(5) states that the Registrar cannot be so satisfied unless the application includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met and 'briefly' sets out the grounds on which the Registrar should consider that this is so. 'Authorisation' is defined in s. 251B.

The applicant provided what the delegate described as four versions of the claim to authority, contained in various affidavits and the application itself:

- the first appeared to describe a process pursuant to s. 251B(a), as it made reference to the authorisation being in 'accordance with its laws and customs';
- the second appeared to conflate s. 251B(a) and s. 251B(b), those provisions being phrased in the alternative;
- the third appeared to refer to a traditional process; and
- the fourth process was said to have been arrived at in accordance with 'standard protocols and procedures about these types of matters'. There was no explanation of what those standard protocols and procedures might be—at [26] to [27].

There was also an affidavit referring to a quite different process from that previously used, although it was asserted that it was in accordance with the 'traditional laws and customs'. Because the material was vague as to what had actually happened and whether the 'usual procedures' had, in fact, been followed, the delegate sought further information from the applicant but the reply did not assist in providing the necessary explanation—at [28] to [30].

The delegate concluded that the application, although generally otherwise sound, was not properly authorised in accordance with the NTA, noting that the effect of s. 251B was to provide alternative modes of authorisation. He said the effect of s. 251B(a) was that, where there was a process of decision-making under the traditional laws and customs that must be followed, the applicant was required to be authorised according to that process. It was only in the event 'there is no such process' that the alternative method of authorisation under s. 251B(b) becomes applicable—at [18] and [32].

Approach to review under s. 190D(2)

His Honour Justice RD Nicholson noted that:

- review under s. 190D is not restricted to consideration and determination of a

question of law. Rather, it enlivens the court's jurisdiction in respect of the whole of the matter and all the issues of fact and law raised by the parties are before the court;

- the review may require redetermination of factual issues according to the material then available and it is not restricted to the material before the Registrar. As a consequence, the court may take into account events that have occurred since the decision under review was made;

- this is in contrast to a review under the *Administrative Descisions Judicial Review Act 1977* (Cwlth), in which only the legality of the decision-making process is reviewed and the court cannot freshly determine issues of fact or substitute its view for that of the decision-maker—at [35] to [37], referring to *Western Australia v Strickland* (2000) 99 FCR 33 and *Northern Territory of Australia v Doepel* (2003) 203 ALR 385.

The court also noted that:

[A] significant margin of appreciation should be allowed for the experience and detailed administrative knowledge of the Registrar and his delegates in making largely evaluative judgments on whether applications comply with the statutory conditions of registration—at [38], citing *Strickland v Native Title Registrar* (1999) 168 ALR 242 at [44].

The authorisation issue

On the issue of authorisation, Nicholson J held that:

- section 251B provides alternative methods of authorisation and it is not possible to conflate the two methods;

- the delegate had not misconstrued the information before him by wrongly regarding it as not clear on which of the methods of authorisation was being addressed;

- this was a case where there was 'genuine inconsistency in the information provided';

- the inconsistency was 'patent' it was the delegate's reasons and the evidence clearly described differing methods of authorisation;

- a later affidavit introduced as evidence before the court, which explained traditional methods of decision-making and proceedings at a meeting of the Koara claimants in March 2002, was considered inconsistent with earlier evidence, and no explanation for those inconsistencies was provided— at [7], [52] to [60] and [71].

Delegate's requests for further details

Additional material supporting the authorisation had been sought by the delegate. The request for further information included a list of matters to be addressed. The list was drawn from the judgment in *Ward v Northern Territory* [2002] FCA 171 at [24], a decision on authorisation for the purposes of an application to replace the applicant under s. 66B. The applicant submitted that:

- the use of the word 'briefly' in s. 190C(5)(b) indicated that the delegate was not required or empowered to request a detailed explanation of the process by which authorisation was obtained; and

- the delegate's request for extensive and detailed information concerning the process of authorisation showed that he essentially misunderstood how he should approach the question of authorisation.

His Honour found that the delegate had made no error in making this request because the materials before the delegate were contradictory as to which process of authorisation had been adopted and, as the response to the delegate's first request for additional information did not bring clarification, there was a proper foundation for the request for further explanation:

> In those circumstances, it could not rightly be said that the range of issues upon which additional information was sought was inappropriate. The issues were ones that

had been identified judicially as relevant to an issue of authorisation. The word 'briefly' in s 190C(5)(b) is to be understood in the particular circumstances and as taking its colour from those circumstances. It was necessary, in the context of conflicting accounts in the evidence, that the statement should place before the delegate information on which the delegate could consider that the authorisation test had been met. The items suggested for explanation were all relevant to that end—at [41] to [43].

No need for adverse submissions

An argument that the delegate misconstrued his role by (among other things) raising questions about issues that were not the subject of any adverse submission was rejected because:

- under s. 190A(6), the Registrar has no discretion, i.e. claims for registration that satisfy all the conditions in ss. 190B and 190C must be accepted and those that do not must not be accepted;
- it is immaterial whether or not there was any adverse submission—the Registrar's administrative function is to reach satisfaction on the matters put at issue by ss. 190B and 190C;
- the delegate was not under any administrative obligation to accept the material placed before him by the applicant, particularly where that material was the source of contradiction and inconsistency—at [46] to [47].

Decision

Nicholson J dismissed the application for review.

