# Native Title Hot Spots

No.12, November 2004

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## Determinations of native title – conditional

### *Wik People v State of Queensland* [2004] FCA 1306

Cooper J, 13 October 2004

**Issue**

His Honour Justice Cooper made orders consistent with the terms agreed by the parties in relation to part B of the Wik and Wik Way Peoples' application for a determination of native title under the Native Title Act 1993 (Cwlth) (NTA). This resulted in two determinations of native title recognising the existence of native title rights and interests. However, as noted below, the determinations do not take effect unless and until several indigenous land use agreements are registered.

**Background**

The Wik and Wik Way Peoples' claimant application was lodged with the National Native Title Tribunal on 24 March 1994 and remained in mediation for some time. In June 2000, in an attempt to expedite the matter, his Honour Justice Drummond ordered that the claim be determined in two parts.

Part A was confined to areas that had always been unallocated Crown lands or lands that had only ever been subject to forms of title granted for the benefit of Aboriginal peoples (subject only to a small number of fishing permits in inland waters). Part B comprised the balance of the lands and waters, including lands held by pastoral and mining interests.

On 3 October 2000 Drummond J determined by consent that native title existed in the area within Part A. The recognised native title rights and interests conferred possession, occupation, use and enjoyment to the exclusion of all others (subject to certain qualifications regarding other interests in the determination area) and, in relation to tidal and flowing water, 'such rights and obligations as the common law recognises'. The determination was registered on the National Native Title Register (www.nntt.gov.au/ntdetermination/1021621467_21773.html) (the NNTR) on 17 October 2000: see *Wik People v State of Queensland* [2000] FCA 1443 – at [3], [5] and [8].

This decision determines Part B of the original application, which was further divided into two determinations. The Federal Court now recognises Part A, previously determined by Drummond J on 3 October 2000, as determination number one and the two determinations within Part B as determinations numbers two and three.

**Section 87 – appropriateness of orders sought**

Cooper J was satisfied that it was within the power of the court to make the consent orders sought consistent with the terms agreed by the parties – see s. 87(1).

In this case, there appears to have been a substantial amount of evidence to which reference was made for the purposes of s. 87(1), in particular the evidence and opinions contained in anthropologist Dr Peter Sutton's affidavit and reports, with the latter providing

'details the substantial anthropological work carried out in respect of the claim area and its peoples', which dated back to 1927 – at [8] and [12] to [13]. (On the factors going to the exercise of discretion under s. 87, see *Munn v Queensland* [2001] FCA 1229 and *Kelly v NSW Aboriginal Land Council* [2001] FCA 1479.)

Cooper J commented that:

> [T]his is a case where there is a rich body of documented material which has been brought into existence over very many years. It establishes the existence of organised Aboriginal occupation and possession of the determination area extending back beyond the imposition of British sovereignty. It also establishes the continuity of an identifiable society of Aboriginal peoples having a connection with the lands and waters of the determination area in accordance with traditional laws which they acknowledged and traditional customs which they observed. Additionally, the content of these records, in terms of recorded Aboriginal names and language, enables the linguistic links to be made between the present claimants, their predecessors and the society which existed in the determination area at the time of sovereignty and the relationship of clan groups to particular parts of the determination area. There is also a history of long term field work and academic study in and of the determination area and its peoples which reveals a consistency and continuity in the research findings. This body of material enables the Court to make the findings as to the state of affairs which existed in the determination area at the time of sovereignty with greater confidence and to draw the inferences of connection and continuity between the present claimants and the state of affairs which existed at that earlier time...
>
> This work demonstrates that, despite European contact and the growth of the pastoral industry in the claim area, the predecessors of the claimant group and the members of the present claimant group continued their connection with their country and had cohesion as a social group with traditional laws and customs which they continued to acknowledge and observe. Indeed, it was the use of Aboriginal labour in the pastoral industry, which in part operated to keep together Aboriginal communities based on and around pastoral stations and to give to the young Aboriginal men and women the opportunity to travel over and learn about their country – at [9] and [12].

On the basis of the evidence and opinions before the court, his Honour was satisfied that it was appropriate to make the orders sought.

**Some traditional laws and customs noted**

In recital G to each determination, the court notes that the traditional laws and customs of the Wik and Wik Way Peoples include:

- the authority to resolve disputes about who is, or is not, a Wik or Wik Way person or about native title rights and interests as between Aboriginal people, with the assistance with the latter from native title holders in adjoining areas if necessary;
- to determine, as between Wik and Wik Way Peoples, the particular native title rights and interests over particular parts of the relevant determination area;
- to 'exclude' particular Wik and Wik Way Peoples from exercising particular native title rights and interests over particular areas.

**Native title holders**

In both determinations, it was recognised that the common law holders of native title in the determination area are the Wik and Wik Way Peoples, in accordance with the traditional laws acknowledged and traditional customs observed by them: order 1 of both determinations.

