Native Title Hot Spots

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Determinations of native title

***Warria on behalf of Kulkalgal v Queensland* [2004] FCA 1572; *Mye on behalf of Erubam Le v Queensland* [2004] FCA 1573; *Stephen on behalf of the Ugar People v Queensland* [2004] FCA 1574; *Gibuma on behalf of the Boigu People v Queensland* [2004] FCA 1575; *David on behalf of the Iama People and Tudulaig v Queensland* [2004] FCA 1576; *Newie on behalf of the Gebaralgal v Queensland* [2004] FCA 1577; *Nona on behalf of the Badulgal v Queensland* [2004] FCA 1578**

Cooper J, handed down from 7 to 14 December 2004

Issue

All these cases deal with whether the Federal Court should make a determination recognising the existence of native title over various islands in the Torres Strait as proposed in draft determinations filed by consent. The court decided it was empowered to do so.

The determinations made in *Warria* and *Newie* are effective. The other five will become effective if and when various Indigenous Land Use Agreements are registered, subject to any further orders the court may make.

Background

The making of these consent determinations was delayed while the Full Court of the Federal Court considered two separate questions referred under O 29 r. 2 of the Federal Court Rules, namely:

- whether native title had been extinguished by the construction or establishment of certain public works on land presently held in fee simple pursuant to a Deed of Grant in Trust (DOGIT); and
- if so, whether that extinguishment had to be disregarded by operation of s. 47A for all purposes under the *Native Title Act 1993* (Cwlth) (NTA).

In *Erubam Le (Darnley Islanders) #1 v Queensland (2003)* 134 FCR 155, it was held that public works constructed or established before 24 December 1996 extinguished all native title to the area affected and that s. 47A of the NTA did not apply: see *Native Title Hot Spots* Issue 7. An application for special leave to appeal to the High Court made on behalf of the Erubam Le (Darnley Islanders) was later withdrawn.

Further background can be found at: www.nntt.gov.au/media/Torres_Strait.html. A map of the relevant areas can be found at: www.nntt.gov.au/media/data/files/Map%20Torres%20Strait%20determinations.pdf.

Power of the court—s. 87

In each case, his Honour Justice Cooper noted that the parties had reached agreement as to the terms of a proposed consent determination of native title. However, s. 87 of the NTA provides that the court may, 'if it appears to it to be appropriate to do so', make an order in, or consistent with, the terms of the parties' proposed determination without holding a hearing.

Cooper J also noted that s. 94A of the NTA requires that any determination of native title must set out details mentioned in s. 225 of the Act, namely (in paraphrase):

- whether or not native title exists in relation to a particular area of land or waters (the determination area);
- if it does exist, who holds the common or group rights comprising the native title;
- the nature and extent of the native title rights and interests in relation to the determination area;
- the nature and extent of any other interests in relation to the determination area;
- the relationship between those rights and interests (taking into account the effect of the NTA); and
- to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

Evidence before the court

In all seven cases, there was evidence provided to assist the court to determine whether or not s. 87 was satisfied, which included:

- affidavits from claimants deposing to their use and occupation of the determination area; and
- anthropological reports that included genealogical material and addressed each claimant groups' association with the relevant determination area, both current and historic, including records that pre-dated the assertion of sovereignty in the 1870s.

Maintenance of traditional law and traditional custom

His Honour was satisfied in each case that:

- native title existed in relation to the determination area identified in each draft determination;
- the members of each claimant group are members of a society that is descended from the society that, at the time of the assertion of sovereignty, occupied the lands and waters identified in each draft determination in accordance with traditional laws acknowledged and traditional customs observed by them;
- the laws acknowledged and the customs observed by the relevant society at sovereignty continue to be acknowledged and observed by the members of the relevant claimant group and were acknowledged and observed by their predecessors from the time of the assertion of sovereignty to the present;
- the members of the claimant groups and their predecessors, through their continued acknowledgement and observance of the traditional laws and traditional customs which existed at the time of the assertion of sovereignty, have maintained a continuous connection to the relevant determination area; and
- the native title rights and interests in each determination area are held by the persons who are, or are entitled to be or become, members of the respective claimant group.