Party status—members of claim group and a corporation seek joinder

Combined Dulabed and Malanbarra/Yidinji Peoples v Queensland [2004] FCA 1097

Spender J, 25 August 2004

Issue

Whether a dissentient claimant and an Aboriginal corporation may be joined as respondent parties to a claimant application under s. 84(5) of the NTA. This decision also relates to the distinction between the doctrines of res judicata and issue estoppel, and cost orders under s. 85A(2) on the basis of unreasonable conduct. This summary covers only the principle matters of general application or interest in the judgment. It does not address the particular findings made in relation to all of the orders sought.

Background

Michael Morgan filed a notice of motion in September 2003 (the current motion) seeking 31 orders in relation to the Combined Dulabed and Malanbarra/Yidinji claimant application (the combined application). A similar notice of motion filed by Mr Morgan in this matter in 2002 (the earlier motion) in which an application for orders in substantially the same terms was dismissed by his Honour Justice Drummond: see *Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland* [2002] FCA 1370. Prior to the filing of the earlier motion, the court had ordered that mediation cease because the parties indicated they were close to a consent determination of native title.

Mr Morgan's submissions

Put broadly, Mr Morgan's application was brought because he rejected:

- the asserted connection of those making the combined application to the claim area; and
- the authority of those making the combined application—at [13] to [26].

He also alleged improper conduct by the North Queensland Land Council (NQLC) in relation to its handling of complaint procedures, representation and funding issues—at [27].

Res judicata and issue estoppel

In dealing with submissions that the doctrines of *res judicata* and issue estoppel prevented Mr Morgan from succeeding on the current motion, his Honour Justice Spender, citing relevant authorities, noted that:

- the doctrine of *res judicata* has effect where 'the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence'; and

- in order to rely on *res judicata*, it was necessary to show that the earlier judgment was a final judgment between the parties and that there existed identity of parties and of subject matter—at [30].

It was found that the doctrine of *res judicata* did not prevent the current motion from being considered as there was no final decision, in the sense that a cause of action had merged into judgment. However, as Spender J noted, an issue estoppel may defeat a litigant without *res judicata* doing so. Issue estoppel arises where 'for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order'—at [31] to [33].

Joinder of dissentient claimant as respondent party to claimant application

Mr Morgan sought orders that he and another member of the claim group be joined as respondent parties to the combined application under s. 84(5) of the NTA. It was uncontested that they were members of the claim group. As noted above, Mr Morgan had sought joinder as a party in the earlier motion.

Spender J considered the differing views of his Honour Justice Drummond in *Kulkalgal People v Queensland* [2003] FCA 163 and his Honour Justice Ryan in *Bidjara People #2 v Queensland* [2003] FCA 324 (both summarised in *Native Title Hot Spots* Issue No 5) in relation to joining dissentient claimants as respondents.

In *Kulkalgal*, Drummond J held that the only avenue for a dissentient claimant was an application under s. 66B to replace the applicant on the basis that the applicant was no longer authorised or had exceeded their authority. The statutory scheme left no room for the principle that a person represented in an action by a representative applicant under O 6 r 13 of the Federal Court Rules can, if dissatisfied with the way the representative applicant is conducting the action, be joined as a respondent in the proceedings—at [41].

In *Bidjara People*, Ryan J considered that s. 66B did not accommodate the situation of a dissentient claimant. Noting that it would unnecessarily multiply proceedings to require such persons to institute their own claims, his Honour held that dissentient claimants could be made parties pursuant to s. 84(5) as they are persons whose interests may be affected by a determination in the proceedings within the meaning of s. 84(3)(ii) or s. 84(3)(iii)—at [43].

Spender J preferred the view of Ryan J, noting that whether the discretion conferred by s. 84(5) was to be exercised in the circumstances of a particular case must depend on the circumstances of that case, including its history. In this case, his Honour declined to exercise the discretion to join the dissentient claiamants as parties on the basis of issue estoppel:

> Mr Morgan is seeking the same relief as he sought in the earlier notice of motion, and for the same reasons…I acknowledge that the basis of Drummond J's earlier decision was his Honour's view as to power, but I nonetheless think that Mr Morgan is estopped by the decision on the first notice of motion seeking to be joined as a party from re-agitating the correctness of that decision. Even if I be wrong in that

conclusion I would not, for discretionary reasons…accede to the request…In my opinion the discretion…should not be exercised…The position is now no better than it was when Drummond J declined to join Mr Morgan…in November 2002—at [44] to [49].

Application to join the Aboriginal corporation as a party

Spender J found no basis under s. 84(5) for joining the Tjapanbara Yidinji Aboriginal Corporation as a party because an Aboriginal corporation's interest only existed to the extent to which it represented native title claimants. There was no evidence that the corporation's 'interests may be affected by a determination in the proceedings' beyond the interests of its individual members—at [50] and [51], citing *Adnyamathanha People No 1 v South Australia* [2003] FCA 1377, summarised in *Native Title Hot Spots* Issue No 8.

Order seeking referral to Tribunal for mediation

An application to have the proceedings referred back to the Tribunal for mediation was refused because:

> [M]ediation would not have been an appropriate order [even] if Mr Morgan was [made] a party to the proceedings, as s. 86B(5) empowers the Court to direct mediation if the Court considers that the parties 'will be able to reach agreement'. Mr Morgan has made it abundantly clear that he is unable to accept even the validity of the combined claim and thus any order for mediation involving Mr Morgan would have the effect of creating an…indefinite adjournment of the prosecution of the claim—at [53].

Orders sought against land council

Spender J declined to make orders against NQLC, the representative body for the area, on the basis that NQLC was not a party to the proceeding. His Honour also held it was not competent for the court to make orders dictating procedure and allocation of resources by a representative body—at [62] and [69].