**Determination two: areas of exclusive possession**

The nature and extent of the native title rights and interests recognised in determination two (other than in relation to flowing, tidal and underground waters and 'but for' the non-native title rights and interests recognised in the determination – see below) are that they confer possession, occupation, use and enjoyment of the determination area on the native title holders, including rights to do the following:

- speak for, on behalf of and authoritatively about, the determination area;
- inherit and succeed to the native title rights and interests;
- give or refuse, and determine the terms of any permission to enter, remain on, use or occupy the determination area by others;
- make use of the determination area by:
  - engaging in a way of life consistent with the traditional connection of the native title holders to the determination area;
  - hunting and gathering on, in and from the determination area;
  - living on and erecting residences and other infrastructure
  - conducting ceremonies on the determination area;
  - being buried on, and burying native title holders on, the determination area;
  - maintaining and caring for springs, wells and other places in the determination area where underground water rises naturally, for the purpose of ensuring the free flow of water;
- take, use and enjoy the natural resources from the determination area;
- maintain and protect by lawful means those places of importance and areas of significance to the native title holders under their traditional laws and customs in the determination area; and
- use and enjoy the determination area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual and other knowledge, traditions, customs and practices of the native title holders in relation to the determination area: order 3.

These rights and interests were determined to confer possession, occupation, use and enjoyment of the determination area on the native title holders to the exclusion of all others, other than in relation to flowing, tidal and underground waters and subject to the non-native title rights and interests recognised in the determination: order 9. The limitations are set out below.

**Determination two: ss. 47A and 47B**

In determination two, it is stated that:

- Subparagraph 47A(1)(b)(i) applied to the land and waters comprising the Aurukun Shire Lease because, when the claimant application was made, the lease was in force under the *Local Government (Aboriginal Lands) Act 1978* (Qld), which was an Act that made provision for the grant of such a lease only to, or for the benefit of, Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area at that time;
- Subparagraph 47A(1)(b)(ii) applied to the areas covered by a pastoral lease and two Deeds of Grant in Trust because, when the claimant application was made, those interests were held expressly for the benefit of, or were held on trust expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area at that time; and

- Paragraph 47B(1)(b) applied to the land and waters comprising Lot 2 on Plan SP161882 because, when the claimant application was made, that area was not covered by a freehold estate or a lease or by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth or the State under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose. Nor was it subject to a resumption process. Further, one or more members of the native title claim group occupied the area: order 7 and recital E.

The effect of the application of these provisions is that all extinguishment brought about by the creation of a prior interest must be disregarded for all purposes under the NTA, including the making of a determination of native title: ss. 47A(2) and 47B(2) but see ss. 47(3) and (4) and 47B(3).

**Determination three: areas of non-exclusive possession**

The nature and extent of the native title rights and interests recognised in determination three (other that in relation to flowing and underground waters and subject to the non-native title rights and interests in the determination area) are non-exclusive rights to:

- be present on, use and enjoy the determination area;
- make use of the determination area by:
  - hunting and gathering on, in and from the determination area;
  - conducting ceremonies on the determination area;
  - being buried on, and burying native title holders on, the determination area;
  - maintaining springs and wells in the determination area where underground water rises naturally, for the sole purpose of ensuring the free flow of water;
- take, use and enjoy the natural resources found on or within the determination area;
- maintain and protect by lawful means those places of importance and areas of significance to the native title holders under their traditional laws and customs in the determination area;
- use and enjoy the determination area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual and other knowledge, traditions, customs and practices of the native title holders in relation to the determination area; and
- inherit and succeed to the native title rights and interests: order 3.

**Determination three: no right to control access to, or use of, the determination area**

It is expressly stated that, notwithstanding the recognition of the preceding native title rights and interests, they 'do not extend to a right to control access to or a right to control the use of' the determination area and 'do not confer possession, occupation, use and enjoyment of the determination area...to the exclusion of all others': orders 6 and 9.

**Flowing, tidal and underground waters**

In determination two, the nature and extent of the native title rights and interests in relation to the flowing, tidal and underground waters of the determination area are that they confer non-exclusive rights to:

- hunt, gather and fish on, in and from the flowing, tidal and underground waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;

- take, use and enjoy the flowing, tidal and underground waters and natural resources and fish in such waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs.

It is stated that, to avoid any doubt, the rights to take, use and enjoy the flowing, tidal and underground waters and natural resources and fish in such waters, are only rights to do so for non-commercial purposes: order 4. In determination three, the same native title rights and interests are recognised and the same limitation imposed but the reference is to 'flowing and underground waters' only: order 4.

'Flowing, tidal and underground waters' and 'flowing and underground waters' are defined in the determinations. Both limit underground water to that accessed by traditional means and differ significantly from the definition of 'waters' found in s. 253 of the NTA.

**All subject to other laws**

In both determinations, the native title rights and interests are subject to and exercisable in accordance with:

- the laws of the State and the Commonwealth; and

- the traditional laws acknowledged and traditional customs observed by the native title holders: order 5 in both.

**Other interests recognised**

In both determinations, the other rights and interests in the determination area were noted, as required under s. 225(c). In determination two, these included those of relevant local governments, those held under the *Fisheries Act 1994* (Qld), those of the Ports Corporation of Queensland within the limits of the Port of Weipa, the public to fish in, and navigate over, any tidal navigable river or tidal waters, along with any other rights and interests held by or under the Crown under laws current at the determination date: order 6. In determination three, they included those held under pastoral leases or the *Fisheries Act 1994* (Qld): order 7.