Determination areas

In all cases, the determination area is described as being landward of the 'high water mark', as defined in the *Land Act 1994* (Qld). In some cases, certain areas within the external boundary of the determination area were excluded from the area covered by the relevant claimant application and so are specifically excluded from the determination area e.g. all roads whether declared, notified,

constructed, surveyed, or taken under the laws of the Commonwealth or the State of Queensland including the common law, to be a road.

Conditional on ILUA registration

The five conditional determinations will take effect if and when various ILUAs are registered on the Register of Indigenous Land Use Agreements. The matters will be listed for further directions if the ILUAs are not registered within six months of the date of the orders (or such later time as the court orders).

Common law holders

The people determined to be the common law holders of native title in each case are described as follows:

- the Kulkalgal People, being the members of certain groups who are the descendants of one or more apical ancestors;
- the Gebaralgal, being the descendants of one or more named ancestors;
- the Erubam Le People, being the members of certain families who are descended cognatically from one or more of named people;
- the Ugar People, being the members of certain families who are descended from named apical ancestors;
- the Boigu People, being the members of certain families who are descended cognatically from one or more named apical ancestors.
- the Badulgal People, being the descendants of one or more named apical ancestors; and
- the Yam Islanders/Tudulaig People, being the descendants of one or more named apical ancestors.

In all seven cases, Torres Strait Islanders who have been adopted in accordance with the traditional laws acknowledged and traditional customs observed by the people identified above are also common law holders of native title.

Rights and interests recognised

Subject to the qualifications noted below, and with the exception of native title rights to 'water', the nature and extent of the native title recognised in each determination area is a right to possession, occupation, use and enjoyment to the exclusion of all others.

Native title to 'water' does not confer possession, occupation, use and enjoyment to the exclusion of all others. Rather, what is recognised is a non-exclusive native title right to:

- hunt and fish in or on, and gather from, the water for the purpose of satisfying personal, domestic or non-commercial communal needs; and
- take, use and enjoy the water for the purpose of satisfying personal, domestic or non-commercial communal needs.

'Water' in this context has the meaning given to it in the *Water Act 2000* (Qld).

Qualifications

The native title rights and interests recognised are subject to, and exercisable in accordance with:

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

Other rights and interests recognised

The other interests recognised in the determinations, as required by s. 225(c), included (as relevant):

- those recognised under the Treaty between Australia and Papua New Guinea concerning sovereignty and maritime boundaries, including the area known as Torres Strait, and related matters, such as

the interests of indigenous Papua New Guinean people in accessing the determination area for traditional purposes;

- those arising under a DOGIT or under various leases or agreements, including ILUAs;
- those of the Commonwealth, including the Australian Maritime Safety Authority;
- the state's interests in education facilities, community health centres and accommodation facilities;
- the interests of the various island councils under the *Community Services (Torres Strait) Act 1984* (Qld) to discharge the functions of local government;
- the interests of Ergon Energy Corporation Ltd and Telstra Corporation Ltd;
- applications under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld); and
- any other interests held by reason of the force or operation of the laws of the Commonwealth or the state, including the common law.

Relationship between native title and non-native title interests

The relationship between the native title rights and interests and the other, non-native title interests recognised in the determinations is that:

- the other interests continue to have effect;
- the rights conferred by, or held under, those other interests may be exercised notwithstanding the existence of the native title; and
- the other interests, and any activity done in exercise of the rights conferred by or held under the other interests, prevail over the native title and any exercise of the native title: see also s. 44H of the NTA.

Prescribed bodies corporate—trustee

In all cases, the native title is either held, or will be once the determination is effective, in trust by:

- *Warria:* The Kulkalgal (Torres Strait Islanders) Corporation;
- *Newie:* The Gebaralgal (Torres Strait Islanders) Corporation;
- *Mye:* Erubam Le Traditional Land and Sea Owners (Torres Strait Islanders) Corporation;
- *Stephen:* Ugar Kem Le Ged Zeuber Er Kep Le (Torres Strait Islanders) Corporation;
- *Gibuma:* Malu Ki'ai (Torres Strait Islanders) Corporation;
- *Nona*: Mura Badulgal (Torres Strait Islander) Corporation;
- *David:* Magani Lagaugal (Torres Strait Islanders) Corporation: see ss. 56 and 57 of the NTA.