Costs orders against Mr Morgan

Subsection 85A(1) provides that each party is to bear their own costs unless the court otherwise orders but this is subject to s. 85A(2), which provides that a party that has 'by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding' may be ordered to pay costs. Spender J, while noting that Mr Morgan was not legally represented, considered he should pay the combined applicants' costs 'forthwith', according to O 62 r 3(3) of the Federal Court Rules, stating that:

> Mr Morgan is…not entitled to seek to re-litigate issues decided adversely to him in earlier court proceedings, at least without exposure to costs…[H]e has unreasonably caused the respondents…to incur the costs of his second notice of motion. He has frustrated and delayed the possibility of a consent determination of a claim that has a very protracted history, a result that would…benefit Mr Morgan as an acknowledged member of the claim group—at [74].

His Honour found the policy that it is ordinarily inappropriate that an unsuccessful party in interlocutory proceedings pay costs 'forthwith' had no application in the circumstances:

> Mr Morgan unsuccessfully sought to be made a party to these proceedings. His plain objective…was to torpedo…aspirations…for a determination of the native title claim. The making of an order that the costs of this second notice of motion be paid forthwith might tend to dissuade Mr Morgan from any further such attempts—at [77].

Decision

The current motion was dismissed, with orders as to costs outlined above.

Representation by an unqualified person

Adnyamathanha People No 1 v South Australia (2004) 208 ALR 91; [2004] FCA 950

Mansfield J, 22 July 2004

Issue

Under what circumstances should leave be given under s. 85 of the NTA to allow representation by an unqualified person in a proceeding for a determination of native title?

Background

At the commencement of the hearing of an application to be joined as a party (the joinder application) to a claimant application, Brenton Richards, the person seeking to be joined, applied under s. 85 for leave to be represented by Mr Iain Greenwood, who was not a legal practitioner. His Honour Justice Mansfield granted leave on limited terms. Subsequently, it became apparent that the joinder application was not necessary. This case sets out the reasons for the limited leave granted.

Principles governing s. 85

Mansfield J noted that:

- the exercise of the discretion available under s. 85 depends upon whether it is in the interests of the administration of justice, in all the circumstances, that a party be represented by a person who is not legally qualified;
- the interests of the administration of justice involve consideration of both that person's capacity to represent the party seeking leave and the interests of the other parties, as well as the efficient conduct of the proceedings. Therefore, the unqualified person must have the capacity to understand the nature of the court's processes and to serve the interests of the party they represent;
- representation by the unqualified person must not unduly or unfairly disadvantage the interests of other parties and 'the proposed representation must be useful, in a real sense, in the conduct of the proceedings'—at [10], citing *Rubibi v State of Western Australia* [2003] FCA 62 at [11], Merkel J (summarised in *Native Title Hot Spots* Issue No 4) and *Harrington-Smith v Western Australia* [2002] FCA 871 at [20], Lindgren J.

Mr Greenwood's capacity

Mansfield J commented that the material before the court did not demonstrate that Mr Greenwood was capable of assisting Mr Richards in any meaningful way at either a procedural or substantive level and, were it not for the timing of the application under s. 85, leave would not have been granted. The application was procedurally and substantially incompetent. Similar deficiencies existed in a previous joinder application Mr Greenwood had assisted with and the court noted that there was nothing to think that Mr Greenwood had learnt from that experience or that he otherwise had the necessary skill to meaningfully assist Mr Richards—at [17] to [26].

Section 66B may be the appropriate route

Mansfield J also noted that, if Mr Richards was a member of the native title claim group asserting rights different from, and inconsistent with, what was being presented by those authorised to make the application, the appropriate procedure was to review the authorisation and then, depending upon the outcome of that review, seek replacement of the applicant under s. 66B—at [25]. On this point, see *Combined Dulabed and Malanbarra/Yidinji Peoples v Queensland* [2004] FCA 1097, summarised in this issue.

Decision

His Honour would not have granted leave but for the particular exigencies of the present matter and, therefore, gave leave only in the limited terms noted above. Had limited leave not been given, Mr Richards 'would simply not have had the opportunity to present his case to

the Court at all', in which case 'it would have been necessary to adjourn the proceedings to give him the opportunity to seek other assistance…The adjournment would have incurred extra expense and inconvenience to the other parties'. In future, however, Mansfield J would resolve any s. 85 application at a directions hearing—at [13] to [15].

Injunctive proceedings and the future act regime

Ngunawal People v Australian Capital Territory [2004] FCA 785

Emmett J, 19 March 2004

Issue

The issue before the court was whether the provisions of the NTA, particularly subdivision K of Part 2, Division 3 of the NTA (part of the future act regime), could be used to obtain interlocutory relief in aid of a native title claim.

Background

Dean Bell, the applicant in an unregistered claimant application in the Australian Capital Territory made on behalf of the Ngunawal People, sought interlocutory relief in relation to the proposed Gungahlin Drive Extension (the extension). Mr Bell was unrepresented.

Approximately 12 months prior to the hearing, Mr Bell had been contacted about, and participated in, a cultural heritage walk of the proposed site of the extension. During the cultural heritage walk, he identified a significant site which was recorded by Environment ACT. Evidenced produced at the hearing indicated that no immediate threat was posed to the site identified by Mr Bell, because the works that were due to commence would start some kilometres away.

Grounds of interlocutory relief

Mr Bell sought interlocutory relief as part of proceedings on the claimant application, including an injunction to stop all development on the extension immediately until consultation and discussion with the Aboriginal traditional owners about cultural heritage issues had taken place. In his submission to the court, Mr Bell relied on the provisions of the NTA, the terms of the Ngunawal People's claimant application and the decision of Drummond J in Fourmile v Selpam Pty Ltd [1998] FCA 67.