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

In determination two, the relationship between the native title rights and interests and the other rights and interests in the determination area is that, where there is any inconsistency between the two, the non-native title rights prevail, as does the doing of any lawful activity under those rights and interests. It is described in similar terms to ss. 44H and 238 (the non-extinguishment principle) of the NTA: order 8.

In determination three, the relationship between the native title rights and interests and the other rights and interests is that:

- the other rights and interests continue to have effect; and

- for avoidance of doubt, any activity that is required or permitted by or under, and done in accordance with, the other rights and interests or any activity that is associated with or incidental to, such an activity, prevails over the native title rights and interests and any exercise of the native title rights and interests, but does not extinguish them: order 8.

**Determinations are conditional**

Determination two is to take effect if and when an indigenous land use agreement (ILUA) is registered on the Register of Indigenous Land Use Agreements (the ILUA Register). Determination three is to take effect if and when four ILUAs are registered: see Part 2, Div 3, Subdivs C and E of the NTA. If these agreements are not registered within six months of the date of the orders or such later time as the court orders, the matter is to be listed for further directions. The Tribunal provided assistance with the preparation of the ILUAs.

**Prescribed Body Corporate**

In all three determinations, the native title is not to be held in trust and so is held by the Wik and Wik Way Peoples. In relation to determinations two and three, the court determined that the

Ngan Aak Kunch Aboriginal Corporation is to be the prescribed body corporate for the purposes of s. 57 of the NTA.

### Remainder of the claim

These two determinations finalise the majority of the Wik and Wik Way Peoples' claimant application. However, there are still four pastoral leases amounting to about 5,200 km$^2$ subject to claim that are not covered by any of the determinations to date. A second claimant application brought by the Wik Peoples in 2001 over bauxite mining leases south of the Embley River (about 1,600 km$^2$) is still in mediation.

## Determination of native title varied on appeal by consent

### *Wandarang, Alawa, Marra and Ngalakan v Northern Territory of Australia* [2004] FCAFC 187

Black CJ, Moore and Hely JJ, 3 June 2004

### Issue

This determination of native title made by consent settles appeal proceedings relating to a determination of native title made in 2000.

### Background

This determination relates to an area that includes most of the old St Vidgeon's Homestead Station, a gazetted stock route, the banks of the Roper River and river beds of the Roper, Towns and Limmen Bight rivers, to the extent that they are tidal. At first instance, Olney J proposed a draft determination: see *Wandarang Peoples v Northern Territory* (2000) 104 FCR 380; 177 ALR 512; [2000] FCA 923 which was finalised by orders on 14 November 2000. An appeal and a cross appeal were subsequently filed against aspects of both the judgment and the determination.

### Appeals allowed and determination varied

In this case, the Full Court of the Federal Court (by consent) upheld in part both the appeal and cross-appeal and varied the determination of native title made on 14 November 2000. This summary deals only with the variations.

### Non-exclusive native title rights and interests recognised

The nature and extent of the native title rights and interests in relation to the determination area are non-exclusive rights to:

- use and enjoy the determination area (with the rights to possess and occupy the determination area found in the original determination being deleted);
- speak for the determination area (with the right to make decisions about the use and enjoyment of the determination area found in the original determination being deleted);
- reside upon the land in the determination area and otherwise to have access to the determination area;
- use and enjoy the natural resources found on or within the determination area;
- maintain and protect places of importance under the traditional laws, customs and practices in that area other than with respect to the non-native title rights and interests identified below.

At first instance, Olney J had determined that there was no native title to waters of the rivers within the determination area that are affected by the tide. As varied, the determination recognises non-exclusive native title rights to those waters.

## Extinguishment and creation of a 'legally enforceable right'

### *Daniel v Western Australia* [2004] FCA 1388

Nicholson J, 29 0ctober 2004

### Issue

The main issue in this case was whether the grant of a lease in April 2002 was either a past or valid future act, by reference to s. 228 or

Subdivision I of Division 3, Part 2 of the NTA. This was of significance because the answer to the question would decide whether or not that lease should be included in a determination of native title as an act that wholly extinguished native title. This is the first case to deal with these provisions in detail.

**Background**

In the reasons for judgment in *Daniel v WA* (2004) 208 ALR 51; [2004] FCA 849 at [66] to [69], summarised in Native Title Hot Spots Issue No 11, leave was granted to reopen questions about the extinguishment of native title over certain areas in order to settle the terms of a determination of native title: see *Daniel v Western Australia* [2003] FCA 666, summarised in Native Title Hot Spots Issue No 6. The applicant in the Ngarluma and Yinjibarndi Peoples' native title claimant application (the applicant), the State of Western Australia and the North West Shelf Joint Venturers & Woodside Offshore Petroleum Pty Ltd (Joint Venturers) made submissions on the areas of contention, namely:

- the creation and dedication of several roads; and
- the granting of a lease (accommodation lease) in April 2002 under the *Land Administration Act 1997* (WA), where the grant arose out of an agreement (the agreement) made in November 1979 which was ratified by the *North West Gas Development (Woodside) Agreement Act 1979* (WA) (agreement Act).