Therefore, despite what is said in the determinations, these corporations are, or will be, the native title holders, holding the recognised rights and interests on trust for the benefit of the common law holders: see s. 224(a) of the NTA.

Djabugay v Queensland [2004] FCA 1652

Spender J, 17 December 2004

Issue

This case deals with whether the Federal Court should make a determination recognising the existence of native title over Barron Gorge National Park in north Queensland as proposed in draft determinations filed by consent.

Background

A claimant application for a determination of native title was lodged on behalf of the Djabugay People in May 1994. The

respondents were the State of Queensland and the Cairns City Council. The agreement reached between the parties recognised that the Djabugay People have non-exclusive native title rights to use and enjoy the land and waters in the determination area. For further background information, go to www.nntt.gov.au/media/Djabugay.html.

Power of the court—s. 87

His Honour Justice Spender noted that the parties had reached agreement as to the terms of a proposed consent determination recognising the existence of native title, going on to point out the requirements of ss. 87, 94A and 225 of the NTA, summarised in this issue in relation to the Torres Strait determinations.

Evidence before the court

The evidence provided to assist the court to determine whether or not s. 87 was satisfied included:

- affidavits of claimants deposing to their connection to the claim area according to the traditional laws and customs of their people;

- an anthropological report by Dr Sandra Pannell which stated (among other things) that the traditional entitlement to ownership of the Djabugay People's ancestral lands and waters derived from the charter of Bulurru, which is regarded by the Djabugay People as the source of customary beliefs and practices, jural protocols and procedures, and traditional interests and rights. It also noted that the Djabugay People's entitlement to possession of the claim area was recognised by senior members of neighbouring Aboriginal groups and senior members of non-neighbouring Aboriginal groups that had had association with the area through their residence at the Mona Mona mission;

- the anthropological reports of Norman Tindale in 1938, based on the information contained in reports of Meston (1889), McConnel (1931 and 1939–40), Davidson (1938) and Sharp (1938-9), which identified Djabugay territory as including the Barron Gorge and the surrounding area. The description of the traditional territory given by Tindale was generally affirmed by R.M.W Dixon, a linguist with more than three decades of research experience in north Queensland.

Appropriate to make determination

Based on the evidence provided, Spender J was satisfied that the Djabugay People have a 'long-standing strong connection to the determination area under traditional laws acknowledged and traditional laws observed by them'. Therefore, his Honour was satisfied that the court had the power to make a determination in the terms proposed by the parties.

It was noted that:

> It is a cause of great satisfaction when native title claims are settled through agreement rather than through litigation. The number of native title determinations… reached by consent, has dramatically increased…This suggests that…parties are increasingly aware of the benefits of negotiated settlements of native title claims, which otherwise have the potential to be lengthy, costly and divisive in the community—at [24].

Conditional on ILUA registration

The determination of native title will take effect if and when an ILUA is registered on the Register of Indigenous Land Use Agreements. The matter will be listed for further directions if the ILUA is not registered within eight months of the date of the determination (or such later time as the court orders).

Determination area

Native title was recognised over the area known as the Barron Gorge National Park. However, a number of areas within the boundaries of the national park are not included in the determination area, for example:

- areas currently or formerly subject to various special or term leases;

- the airspace above a term lease for a sky rail;

- areas on which any public work has been constructed, established or situated, including the boardwalk that links the Barron Gorge train station with the Barron Gorge National Park car park off Barron Falls Road and the part of the Cairns Kuranda railway corridor that traverses the Barron Gorge National Park: order 1 and Schedule 1. 'Public work' is defined to include any adjacent area the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work: order 10 and see s. 251D of the NTA.

Minerals and petroleum are also expressly excluded from the determination: see *Wik v Queensland* (1996) 63 FCR 450 at 501–504 and at 686–688.