Subdivision K

His Honour Justice Emmett considered the provisions of subdivision K, particularly s. 24KA, noting that:

> [T]he provisions of the Act…indicate that, even if there is a threat to native title heritage sites by reason of the construction of the…Extension, any grant of native title would not necessarily stand in the way of the construction. Section 24KA…applies to a future act if the future act permits and requires the construction, operation, use, maintenance or repair by or on behalf of any person of any of the things listed in s 24KA(2) to be operated, for the general public. Section 24KA(2) provides that, for the purpose of that provision, the things in question include a road.
>
> Section 24KA(3) provides that, if those provisions apply to a future act, the future act is valid—at [10] to [11].

Application misconceived

His Honour concluded that:

- even if there was a threat to native title heritage sites by reason of the construction of the extension, any grant of native title would not necessarily stand in the way of the construction;
- while native title claimants do have limited procedural rights and rights to compensation under subdivision K, the native title of the Ngunawal People, whatever it might comprise, would not extend to preventing the construction of the extension;
- the notice of motion was misconceived insofar as it was filed in the native title proceeding and claimed interlocutory relief in aid of the native title claim—at [9] to [12].

Decision

It was held that the notice of motion filed by Mr Bell be dismissed and (on application by the Commonwealth) that Mr Bell pay the Commonwealth's costs—at [15].

When is an application 'made' for purposes of ss. 47 to 47B?

Rubibi Community v Western Australia [2004] FCA 1019

Merkel J, 6 August 2004

Issue

The question to be determined in this case was whether the non-extinguishment principle found in s. 238 was to be applied on the basis of the facts in existence at the date at which a claimant application is filed in the court or at the date at which such an application is the subject of a determination of native title by the court.

Background

In the proceedings before the court, eight claimant applications had been combined, with one being nominated as the lead application and the seven other applications being 'continued in and under' the heading in that application: see s. 64(2). The eight pre-combination applications were filed at various times from February 1994 to December 1997 (i.e. under the old Act).

There were areas within the boundaries of the area covered by the applications where it appeared native title had been extinguished completely or partially before the pre-combination applications were filed. However, the applicants argued that, since the filing of the applications, facts had arisen which required the application of the non-extinguishment principle (found in s. 238) to those areas, with the consequence that extinguishment of the native title rights and interests in the relevant areas must be disregarded. The applicant's 'dilemma' was:

- whether those areas were claimed in their current applications and, therefore, able to be the subject of a determination of native title; or
- whether those areas were not able to be the subject of their current applications because of the extinguishment of native title prior to the filing of the applications.

If they were not able to be the subject of a determination, then the applicants would have to amend to ensure that those areas were not being claimed and file new applications over those areas.

The application for a determination of native title had been heard and was awaiting determination, subject only to the imminent hearing of extinguishment issues. In order to resolve the 'dilemma', the applicants were granted leave under O 29 r 2 of the Federal Court Rules to have the question of the operation of ss. 47, 47A and 47B of the NTA (the remedial provisions) decided separately. Under those provisions, prior extinguishment must be disregarded in certain circumstances, provided those circumstances existed 'when the application is made', and the non-extinguishment principle found also in s. 238 applies. The applicants contended the application was made as at the time of the determination or, alternatively, at the date of the combination application.

The statutory scheme

His Honour Justice Merkel set out the relevant provisions of the NTA, noting in particular that:

- a claimant application must not be made over an area where native title has been completely extinguished by a 'previous exclusive possession act' as defined in s. 23B or the analogous state/territory provision: see ss. 61A(2) and 23E;
- a claimant application must not claim rights and interests conferring exclusive possession over any area subject to a 'non-exclusive possession act' as defined in s. 23F or the analogous state/territory provision: see ss. 61A(3) and 23I;
- however, neither of these limitations apply if the remedial provisions also apply to the area: see s. 61A(4).

Merkel J went on to note that:

> It is clear from the statutory scheme that the area covered by the native title application is the area in which native title rights and interests are claimed; and that the areas within the boundaries of the area covered by the application that are not covered by the application [see s. 62(2)(a)] include…areas within the boundaries of the claimed area where native title rights and interests have been completely extinguished…[I]t is common for applicants to include…areas that may have been extinguished but to state that the inclusion of those areas is subject to…ss 47, 47A and 47B…That form of claim was adopted by the applicants in the present case. However, it is relevant to note that, subject to such a reservation, the statutory scheme prohibits an application being made that claims native title in relation to an area in which native title has been completely extinguished—at [17].

Decision

His Honour noted that the applicant's submissions were superficially attractive because they would:

> give effect to harmonious goals…by ensuring that the date of determination is the date at which *all* native title and extinguishment issues in relation to the land claimed can be determined [referring to sss 223, 225 13(5) and 68]…If the determination was to be based on the events that have taken place as at the date of filing, rather than as at the date on which the determination is made, it could be expected that events since the filing, rather then since the determination, would be relevant for the purposes of a revocation or variation order under s 13(5)—at [24], emphasis in original.

However, Merkel J rejected this submission, finding that:

- the applicable principle of construction was that the meaning of a provision must be determined 'with reference to the language of the instrument viewed as a whole'; and
- the operation of the remedial provisions was dependent upon the prescribed factual situation existing at the time specified in those provisions—at [26] to [27], referring *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

It was noted that the ordinary meaning of the words of the remedial provisions is that an application in relation to an area is made when it is 'made' to the Federal Court upon filing in that court—at [28], referring to ss. 60A and 61A and *Strickland v Native Title Registrar* (1999) 168 ALR 242 at [35].