**Roads**

The applicant alleged that there was not enough evidence to prove that the roads existed or had been properly dedicated so as to extinguish native title. While accepting it bore an evidentiary burden in relation to extinguishment, the state:

- relied on the presumption of regularity arguing it had discharged that onus and that the dedication and creation of the roads in question wholly extinguished native title;
- pointed to copies of the *Government Gazette*, cancelled public plans and a deposited plan that were before the court and relied upon various legislative provisions;
- noted that the onus was on the applicant to prove native title had not been extinguished – at [7].

His Honour Justice RD Nicholson held that the dedication of roads extinguished native title, consistent with his findings in *Daniel v WA* [2003] FCA 666 at [642] to [643].

**Terms of the agreement**

Subclause 19(1) of the agreement provided that:

> The State shall in accordance with the Joint Venturers' approved proposals grant to the Joint Venturers...leases and where applicable licences, easements and rights of way for any purposes related to the Joint Venturers' operations under this Agreement – see [19].

Under the agreement, the Joint Venturers were to provide the state Minister with 'proposals', including for housing and township requirements and 'any other works, services or facilities desired' by the Joint Venturers. There was provision for proposals that had been approved by the minister to be modified, expanded or varied at any time during the life of the agreement – see [16] and [18], referring to clauses 7 and 9.

Under clause 8, the minister must either:

- approve the Joint Venturers' proposals wholly or in part;
- defer the matter until further information or proposals were received; or
- make certain alterations to the proposal or impose conditions that the minister thought reasonable as a condition precedent to the approval of the proposal – see [17].

His Honour held that issues of interpretation of the effect of these arrangements must be approached without any presumptions favouring the Joint Venturer – at [41] to [42].

**Was the accommodation lease valid?**

Nicholson J noted that:

- the effect of the grant of the accommodation lease was to grant exclusive possession which, prior to the commencement of the *Racial Discrimination Act 1975* (Cwlth) (RDA) on 31 October 1975, would have wholly extinguished native title;

- as it was granted after the commencement of the RDA, it would be been invalid by operation of s. 10(1) if the RDA because of its extinguishing effect (it appears the parties all agreed this would have been the case and so the court did not go into it but see *Western Australia v Ward* (2002) 213 CLR 1 at [103] to [133], [250] to [254], [278] to [280], [321] and [342] for an analysis of the operation of s. 10(1) of the RDA) unless the NTA intervened to 'cure' that invalidity.

The state and the Joint Venturers argued that the NTA provided the 'cure', in that the act of granting the accommodation lease was a category A past act because of the operation of ss. 228(3) and 229(3). It was validated by s. 14, the effect of which was to wholly extinguish native title – see ss. 15(1)(a) and 19.

Alternatively, it was argued that the act of granting the lease was a valid future act under Subdivision I of Division 3, Part 2 of the NTA and the result would be the same – see 24ID(1)(b).

The applicant argued that none of these provision applied and that the lease was a future act that was invalid to the extent that it is affected native title, relying on ss. 24AA (2) and Subdivision O of Division 3, Part 2 of the NTA.

Note that:

- all references here and in the judgment are to the NTA but the effect of the validation of a past act on native title would, in law, arise under the relevant analogous state provisions, which are found in the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) – see s. 19 of the NTA.; and

- while the provisions dealing with the confirmation of extinguishment found in Part 2, Div 2 of the NTA usually provide 'the analytical starting point' when dealing with extinguishment under the NTA, they were not relevant in this case because none of the acts considered fell within the definitions found in that subdivision – see *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1 at [10] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

**The past act provisions**

Essentially, s. 228(3) relevantly provides that an act (such as the grant of the Accomodation Lease) that takes place on or after 1 January 1994 is a past act if:

- it would have fallen within the definition found in s. 223(2) if that part of the definition of 'past act' was not retricted to acts done before 1 January 1994; and

- it takes place:
  - in exercise of a legally enforceable right created by the making, amendment or repeal of legislation before 1 July 1993 or by any other act done before 1 January 1994-s. 223(b)(i); or
  - in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993, and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made-s. 228(3)(b(ii); and

- it is not the making, amendment or repeal of legislation.

A category A past act is defined to include the grant of a commercial lease or a residential lease after 31 December 1993 that is a past act because subsection 228(3) applies. (There are other acts within the defnition and some limitations, such as that it must not be a Crown-to-Crown grant, that are of no relevance in this case.)

A 'commercial lease' is 'a lease (other than a mining lease) that permits the lessee to use the land or waters covered by the lease solely or primarily for business or commercial purposes' and a 'residential lease' is a lease that permits the lessee to use the leased area 'solely or pimarily for constucting or occupying a private residence' – see ss. 242, 246 and 249.

The applicant argued that:

- the scheme for validating past acts must be understood as granting security to people who obtained title at a time when there was 'ignorance as to native title';
- it was an exception to the rule to validate what would otherwise be invalid due to discrimination and the operation of the RDA;
- as a result, s. 228(3) should be read down and not used to 'afford a loophole for avoiding the...future act system for new leases granted [on or] after 1 January 1994' – at [38].