Common law holders

The common law holders of native title are the Djabugay People, defined as the persons descended from certain named apical ancestors: order 2.

Nature and extent of native title rights and interests recognised

Subject to the qualifications noted below, the native title rights and interests recognised in relation to the determination area are non-exclusive rights to use and enjoy the land and waters being to:

- be physically present;

- camp (defined to exclude the right to permanently reside or build permanent structures or fixtures);

- hunt, fish and gather on, and take the natural resources for the purpose of satisfying the native title holders' personal, domestic, social, cultural, religious, spiritual, ceremonial, and communal needs for non-commercial purposes. 'Natural resources' is defined as animal, plant, fish and bird life found on or in the determination area from time to time and all water, clays and soils found on or below the surface of the determination area. 'Water' in this context means water as defined in the *Water Act 2000* (Qld) and tidal water as defined in the *Land Act 1994* (Qld);

- maintain and protect by lawful means places of importance to the Djabugay People;

- perform social, cultural, religious, spiritual or ceremonial activities and invite others to participate in those activities;

- make decisions about the use and enjoyment of the determination area by Aboriginal people who are governed by the traditional laws acknowledged and traditional customs observed by the Djabugay People: order 3.

Qualifications

It is expressly stated that the native title rights and interests recognised in relation to the determination area:

- do not confer possession, occupation, use and enjoyment of the determination area on the Djabugay People to the exclusion of all others; and

- do not extend to a right to control access to, or a right to control the use of, the determination area: orders 4 and 5.

The native title rights and interests are subject to and exercisable in accordance with:

- the laws of the Commonwealth and the state; and

- the traditional laws acknowledged and traditional customs observed by the Djabugay People.

They are also subject to the *Nature Conservation Act 1992* (Qld) and the operation of s. 24JA of the NTA (which deals with the doing of certain future acts on reserved lands) such that some existing native title rights might be extinguished in the future: order 6.

Other rights and interests recognised

The other interests recognised in the determination area, as required by s. 225(c), included those of:

- the state;
- the public to access the national park for recreation purposes in accordance with the *Nature Conservation Act 1992* (Qld);
- permittees or licensees pursuant to the *Nature Conservation Act 1992* (Qld);
- the Wet Tropics Management Authority and permittees;
- the Cairns City Council and Mareeba Shire Council;
- Queensland Electricity Transmission Co Ltd and Ergon Energy Co Ltd;
- proprietors of certain lots and people authorised by them to access those areas;
- Skyrail Pty Ltd;
- people accredited under the *Transport Infrastructure Act 1994* (Qld) to enter and carry out railway works; and
- other interests that may be held by reason of the effect and operation of the laws of the Commonwealth and the state: order 7.

Relationship between native title and non-native title interests

The relationship between the native title rights and interests and the other, non-native title interests recognised in the determination is that:

- those other interests continue to have effect;
- the rights conferred by or held under the other interests may be exercised notwithstanding the existence of the native title rights and interests; and
- the other interests and any activity that is required or permitted by or under, and done in accordance with, the other interests prevail over the native title rights and interests and any exercise of the native title rights and interests: order 8. See also s. 44H of the NTA

Prescribed body corporate—agent/ representative

The native title is not to be held in trust: see ss. 56 and 57 of the NTA. Once the determination becomes effective, the Djabugay Native Title Aboriginal Corporation will be the prescribed body corporate, acting as agent/ representative for the native title holders, the Djabugay People: see s. 224(b).

Vesting of Lake Victoria—effect on native title

Lawson v Minister Assisting the Minister for Natural Resources (Lands) (NSW) [2004] FCAFC 308

Wilcox, Sackville and Finn JJ, 19 November 2004

Issue

The issues on appeal before the Full Court of the Federal Court were whether:

- a vesting for an estate in fee simple by notice given in the *New South Wales Government Gazette* under the *Public Works Act 1912* (NSW) (Public Works Act) was qualified by the reservation of certain rights under the River Murray Waters Agreement (the Agreement); and
- any such qualification could encompass native title rights and interests.