His Honour was of the view that:

- the non-extinguishment principle was intended to operate in light of the facts existing at the time of filing and not any later time;
- the filing date gives rise to certainty of the areas that are claimed in the application;
- the notification provisions found in s. 66 and 66A would effectively be by-passed in respect of areas claimed on the basis of events continuing up to the date of determination;
- on the other hand, native title claimants could be disadvantaged when the factual basis in support of the application of the non-extinguishment principle ceased prior to a determination by the court—at [30] to [36].

The contention that the application is made when the combination order was made was rejected because:

> It is clear from the terms of the combination order that it is combining the eight applications, each of which is continuing. Also…the date at which an application…is made has important consequences. There is nothing in the legislative scheme that suggests that an order combining applications may override those consequences.

Therefore, it was held that, for the purposes of the remedial provisions, the application is made at the time when the initiating application under s. 13 and s. 61 is filed in the Federal Court.

Comment

As the eight applications in question were made under the old Act, they were not filed in the court but 'given' to the Native Title Registrar. Therefore, item 6 of Schedule 5 of the Native Title Amendment Act 1998 (Cwlth) (the transitional provisions) appears to be relevant. However, it was not addressed in the reasons for decision and, in any case, nothing appears to turn on it.

Determination of prescribed body corporate

Rubibi Community v Western Australia [2004] FCA 964

Merkel J, 23 July 2004

Issue

His Honour Justice Merkel considered whether it was appropriate to make a determination that the Kunin (Native Title) Aboriginal Corporation hold the native title rights on trust for the members of the Yawuru Community.

Background

The members of the Yawuru Community were determined to hold native title rights in the area known as Kunin—see *Rubibi Community v Western Australia* (2001) 112 FCR 409; and *Rubibi Community v Western Australia* (No 2) (2001) 114 FCR 523. As required, the members of the Yawuru Community nominated a body corporate, the Kunin (Native Title) Aboriginal Corporation, to hold their native title in trust: see ss. 55 and 56 of the NTA.

His Honour was satisfied that each of the three requirements identified in *Ngalpil v Western Australia* [2003] FCA 1098 (summarised in *Native Title Hot Spots* Issue No. 7) were met, namely:

- a representative of the common law holders had made the nomination in writing;
- the nominated body corporate was a 'prescribed body corporate' as provided in the *Native Title (Prescribed Bodies Corporate) Regulations 1999;*
- the nominated body corporate had given its written consent to be the trustee of the native title rights and interests—at [3] to [12].

Decision

The court determined that the Kunin (Native Title) Aboriginal Corporation was to hold the native title rights and interests in trust for the common law holders of native title.

Evidence—admissibility of expert reports

Jango v Northern Territory (No. 2) [2004] FCA 1004

Sackville J, 3 August 2004

Issue

The issue in this case was whether a number of paragraphs in two expert reports were admissible in native title compensation proceedings.

Background

This case relates to the hearing of an application for a determination of compensation covering parts of Yulara, a town in the Northern Territory. Prior to the taking of the evidence of the authors of two experts' reports, both prepared by anthropologists, the Northern Territory and the Commonwealth filed over 1,100 objections to the admissibility of various passages of the reports. This summary is not comprehensive and interested readers are referred to the decision itself.

The reports generally

His Honour Justice Sackville noted that it was apparent that each of the reports had been prepared with scant regard for the requirements of the *Evidence Act 1995* (Cwlth). The basis on which the authors

reached particular opinions was often either not stated or unclear. In particular, the Yulara Anthropology Report often did not:

- clearly expose the reasoning leading to the opinions arrived at by the authors;
- distinguish between the facts upon which opinions were presumably based and the opinions themselves;
- identify whether the authors were advancing factual propositions, assuming the existence of particular facts or expressing their own opinions—at [8] to [11].

Sackville J acknowledged that a very large investment of time in the preparation of the reports was attributable, at least in part, to a failure to define the task with precision and a lack of due regard to the rules of evidence. For example, when (some four years after their initial instructions) the authors were directed to particular questions that might be relevant, they were not informed of:

- the requirements of s. 79 of the Evidence Act concerning the admissibility of expert evidence;
- the need to identify clearly expressions of opinion; or
- the need to present material in a form that allowed the court to determine whether the authors' opinions were based on specialist knowledge derived from training, study or experience—at [12] and [14].

While his Honour accepted that the developing nature of the law of native title had not made it easy to identify the precise questions requiring analysis, the principal problem was the form of the reports and the manner in which the questions identified were addressed. The court was critical of a process whereby a failure to comply with the rules of evidence produced lengthy reports of only limited forensic utility—at [16] to [17].

Effect of Land Rights Act experience

Counsel for the applicant attributed the anthropologists' failure to pay sufficient regard to the Evidence Act to practices that had grown up under the *Aboriginal Land Rights Act 1976* (Cwlth) (ALRA) which persisted in the preparation of expert evidence for claims made under the NTA. Sackville J noted that:

- claims under the ALRA are heard by an Aboriginal Land Commissioner who is not bound by the rules of evidence;
- in contrast, under s. 82 of the new Act, the court is bound by the rules of evidence in proceedings under the NTA, except to the extent it otherwise orders—at [19].

His Honour held that the practice that grew out of the ALRA process should have stopped when s. 82 of the NTA was amended in 1998—at [20].

The basis rule considered

Sackville J considered the 'basis rule', i.e. the requirement at common law that, for an expert's opinion to be admissible, it must be based on facts stated by the expert and either:

- proved by the expert; or
- assumed by the expert and proved from another place or person—at [33].