The state's submission was that:

- subsection 228(3) was not a loophole;
- there was no presumption that an act done on or after 1 January 1994 was a future act;
- the past act provisions provide the 'starting point' and it is only once it is established that a particular act is not a past act that the future act provisions become relevant – see s. 233(1)(b).

His Honour agreed with the state's submissions i.e. the NTA 'must be approached with regard to its terms' – at [40].

**The agreement created a legally enforceable right**

After noting that s. 228(3)(b)(i) draws a distinction between the 'act' which takes place on or after 1 July 1994 and the 'legally enforceable right' in exercise of which the 'act' takes place, his Honour found that:

- the accommodation lease was not the 'legally enforceable' right but it may be the 'act' resulting from the legally enforceable right created in accordance with s. 228(3)(b)(i);
- it is sufficient if the enactment or act in question sets out a mechanism providing a legally enforceable right which results in the application of that mechanism on a later occasion to produce an act;
- under the agreement, clause 19(1) created a legally enforceable obligation expressed in mandatory terms;
- that clause, which read with clause 8, showed there was no discretion so great as to negate the legally enforceable character of the mandatory provisions in regard to approving the Joint Venturers' proposals (rejecting the applicant's argument to this effect);
- therefore, the conclusion of the agreement on 27 November 1979 was an act falling within s. 228(3)(b)(i) i.e. the agreement created a legally enforceable right in the terms requried and the accommodation lease was an 'act' that took place in exercise of that right – at [45] to [49] and [53].

**On the evidence, the agreement Act did not create a legally enforceable right**

His Honour was not satisfied on the evidence that a 'legally enforceable right' was 'created' by the agreement Act because it merely ratified an existing agreement. While the effect of ratification was not argued, Nicholson J was of the view that:

> The evidence shows that in its terms it authorised the implementation of the agreement and provided that 'all the provisions of the agreement shall operate and take effect notwithstanding any other Act or law'. It follows that if the legally enforceable right [created by the agreement] was impeded by any other Act or law, it would operate and take effect notwithstanding. However, 'creation' involves the bringing of the right into being: cf *The Macquarie Dictionary*, 2nd edn, 1991 at p. 418. On...the evidence I cannot find that the agreement Act itself created the right in question.

His Honour left open for future argument on further or different evidence whether the legal effect of ratification in the terms provided in the agreement Act would lead to a different conclusion – at [54]

**Not an offer, commitment, arrangement or undertaking**

The act in question would fall within the category of past act in s. 228(3)(b)(ii) if it was 'giving effect to, or otherwise because of an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993'.

While noting that the words 'offer commitment, arrangement or undertaking' are of wide import, his Honour was of the view that they did not extend to the agreement Act:

> That is because subpar (i) of s 228(3)(b) addresses rights resulting from legislation and other acts. Subparagraph (ii) is therefore left to address the remainder, namely offers, commitment, arrangements and undertakings. These must necessarily be something different to what is dealt with in the former paragraph. In my view it does not assist the respondents here. Accordingly I do not express an opinion on the submission of the first respondents [the state] that the words used in s 228(3)(b)(ii) encompass a justified expectation – at [58].

**Not a commercial lease**

Nicholson J found that the lease was not a commercial lease as it did not permit the lessee to use the land 'solely or primarily for business or commercial purposes':

> Here the purpose of the proposal and of the grant of the accommodation lease is to accommodate an expanded construction workforce. While such accommodation is undoubtedly part of the wider commercial purpose...that does not mean that [Woodside] is ...permitted to use the land the subject of that lease for business or commercial purposes...Accommodation of a workforce incidental to achievement of a wider commercial purpose is distinguishable from the operation of a place of accommodation on commercial terms for gain. In my opinion the accommodation lease is not a commercial lease within the meaning of s 246 [of the NTA] – at [60]

**Future act argument**

The relevant future act provision was s. 24IB(a), which provides that a future act is a 'pre-existing right-based act' if it takes place in exercise of a legally enforceable right created by any act done on or before 23 December 1996 that is valid (including because of Division 2 or 2A of the NTA). This provision is similar to s. 228(3)(b)(i) except it operates on acts creating legally enforceable rights done at any time before 24 December 1996 and does not specifically refer to the act of making, amending or repealing legislation. (The definition of 'act' in s. 226 would include this.)

Nicholson J found that, if the grant of the accommodation lease was not a past act under s. 228(3)(b)(i), then it would be a future act to which s. 24IB applied for the same

reasons as were given in relation to s. 228(3)(b)(i) – at [61] to [64] and [66].

**Failure to afford procedural rights does not affect validity**

Before doing the future act in question (in this case, the grant of the accommodation lease), notice must be given to, among others, registered native title claimants and they must be given the opportunity to comment on the future act: s. 24ID(3). The state did not dispute that it had not complied with these requirements.

On the question of whether or not this affected the validity of a future act covered by s. 24IB, Nicholson J was of the view that there was 'no reason to depart from such persuasive authority' as the *obiter dicta* comments of Cooper J in Lardil *Peoples v Queensland* (1999) 95 FCR 14 at [30] and the Full Court in *Lardil v Queensland* (2001) 108 FCR 453 at [52], [58], [72] and [117] to [120].

Therefore, it was found that, if s. 24IB did apply, then the accommodation lease would *not* be invalid to any extent as a consequence of non-compliance with s.24ID(3) – at [63].