Background

The trial at first instance dealt with a single 'knock-out' question asked in advance of the hearing of the matter, as provided for in O 29 r. 4 of the Federal Court Rules. The central issue was whether the vesting of the area known as Lake Victoria for an estate in fee simple in the State of South Australia was a 'previous exclusive possession act' attributable to the State of New South Wales,

as defined in s. 20 of the *Native Title (New South Wales) Act 1994* (NSW) (the NSW NTA).

His Honour Justice Whitlam found that it was 'perfectly plain' that the gazette notice satisfied the three requirements set out in s. 23B(2)(a), (b) and (c)(ii) of the NTA and s. 20 of the NSW NTA, namely:

- it was valid;
- it took place on or before 23 December 1996 (in fact, in 1922); and
- it consisted of the grant or vesting of a freehold estate.

The exception found in s. 23B(9C) in relation to Crown-to-Crown grants did not apply because the gazette notice was: 'valid and effective to extinguish native title at common law', that is, 'apart from' the NTA NSW. The gazette notification was thus a 'previous exclusive possession act': see *Lawson v Minister for Land & Water Conservation NSW* [2003] FCA 1127 at [22], summarised in *Native Title Hot Spots* Issue 7, and *Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2004] FCA 165. The native title applicant appealed against this decision.

Argument on appeal

The appellant contended that the vesting was not a previous exclusive possession act because the resumption of the area was qualified by the reservation of certain rights under clause 57 of the Agreement, which was reproduced as a schedule to the *River Murray Waters Act 1915* (NSW) (RMW Act). This contention had been raised and rejected at first instance.

Decision

The court dismissed the appeals, finding that Whitlam J was correct to conclude that the Agreement had no legislative force and did not confer upon, or reserve to, third parties any proprietary rights in the area concerned. The court also held that there was nothing in the RMW Act to give the Agreement that effect—at [28].

The court held that:

- nothing in clause 57 of the Agreement could detract from the fact that, upon notification in the *Gazette*, the claim area vested in the Crown in right of South Australia for an estate in fee simple in possession;
- it followed that, under the general law, any native title over the claim area was extinguished and that the NTA and the NTA NSW operated in the manner described by Whitlam J;
- even if clause 57 could have operated to preserve pre-existing property rights:

> [I]t could not have preserved native title rights and interests over the claim area. Clause 57 referred to rights 'lawfully exercisable by an occupier of land on the bank of the ... lake' to use the water for 'domestic purposes or for watering cattle ... or for gardens'. This language was not apt to encompass any native title rights and interests that might then have been in force—at [28] to [29].

Evidence—admissibility of expert reports and opinions

Jango v Northern Territory of Australia (No 4) [2004] FCA 1539

Sackville J, 26 November 2004

Issue

In these proceedings, his Honour Justice Sackville considered (among other things):

- whether disconformity between the applicant's expert report and evidence of the applicant's witnesses should result in the expert report being rejected as irrelevant to the issues in dispute;
- whether opinions based on the analysis of source data should be admitted despite the source data not being in evidence;
- whether general observations by the applicant's expert on the difficulties of

language and communication experienced by Aboriginal people when talking about traditional laws and customs was admissible.

Background

This case relates to the hearing of an application under ss. 50(2) and 61(10) of the NTA for a determination of compensation in relation to the town of Yulara in the Northern Territory.

In an earlier judgment, Sackville J had rejected substantial portions of a report co-authored by Professor Peter Sutton on the ground that they 'did not comply with the requirements of the *Evidence Act 1995* (Cwlth) applicable to opinion evidence': see *Jango v Northern Territory (No 2)* [2004] FCA 1004, summarised in *Native Title Hot Spots* Issue No. 11. The report now tendered by the applicants prepared by Professor Sutton was recast in an attempt to comply with the requirements of the Evidence Act—at [2].

Global objection—disconformity between report and indigenous witnesses' evidence

The Solicitor-General for the Northern Territory submitted that, because there was a disconformity between the report and the evidence given by the Aboriginal witnesses, the report should be rejected under s. 56(2) of the Evidence Act as it was irrelevant to the issues in dispute. His Honour noted that:

> This was said to be illustrated by Professor Sutton's contention that native title rights and interests can exist under the traditional laws and customs of the eastern Western Desert Bloc in persons who are not necessarily *ngurraritja* for particular places [meaning someone that belongs to a place, traditional owner or custodian]—at [4].