It was held that:

- proof of the facts assumed by an expert in giving their opinion goes to the weight that should be accorded to the opinion rather than the admissibility;
- however, an expert's report should be presented in a form that makes it possible for the court to determine whether the opinion is wholly or substantially based on the expert's specialised knowledge, which in turn is based on training, study or experience;
- while it might be possible that certain material in a report was intended to explain or support an opinion expressed elsewhere in that report, the relevant paragraphs

would need to be linked to any expression of opinion by the author—at [34] to [36].

The objections conceded by the applicant

Sackville J invited the Northern Territory and the Commonwealth to select a limited, representative number of objections, the rulings on which might also cover other similar objections. The applicant conceded that virtually all of the representative objections were well founded. However, his Honour thought it appropriate to record the objections and the consequences of the concessions made by the applicant's representative, only some of which are summarised here—at [29].

Tindale's cards

Part of one of the reports examined certain card entries made by the late Norman Tindale, Curator of Ethnology at the South Australian Museum. The author of the report expressed views about Tindale's subjective thought processes and the methodology employed by him in compiling the cards, including an unexplained assertion that Tindale had 'attempted to clean up what appeared to him as anomalies'. The objection taken to this material (conceded by the applicant) was that the views expressed by the authors of the report amounted to unsupported speculation that could not be seen to be a product of the authors' training, study or experience. The applicant was granted leave to obtain the reasons for this view of Tindale's work and to link that view to the authors' opinion—at [39].

Reference was also made to 'personal data cards' prepared by Tindale in the course of a field trip and incorporated in a table recording the birthplaces and totems of parents and offspring. The original data cards were not tendered. Sackville J held that:

- if the applicants intended to rely on Tindale's material to prove the truth of the information it contained, the report must address either the significance or reliability of Tindale's work for the purpose of proving matters in issue; and
- if the summary of Tindale's cards was intended to support an opinion expressed by the author, it was not clear what the opinion was and how it was supported by the information recorded in the data cards—at [42] to [44].

Land claim book

The authors of one of the reports summarised points made in a claim book prepared for an ALRA land claim that was not tendered. Sackville J held that, if the summary was intended to provide probative evidence of facts asserted in the claim book, it was inadmissible in form. If it was intended to provide support for an opinion expressed by the authors of the report, the opinion would need to be identified—at [46].

Assertions of fact

On several occasions, the authors made certain assertions of fact, such as that:

- there were a number of sites where water serpents guard water resources against trespass;
- a particular customary activity was widely known in the region and appeared to have been retained over the generations.

Sackville J held that the basis of any such assertion needed to be identified, e.g. that the authors were relying on information given to them by the claimants—at [48].

Genealogies

Computer generated genealogical charts were appended to one report. While there were references to some sources, there was no explanation of how the charts were compiled and few of the sources referred to were in evidence. Sackville J held that the information recorded in the charts needed to be authenticated and that an explanation of why the charts were a product of specialist knowledge was also required—at [66].

Reliance on an unpublished report of another anthropologist

Part of one of the reports summarised and drew on the work of Dr Nancy Munn, an anthropologist who carried out field work in the 1960s near the area covered by the application. There were three footnote references to Dr Munn's unpublished report of her field work. Sackville J noted (among other things) that:

- there was no reason in principle why anthropologists could not identify hearsay material in their report that went to establishing the foundation of the knowledge applied in preparing the report and forming the opinions expressed in it;

- the summary of Dr Munn's work, insofar as it provided one of the bases for the opinions expressed in the report, was relevant and, subject to the operation of ss. 135 and 136 of the Evidence Act, admissible in evidence— at [73] to [75].

However, it was found that, as the applicant was unable to identify any opinion in the report supported by the summary of Dr Munn's work, the foundation of admissibility was wanting and there was no occasion to consider the possible application of the Evidence Act. Insofar as the summary of Dr Munn's work was relied on as proof of the truth of the facts asserted in Dr Munn's report, it was not admissible for that purpose—at [76] and [78].

Decision

The court rejected the paragraphs of the reports that were subject to the objections.

Adjournment sought to address evidentiary problems

Jango v Northern Territory of Australia (No. 3) [2004] FCA 1029

Sackville J, 9 August 2004

Issue

An adjournment was sought in a part-heard matter to allow the applicant time to prepare additional documents to address and, presumably, overcome, evidentiary objections upheld in *Jango v Northern Territory (No. 2)*, summarised in this issue.

Background

The applicant sought an adjournment as a result of the applicant's advisors' failure to appreciate the magnitude of the task facing them. As the expert reports had not been prepared with close attention to the requirements of the Evidence Act, it was necessary to reassess the reports. It was not yet clear to the applicant whether or not fresh reports were needed. The applicant estimated that this would take at least a month.

Adjournment granted

His Honour Justice Sackville held that, as the adjournment was not opposed and the applicant could not be held responsible for the deficiencies in the expert reports, the adjournment should be granted and the scheduled hearing vacated—at [11].

Preparation of evidence requires legal intervention

Sackville J noted that:

- the present extremely unsatisfactory state of affairs came about because the applicant's advisors failed to ensure that reports complied with the Evidence Act;

- legal representatives must have the requirements of that Act firmly in mind when preparing reports and written statements;

- it was essential that the task of gathering and adducing evidence was carried out paying close attention to the issues that, on the pleadings, the applicants must address;

- the preparation of relevant and admissible evidence could not normally be safely delegated to experts without the intervention of the appropriate legal knowledge and skills—at [12] to [13].

Directions

The court gave the applicant leave to file and serve further supplementary reports in response to the respondents' objections to the expert reports.