**Decision**

The grant of the accommodation lease was either:

- a past act as a consequence of the application of s. 228(3)(b)(i) and, being a past act, it wholly extinguished native title rights and interests; or, if this was wrong
- a future act covered by s. 24IB – at [64] and [68].

**Comment**

With respect, it is not the fact that the act in question is a 'past act' that determines the effect of that act on native title. There are four categories of past act, each with varying effects on native title – see ss. 15 and 229 to 232. After rejecting the characterisation of the accommodation lease as a 'commercial lease', the court did not go on to consider what other category of past act it may be.

For example, the accommodation lease may be a category A past act as a 'residential' lease – see s. 229(3)(a). If it was, native title is extinguished: s. 15(1)(a). This would depend on what is meant by 'private residence' in the definition of 'residential lease' – see s. 249. Alternatively, it may be a category B past act and, if wholly inconsistent with native title, may also have the effect of completely extinguishing native title: ss. 15(1)(c) and 230. If it is not a category A or B past act, then the non-extinguishment principle applies – see ss. 15(1)(c), 231, 232 and 238. His Honour did find that the effect of the grant of the accommodation lease was to grant exclusive possession and, absent the intervention of the NTA and the RDA, complete extinguishment. On this point, however, see the findings of Mansfield J in *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539 at [287] to [292], summarised in *Native Title Hot Spots* Issue No 10.

Similarly, in relation to the finding that the grant of the accommodation lease was, if not a past act, a future act within the terms of s. 24IB, then the effect on native title is determined under s. 24ID. Again, the finding that the lease conferred a right of exclusive possession may be of assistance, since an act that confers such a right is said to extinguish any native title in relation to the area it affects – see s. 24ID(b). However, his Honour made no comment on this point.

Finally, both the agreement (made in 1979) and the agreement Act (passed in 1979) are potentially past acts themselves: see s. 228. However, the issue of the validity of these acts does not appear to have been in issue.

## Replacing the applicant under s. 66B

### *Wiradjuri Wellington v NSW Minister for Land & Water Conservation* [2004] FCA 1127

Madgwick J, 2 July 2004

**Issue**

The question was whether the court should exercise its discretion to make an order under s. 66B(2) of the NTA to replace the applicant in a claimant application.

**Background**

This was a case where one of the people named as one of the group of people that jointly constituted 'the applicant' (the applicant group) in a claimant application was seen by other members of the claim group as being a 'dissident', particularly as a result of her opposition to the registration of an indigenous land use agreement. In making her objection, she contended that other members of the claim group had not acted in accordance with traditional laws and customs in making the agreement: see s. 61(2) and [4] to [6].

**Claim group coextensive with corporation**

According to his Honour Justice Madgwick, the 'critical' point in this case was the fact that the evidence established that the native title claim group was coextensive with an organisation known as the Wiradjuri Wellington Aboriginal Town Common (Aboriginal Corporation) (the corporation) – at [7].

Madgwick J was satisfied that, in acting to remove the 'dissident', the proper procedures according to the rules of the corporation had been observed and it was therefore open to the court to exercise the discretion available under s. 66B(2) to remove her from the applicant group – at [8].

His Honour commented that:

> It is not for me to enter into the debate as to which sub-group or groups within the claim group are or are not authentically acting in accordance with traditional custom or in the best interests of the claim group as a whole. The claim group have chosen to regulate their affairs in relation to this application by their membership of the corporation and by proceeding according to the rules of the corporation. Where, as appears to be the case here, those rules have been apparently obeyed and validly acted on, respect should ordinarily be given by a court to the decisions arrived – at [16].

**Decision**

The applicant was replaced so as to remove the dissident member. Madgwick J was of the opinion that 'so far as possible, named applicants on behalf of the claim group should be speaking with one voice and not be divided between themselves' – at [17] to [19].

# Right to negotiate applications

The determinations made by the Tribunal that are summarised below raise interesting points or develop the law relating to right to negotiate applications made under s. 75 of the NTA, i.e. objections to the application of the expedited procedure and future act applications. Significant Tribunal determinations are also reported in the Federal Law Reports. For further information about right to negotiate proceedings, see the *Guide to future act decisions* on this web site at www.nntt.gov.au/futureact/Info.html.

### Tribunal determinations on AustLII and medium neutral citation

All determinations made by the Tribunal in right to negotiate applications are now published both at:

- www.nntt.gov.au/futureact/Determinations.html; and
- www.austlii.edu.au/au/cases/cth/NNTTA.

Note that all these determinations, including those made in the past, now have a medium neutral citation.

## Right to negotiate applications – scope of sections 32 and 38

### *Taylor/Queensland/Freehold Mining Ltd and Western Metals Copper Ltd (Receivers and Managers Appointed)* [2004] NNTTA 80

Mr John Sosso, 7 September 2004

**Issue**

The parties sought to resolve an objection to the application of the expedited procedure by a determination of a type not contemplated by s. 32 of the NTA.