It was submitted that both counsel for the applicant and the Aboriginal witnesses took a more confined view of the rights and interests that could exist under the traditional laws and customs of the Western Desert bloc.

While acknowledging that there may be some force in the Solicitor-General's observations as to possible disconformity, Sackville J was of the view that it was not appropriate to attempt to make that assessment at this stage of the litigation. His Honour observed that he had not been taken in any detail to the evidence of the Aboriginal witnesses. In view of the volume of evidence from those witnesses, heard over some 30 days, and the range of matters dealt with in the report, his Honour felt that he could not yet assess whether any disconformity that may exist was as pronounced as the Solicitor-General suggested. Accordingly, the global objection was not upheld—at [6].

Specific objections

Sackville J observed that the specific objections to the report reflected, in part, the concerns of both the Territory and the Commonwealth that a vast amount of material was referred to in the footnotes and appendices to the report.

His Honour noted that, if this material was admitted into evidence on the basis that it explained Professor Sutton's reasoning process, the effect of s. 60 of the Evidence Act may be to prevent the hearsay rule applying. His Honour's initial impression was that the respondents' concerns were well founded. The applicant agreed and indicated an order under s. 136 of the Evidence Act limiting the use of that material to ensure that the respondents would not suffer unfair prejudice would not be resisted. A direction to that effect was made in terms agreed by the parties. However, the Territory (supported by the Commonwealth) maintained its objection to some sections of the report—at [8] to [11].

Lack of basis

Sackville J further observed that the Territory's objection to some paragraphs of the report was on the ground that Professor Sutton had expressed the basis for his opinion in such general terms that the reasoning process was insufficiently clear. This had the effect of making the opinion evidence irrelevant or, alternatively, to render it inadmissible on the

basis that it was impossible to distinguish whether the expression of opinion was the product of Professor Sutton's specialised knowledge, as required by s. 79 of the Evidence Act—at [12].

His Honour dismissed some objections and admitted various paragraphs of the report on the basis that a fair reading of the report indicated that the opinion expressed was supported by more than the bare assertion contained therein and that Professor Sutton had formed the opinion by reference to his specialised knowledge as an anthropologist—at [15].

On the other hand, his Honour allowed some of the objections and rejected some of the paragraphs of the report, in particular paragraphs where:

- the source data used by Professor Sutton had neither been admitted into evidence nor made available to the respondents in good time;

- it was found that the expression of opinion was not the product of Professor Sutton's specialised knowledge based on his training, study or experience but rather his opinion based on his assessment of out of court statements made by the very people who gave evidence or who could have given evidence—at [20] to [35].

Language and communication issues

The report contained comments on particular passages of evidence given at the hearing and included some general observations on the difficulties of language and communication experienced by Aboriginal people when talking about traditional laws and customs. The court noted that:

- the general principle is that the ultimate conclusion as to the credibility or truthfulness of a particular witness is a matter for the trier of fact and is not the proper subject of expert opinion;

- an expert may give evidence as to the existence or possible existence of a disorder or disability affecting the capacity of a witness to give reliable evidence, provided the testimony goes beyond the ordinary experience of the trier of fact;

- no submissions were made as to whether this applied to evidence concerning language or communication difficulties experienced by the Aboriginal witnesses and the court was not directed to any case law on this point—at [38] to [39].

However, his Honour said it was arguable that:

> [A]n anthropologist with extensive experience in communicating with Aboriginal people on matters of traditional laws and customs can give evidence of language or communications difficulties that might have a bearing on the ability of Aboriginal witnesses to give reliable or complete evidence on important issues—at [40].

Therefore, in the absence of full argument on the issue, Professor Sutton's general observations were admitted, as they might be of some relevance and could be said to be the product of relevant training or experience. The court noted that some were well known and could equally be made in submissions—at [40].