Jurisdiction of a tribunal—extinguishment

De Lacey v Juunyjuwarra People and Queensland [2004] QSC 297

Davies JA, Mackenzie and Mullins JJ, 13 August 2004

Issue

The main issue before the court was whether the Land and Resources Tribunal (LRT) established under the *Mineral Resources Act 1989* (Qld) had jurisdiction to determine whether the *Starcke Pastoral Holdings Acquisition Act 1994* (Qld) (the Act) extinguished native title in relation to an area the subject of a claimant application.

Background

In December 2003, Ralph De Lacey, an applicant for a 'high impact' exploration permit, applied to the LRT for a determination as to whether or not it had jurisdiction to decide that native title has been extinguished by the Act. On 27 February 2004, the LRT decided that it did have jurisdiction to determine that question and that it would be determined as a preliminary issue. An appeal against that decision was filed in the Supreme Court of Queensland by the State of Queensland.

Decision

Davies JA (with whom MacKenzie and Mullins JJ agreed) held that:

- there was no provision in the Act that contemplated an application to the LRT as was made in December 2003 or any decision by the LRT of the question stated in that application;

- the LRT plainly saw that its jurisdiction to make the decision which it did make, was found in, or implied by, s. 669 of the Act, which governed the making of a 'native title issues decision' by the LRT.

Where, in a proceeding otherwise properly instituted in a tribunal, there remains a condition upon the fulfilment or existence of which the jurisdiction of the tribunal exists (here, non-extinguishment of native title), the fulfilment or existence of that condition remains an outstanding question until it has been decided by a court competent to decide it: *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 359 at 391 that.

His Honour went on to say that, although such a tribunal cannot make a decision on that question which is binding on the parties, it may 'decide it' in order to consider whether it should proceed with an application before it which presumes fulfilment or existence of that condition. In this limited way, the LRT had power to 'decide' the question because the non-extinguishment of native title was a jurisdictional pre-condition to the exercise of power under s. 669 to make a 'native title issues decision'.

His Honour considered that a 'native title issues decision' was a decision that assumed the existence of native title. It determines, among other things, the effect of the grant of the proposed high impact exploration permit on the enjoyment by the registered native title parties of their registered native title rights and interests.

Other issues

His Honour took issue with the LRT's approach to s. 81 of the NTA. The LRT had rejected the contention that s. 81 conferred exclusive jurisdiction on the Federal Court to decide whether extinguishment of native title had occurred, stating that:

> [L]ike Levine J in *Wilson v Anderson & Ors* (1999) 156 FLR 77, we do not see anything in the NTA which expressly or impliedly ousts a State court's (or tribunal's) jurisdiction to determine whether extinguishment occurred.

His Honour found that, in this passage, the LRT likened itself to a superior court of general jurisdiction and did not, therefore, embark on a 'decision' in the limited sense required. Rather, it embarked upon a decision binding on the parties which it could not make because it was merely a statutory tribunal with only the jurisdiction conferred on it by statute. It did not have jurisdiction to decide the question in a way that had legal effect.

The remaining question was whether there would be any point in the LRT 'deciding' this question in order to decide whether it should proceed to make a 'native title issues decision'. His Honour found that it should not be permitted to take that course because:

- the LRT did not have jurisdiction to decide that question and it would be an 'odd result' if the court, having concluded that the LRT had no jurisdiction to decide the question, permitted it to do so even in a tentative, non-binding sense;
- the question would be decided in the native title proceedings by the Federal Court, which is both empowered and competent to decide that question;
- while it might be appropriate for the LRT to 'decide' the existence or fulfilment of a condition precedent to its jurisdiction where that question may be easily resolved or the consequences of not deciding it would result in some injustice or even substantial inconvenience to a party, neither was the case here. The question was potentially complex and may depend upon a conclusion as to the nature of any native title rights otherwise established. And if the LRT did not decide the question, it would proceed to decide the native title issues as the legislature intended it should, pending the determination of that question by the Federal Court.

Decision

The appeal was allowed and the decision of the LRT set aside. In lieu, the application to the LRT was dismissed.

Comment

This decision sits somewhat uncomfortably with the decision in *Mineralogy Pty Ltd v National Native Title Tribunal* (1997) 150 ALR 467 at 472 to 474, where Carr J found that if the jurisdiction or authority of the National Native Title Tribunal, acting as the arbitral body in right to negotiate proceedings, was challenged, the Tribunal is under a duty to inquire into whether or not it has jurisdiction and authority even where deciding that question would involve consideration of complex matters of fact and law. See also *Walley v WA* (1996) 67 FCR 366 and *Risk v Williamson and Others* (1998) 87 FCR 202.

Sacred sites and native title

Sakurai v Northern Territory [2004] FCA 971

Mansfield J, 28 July 2004.

Issue

There where two issues before the court:

- whether the *Northern Territory Aboriginal Sacred Sites Act (NT)* (1989) (Sacred Sites Act) and the NTA are inconsistent; and
- whether the extinguishment of native title rights affects the rights recognised and protected by the Sacred Sites Act.

Background

Three sites were registered with the Aboriginal Area Protection Authority (AAPA) under s. 29 of the Sacred Sites Act. The applicant in these proceedings, Motoo Sakuri, held two exploration licences under the *Mining Act* (NT) in the vicinity of the sites. One of the sites was partly within an area also subject to a claimant application. Mr Sakuri sought a declaration that:

- a sacred site registered pursuant to s. 29 of the Sacred Sites Act is inconsistent with the NTA and, on the basis of this inconsistency, a declaration should be made that sacred sites so registered or the registration of them was of no force and effect; or

- common law extinguishment of native title rights and interests can have the effect of also extinguishing the traditional laws and customs which give rise to those rights and interests in such a way that a declaration under s. 29 of the Sacred Sites Act is ineffective.