**Background**

The proposed tenement was land previously excluded from the Exploration Permit for Mineral 10313 (EPM) granted in 1994. The grantee party applied under s. 176A of the *Mineral Resources Act 1994* (Qld) (MRA) to have the excluded land included in the EPM. The s. 29 notice also stated that the holders of the EPM intended to apply under s. 151 of the MRA for approval to assign the interest of Western Metals Copper Ltd (Western) to Freehold Mining Ltd (Freehold). Western had receivers and managers appointed in 2003. The assignment was approved on 23 April 2004 – at [3] to [9].

**Jurisdiction under s. 32 is limited**

Freehold then concluded an agreement with the native title party. The government party and the receiver and manager of Western, for different reasons, were not prepared to enter an agreement under s.31.

The Tribunal set out its reasons on this issue as follows:

> In an endeavour to break this deadlock, it was first submitted that each of the parties would consent that I determine that the expedited procedure applied. However, what the parties actually wanted was a determination of a type that is not contemplated by section 32[i.e. a determination that the expedited procedure applied but subject to conditions]...A Member holding an inquiry into whether a future act attracts the expedited procedure has only a very limited jurisdiction. The only question the Tribunal determines is whether the future act attracts or does not attract the expedited procedure after considering the criteria outlined in section 237. There is no power to make a conditional finding or to require parties to do certain things. An expedited procedure inquiry is relatively

straightforward and the central issue is resolved either by a negative or positive decision on the one issue, namely whether the act notified in the section 29 notice attracts the expedited procedure – at [15].

The government party then withdrew the statement under s. 29(7) that the expedited procedure applied and simultaneously made application under s.35 for the Tribunal to make a determination under s. 38 – at [17] and [18].

**Pre-conditions to the making of a section 38 determination**

The Tribunal considered that the pre-conditions to the making of a s. 38 determination were met with regard to:

- the requirements that more than six months had passed since notification day in the s. 29 notice; and
- a s. 31 agreement had not been made.

In the absence of any negotiating parties formally raising the issue of good faith negotiation, the Tribunal noted that there is a presumption created by s. 36(2) that good faith negotiations have taken place. None of the parties raised the good faith issue and, therefore, the Tribunal found there was no impediment to making a determination – at [20] to [22].

**Consent determination under section 38**

The native title party, government party, Western and Freehold all consented to a determination that the future act could be done without imposing conditions. The Tribunal adopted the principles that apply to the making of consent determinations set out in *Monkey Mia Dolphin Resort v Western Australia* (2001) 164 FLR 361 at 368 to 371; [2001] NNTTA 50 – at [27] to [28].

The Tribunal considered the requirement that, before making a determination, the Tribunal take into account the issues agreed upon by the parties, with the objective that (absent any compelling reason to the contrary) the agreement should form the basis of the determination: see s. 39(4).

There is no need for the Tribunal to weigh up the s. 39(1) criteria in the circumstances but two factors were taken into account:

- the clear preference in the NTA for negotiated outcomes; and
- the facilitation of agreements negotiated by the parties to allow for mineral exploration is in the interests of the public as well as the immediate parties – at [29] to [31].

**Decision**

By consent, the Tribunal determined the future act could be done pursuant to s. 38 NTA – at [32].

## Objection to the application of the expedited procedure – major disturbance

### *Oriole Resources/Western Australia/Little* [2004] NNTTA 37

Deputy President Franklyn, 3 June 2004

**Issue**

What evidence is required to make out the likelihood of a 'major disturbance' for the purposes of s. 237(c) in an objection to the application of the expedited procedure?

**Background**

The State of Western Australia proposed to grant Miscellaneous licence L59/53 (the proposed licence) for mine site accommodation under the expedited procedure. A notice under s. 29 of the NTA was published and included a statement that the state considered that the grant of the proposed licence was an act attracting the expedited procedure. The native title party objected to the inclusion of that statement, making submissions in relation to s 237(c) of the NTA only.

The government party submitted that the proposed licence would not give rise to any issues under s. 237 of the NTA and provided material identifying previous tenements applied for, or granted, over the licence area and evidence that there were two pending

exploration licence applications which overlapped the whole of the licence area. There was no evidence of any Aboriginal communities in the vicinity and no sites were registered under the *Aboriginal Heritage Act 1972* (WA).

The grantee party stated that:

- the sole purpose of the proposed licence was for mining camp infrastructure;
- there was an existing mining campsite consisting of transportable units and associated facilities that had been in place for a number of years on a miscellaneous licence granted in 1986, which was wholly within the proposed licence area; and
- the proposed licence was required for associated support infrastructure, including possible power easement, access tracks for construction of fire breaks and rubbish disposal and that no further construction was proposed within the licence boundaries – at [22].

**Native title party's evidence and submissions**

The native title party's evidence consisted of an affidavit by a geologist detailing his experience of mining camp structures and facilities. In support of a contention that major disturbance to land was an inevitable consequence of the grant of the proposed licence, reference was made to earlier decisions of the Tribunal on the nature of s. 237(c): see *Wonyabong on behalf of the Tjupan People v Western Australia* (1996) 134 FLR 462 and *Nyungah People v Western Australia and Empire Oil* (1996) 132 FLR 54.