However, comments on particular passages of evidence given at the hearing were not admitted because:

- the evaluation of specific evidence is the task of the trier of fact who will have to take account of many factors, with the difficulty of cross-cultural communications being but one;

- the relevant expertise of an anthropologist does not extend to the evaluation of specific evidence given by particular witnesses; and

- even if it was within Professor Sutton's expertise, the proffered evidence evaluating the testimony of particular witnesses should be rejected pursuant to s. 135(c) of the Evidence Act because allowing evidence of this kind invites a

collateral dispute. This could potentially involve lengthy cross-examination on a matter that is quintessentially for the court to determine. The probative value of the evidence, if any, is substantially outweighed by the danger that the evidence will result in an undue waste of time—at [41] to [42].

Conclusion

His Honour asked the parties to attempt to reach agreement as to which other paragraphs in the report should be rejected or admitted on a limited basis. If no agreement can be reached, his Honour is willing to hear further argument.

Party status—members of claim group seek joinder

Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland [2004] FCA 1632

Kiefel J, 14 December 2004

Issue

The questions here were whether four persons, all members of the native title claimant group, should be joined as parties to the native title claim proceedings and whether alleged conflicts of interest of the North Queensland Land Council (the NQLC) should be investigated.

Background

The relevant claimant application in this matter is a combination of three earlier claims. The person representing those seeking to be joined, Dona Gibbs, contended that the applicant in the native title proceedings was not properly representative of all persons in the claimant group. Two previous applications for joinder by another person who made the same contention had been dismissed: see *Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland* [2002] FCA 1370 and *Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland* [2004] FCA 1097, summarised in *Native Title Hot Spots* Issue No. 11.

Mrs Gibbs made the following submissions (among others):

- the genealogy, so far as it related to her family, and some anthropological reports prepared for the NQLC, were incorrect;
- her family had been shut out of the decision-making process;
- the authorisation claimed by those named as the applicant was not properly given because she was not present;
- the Yidinji people (to which Mrs Gibbs belonged) generally were not properly represented by those named as the applicant and the Malanbarra applicants were the 'wrong people' for the claim area—at [5] to [7].

Allegations against NQLC

Her Honour Justice Kiefel was unaware of any provision which gave the court power of investigation and could not discern any other appropriate order which might be made, having regard to the general and diffuse nature of the complaints against NQLC:

> After hearing Mrs Gibbs' expressions of concern it seems to me that the real complaint of conflict relates to the representation of her people by Malanbarra persons—at [9].

Authorisation

Her Honour found that there was no evidence to suggest a lack of proper authorisation, a matter that the two previous decisions noted above also dealt with. Kiefel J observed that:

> [A]uthorisation under the Native Title Act…refers to authority for persons to act on behalf of the whole of the Native Title Group by a process which is required to comply with custom. It does not require authorisation by every individual in the group, as Mrs Gibbs seems to think. A representative applicant is given full authority by s 62A of the Act to *'deal with all matters arising under [the* Native Title Act] *in relation to the application'*—at [10],

emphasis in original citing Drummond J in *Kulkalgal People v State of Queensland* [2003] FCA 163 at [6], summarised in *Native Title Hot Spots* Issue 5.

Kiefel J observed that the 'only avenue' under the NTA for a person dissatisfied with the way their interests were being represented in native title proceedings is an application under s. 66B(1) to replace the applicant. But those making such an application must have the authority of all the members of the claimant group to do so. There was no such application before the court and no suggestion that Mrs Gibbs enjoyed the support of the claimant group—at [11].

Joinder under s. 84(5)

The only other alternative was to join a person as a respondent under s. 84(5) of the NTA, which provides that the court may, at any time, join any person as a party to the proceedings if the court is satisfied that the person's interests may be affected by a determination in the proceedings.

While it was not necessary to decide the point in this case, because Mrs Gibbs did not want to be joined as a respondent, her Honour was of the view that:

> Assuming [without deciding] there to be [such a] power one would expect that it would not be granted as a matter of course and upon assertions about lack of representation. There would at the least need to be shown a real difficulty in that person's interests being represented—at [12].