Decision

His Honour Justice Mansfield held that there was no inconsistency between the Sacred Sites Act and the NTA noting that:

- section 8 of the NTA provides expressly that the NTA is not intended to affect the operation of any law of a state or territory that is capable of operating concurrently with the NTA and section 29 of the Sacred Sites Act is capable of operating concurrently with the NTA;

- the NTA provides for the recognition of rights and interests recognised by the common law that are possessed under traditional laws and customs of Aboriginal peoples;

- there was nothing to suggest that the NTA confines or defines in any way rights or interests of Aboriginal people, whether they arise by virtue of traditional law and custom or by statute or both (including rights which may arise under the s. 29 of the Sacred Sites Act);

- section 29 of the Sacred Sites Act does not provide any foundation for thinking that it confines or defines rights and interests recognised by the common law possessed under the traditional laws and customs of Aboriginal people so as to be incapable of operating concurrently with the NTA—at [25] to [27].

His Honour, having noted the preamble to the Sacred Sites Act and the definitions of 'sacred site', 'Aboriginal traditional' and 'custodian' in that Act, concluded that:

> [T]he Sacred Sites Act provides for the existence of a sacred site to be recognised, as a matter of law, from its sacredness to Aboriginal people or its significance under Aboriginal tradition—at [27].

Extinguishment

Mr Sakuri asserted that common law extinguishment of native title rights and interests can have the effect of also extinguishing the traditional laws and customs which give rise to those rights and interests in such a fashion that a declaration under s. 29 of the Sacred Sites Act was ineffective.

In Mansfield J's view:

- 'to state the proposition is to demonstrate that it is premature'. As there had been no determination of native title rights and interests in the area concerned, there could be no operational inconsistency and no inconsistent rights had yet been established;

- the assertion of rights by the communal native title claim group, in its terms, did not assert rights that were inconsistent with the protection that registration of a sacred site gives—at [30] to [32].

Mr Sakuri also argued that, if the claimed native title rights and interests were found to have been extinguished, then their extinguishment must also have resulted in the extinguishment of any effective declaration of a registered sacred site under the Sacred Sites Act. His Honour noted that:

> The Sacred Sites Act operates not with respect to Aboriginal tradition recognised by the common law, but with respect only to notions of sacredness and significance under Aboriginal tradition...The existence of a sacred site under the Sacred Sites Act requires no satisfaction of a statutory test of traditional ownership as prescribed under s. 223 of the Native Title Act…The Sacred Sites Act concerns the protection of sites of significance according to Aboriginal tradition, and is intended to apply to land in the Northern Territory regardless of tenure or the existence of native title at law—at [35].

Decision

The application was dismissed, with his Honour noting that, to the extent that the applicant otherwise wished to preserve and protect his rights or interests under his exploration licences, he could apply under s. 84 of the NTA to become a party to the relevant claimant application—at [38].

Customary Aboriginal law v common and statute law

Jones v Public Trustee of Queensland [2004] QCA 269

6 August 2004, McPherson, Williams, Jerrard JJA

Issue

The issue of interest in relation to native title in this case was whether customary Aboriginal law prevailed over common and statute law.

Background

This was an appeal from a decision in the Supreme Court of Queensland in relation to an intestacy. The deceased was a member of the Dalungdalee people of Fraser Island. The appellant, John Dalungdalee Jones, apparently a senior elder of the Dalungdalee people, considered the moneys from the deceased's estate had not been properly accounted for, and 'in the interests of those entitled to it and as an aspect of his duty as senior elder… he instituted these proceedings'. Mr Jones argued that, under the customary law of the Dalungdalee people, as the eldest member of the group, he had the right to insist on representing individual members, without their consent and in spite of their expressed wish that he should not do so—at [3].

Mr Jones argued that Aboriginal traditional and customary law prevailed over the relevant state law because of:

- the provisions of the NTA; and
- the operation of s. 10 of the *Racial Discrimination Act 1975* (Cwth) (RDA)—at [12].

NTA

The court found there was insufficient evidence as to the existence of such a claimed traditional or customary law:

> There is no evidence that among the Dalungdalee people of Fraser Island there was or is a continuing custom that the eldest member is entitled to insist on representing individuals…without their consent and in spite of their expressed wish that he should not do so—at [13].

Further, the claim represented a 'misconception' of *Mabo v Queensland* (No 2) (1992) 175 CLR 1 and the NTA, which gave effect to that decision. It was not the case that Aboriginal customary law prevailed over common and statute law but rather that the common law, in certain circumstances, recognised customary laws relating to land and waters—at [14].

His Honour Justice McPherson, who gave the leading judgment, rejected the suggestion that the application of state laws depended on the absence of rules to the contrary under customary law and, in any case:

> There is nothing in the present case to link with land or water the traditional right or duty asserted by Mr Jones of representing members of the Dalungdalee people, or that constitutes a "connection" [as required under s. 223(1) of the NTA] with any land or water—at [15] to [16].

RDA

Regarding the application of s. 10 of the RDA, McPherson JA found the relevant part of the state law made no distinction between peoples of any race or origin. If there were traditional rights to inherit property special to Aboriginal people that are interfered with, or restricted by, the application of the state law, it had not been shown in evidence. However, his Honour left open the possibility that the evidence in some circumstances might allow for a broader interpretation of family relationships for succession purposes—at [18] to [20].

Decision

The appeal was dismissed.