**Major disturbance**

After referring to the consideration of the meaning of 'major disturbance' by the Full Court of the Federal Court in *Dann v Western Australia* (1997) 144 ALR 1, the Tribunal noted the lack of any evidence from the native title party as to:

- the views or concerns of the Aboriginal community;
- the effect of any previous tenements;
- any areas or sites of particular significance; or
- any traditional use of, or customs relating to, the licence application area;
- why any disturbance would be considered a major disturbance by the native title party – at [25] to [26].

The Tribunal found that:

- in the absence of any evidence of the concerns and views of the Aboriginal people in the locality, and given the prior mining and exploration in the area, the determination was to be made from the viewpoint of the Australian community as a whole;
- the licence, if granted, would increase the areas available for site accommodation and associated areas;
- consequently, the grant would create rights whose exercise may involve major disturbance but, in the absence of evidence of any concerns by the applicants, the matters asserted were not established;
- while exercise of the rights granted under the licence would result in, or involve a, 'disturbance' to the land, in all of the circumstances it was not likely to involve a 'major' disturbance or to create rights whose exercise was likely to involve a major disturbance in the ordinary meaning of that expression – at [25] to [27].

Therefore, the Tribunal found there was no evidence from which to draw an inference on reasonable grounds that any disturbance that may result from the grant and exercise of the licence rights is, or would be considered, a 'major' disturbance.

**Decision**

The grant of the licence was determined to be an act attracting the expedited procedure.

# Future act determination application – good faith negotiations

## *Down/Barnes/Western Australia* [2004] NNTTA 91

Deputy President Franklyn, 1 October 2004

### Issue

The question here was whether the grantee party had negotiated in good faith prior to lodging an application under s. 35 for a future act determination under s. 38 of the NTA. Negotiations in good faith are one of the pre-conditions to the Tribunal making a determination in relation to such an application.

### Background

The native title party alleged that the grantee had not negotiated in good faith and also contended that the grantee party did not own the proposed tenement that was the subject of the inquiry. The native title party wished to negotiate with the company it alleged owned the tenement and alleged that, as the grantee did not own the tenement, he had not acted in good faith. (The native title party eventually conceded that the grantee was the proper party as the sale was conditional on the grant being made and ministerial approval being given to the sale) – at [7] and [21].

The grantee party contented the issue of good faith had been addressed and determined before the inquiry and the matters raised by the native title party were not now relevant – at [8].

The Tribunal confirmed that the issue of good faith goes to the 'jurisdiction' of the Tribunal and must be dealt with prior to determination of a s. 35 application. The Tribunal was satisfied the matter could be determined on the papers – at [21].

Note that only some of the native title party's contentions are summarised here.

### The Valmin code

The native title party's contentions included that the grantee party had not complied with the Code and Guidelines for the Technical Assessment and/or Valuation of Mineral and Petroleum Assets and Mineral and Petroleum Securities for Independent Expert Reports (Valmin code). The Tribunal:

- noted the Valmin code was not a statutory document, had no force of law and was not directed to negotiations but rather at preparing expert reports;
- found there was no obligation on the grantee to provide any report referred to under the Valmin code and any failure to do so was not a failure to negotiate in good faith – at [12.1].

### Refusal to pay for heritage survey

It was also argued that, by refusing to pay for an Aboriginal heritage survey, the grantee party was not acting in good faith. The Tribunal found that:

- there is no legal requirement for an Aboriginal heritage survey to be carried out by, or paid for by, a grantee party;
- although carrying out a heritage survey is often the subject of negotiations, failure to agree is not of itself evidence of a lack of good faith – at [12.3].

### Refusal to accept proposal or commit to costs

The Tribunal did not accept that refusing to agree to the native title party's proposal or to commit to costs stalled the negotiation process and so showed a lack of good faith, particularly when considered against evidence of mediation meetings called for by the grantee party – at [12.4].

Further, not agreeing to the native title party's proposal for an annual 'production fee' by way of compensation and offering a fixed annual payment instead was not evidence of a lack of good faith: 'It does not seem unreasonable to refuse to agree to an annual percentage based on production when the production potential of the area has not yet been assessed' – at [14].

**Findings**

The Tribunal found that:

- the facts did not support the contention that the grantee party had not negotiated in good faith, with the paucity of evidence in support being noted;
- the native title party's contentions were generally based on a misunderstanding of the application of some of the documents relied upon and a misunderstanding of the law, for example at it relates to Aboriginal heritage surveys;
- a request for mediation assistance does not demonstrate good faith has occurred but, in the circumstances of other discussions, the grantee's evidence of meetings which was undisputed, and lack of specific evidence from the native title party, good faith negotiations were not refuted – at [22] to [25].

The Tribunal reaffirmed that it is not required to adopt strict rules on the burden of proof, there is a requirement for the party alleging a lack of good faith to provide evidence to support its contentions – at [25].

**Decision**

The facts did not support the contention that the grantee party had not negotiated in good faith and the Tribunal was therefore empowered to make a determination under s. 38 – at [22] to [25].

**For more information about native title and Tribunal services, contact the National Native Title Tribunal, GPO Box 9973 in your capital city or on freecall 1800 640 501.**
**A wide range of information is also available online at www.nntt.gov.au**

*Native Title Hot Spots* is prepared by the Legal Services unit of the National Native Title Tribunal.