In any case, her Honour would have been disinclined to apply s. 84(5) because the application was made far too late in the proceedings and there was no sufficient evidence that:

- NQLC or their anthropologists would not consider any corrections that Mrs Gibbs wanted made to her family's history;
- the Yidinji people were not being adequately represented—at [13].

Decision

The application was dismissed with no order as to costs.

Replacing the applicant under s. 66B

Combined Mandingalbay Yidinji–Gunggandji Claim v Queensland [2004] FCA 1703

Spender J, 16 December 2004

Issue

Should the court exercise its discretion under s. 66B(2) of the NTA to make an order to replace the applicant in a claimant application?

Background

An application was made under s. 66B(1) to replace the applicant in this claimant application. When the s. 66B application was made, Vincent Mundraby, Les Murgha, Stewart Harris, Frederick (Ricko) Noble were jointly 'the applicant': see s. 61(2). The proposed replacement applicant was to be constituted by Mr Mundraby, Mr Murgha and Mr Harris, with Mr Noble being replaced by Charles Thomas Garling.

His Honour Justice Spender noted that this application had a 'long and unhappy history'. In December 2003, the State of Queensland informally offered to resolve the claim by a consent determination. At the time, all four members of the applicant said they had authority to accept the offer. However, in February 2004 'it became apparent that Mr Noble was not intending to follow through on his previous undertaking'—at [2] to [6].

At a directions hearing in May 2004, Spender J indicated that the application would be struck out if progress towards a determination was halted because of irreconcilable differences between the people named as the applicant. When the matter came before the court in July 2004, Mr Noble indicated that he was not prepared to sign the undertaking.

At that time, Spender J said to Mr Nobel:

> [The claim] has resulted in an offer by the State…which has associated with it positive benefits to members of the Yarrabah community, which you are at the very least postponing, if not putting in complete jeopardy.

The court was also informed by Kim Elston, a senior legal officer of the NQLC that it had expended in excess of $750,000 over ten years in prosecuting the claim and that his understanding of a meeting held on 14 July 2004 to discuss the state's offer was that all four of those constituting the applicant agreed to provide an undertaking to the court in regard to processing the claim. Mr Elston went on:

> If the claim was to be struck out, the Land Council, on my instructions, would not be interested in returning to that claim in view of the amount of money that's already been spent on it.

Counsel for the state also indicated that a 'huge amount' of the state's resources had gone into this claim and that the state would find it hard to go back and start again if there was no resolution of the conflict within the claim group.

The native title claim group

His Honour noted that Mr Nobel seemed to have a 'fundamental misunderstanding' as to who constituted the claimant group. After referring to s. 61(1), Spender J pointed our that:

> The native title claim group…is not the Gunggandji People; it is not the Yidinji People; it is not the Mandingalbay People. This is a joint [combined] claim, and the persons authorised are persons who are authorised by all the persons in the native title claim group—at [14].

Section 251B 'speaks of all the persons in the native title claim group', and in this case:

> [A]ll those persons are not simply all the Gunggandji People or all the Yidinji People or all the Mandingalbay People. Mr Noble misunderstands the provision of the Act when he claims, "I was put on as an applicant by the elders of the Gunggandji People. Only the elders of the Gunggandji People can take me off"—at [16].

Section 66B

Having noted that this view of s. 251B was 'wrong', his Honour considered the requirements of s. 66B, referring to earlier decisions such as:

- *Anderson v Western Australia* (2003) 204 ALR 522 per French J, summarised in *Native Title Hot Spots* Issue No 8;
- *Daniel v Western Australia* (2002) 194 ALR 278 per French J;
- *Moran v Minister for Land and Water Conservation for the State of New South Wales* [1999] FCA 1637 per Wilcox J.

His Honour observed that:

> In this particular case, a very high priority has been given to this claim and extensive resources have been directed at negotiations over the past three years in particular both by the North Queensland Land Council and by the State of Queensland— at [44]. See also [7] to [8].

Evidence of authorisation for s. 66B application

NQLC assisted with advertising in respect of a s. 66B meeting in connection with this application, which included a mail-out to all claim group members, advertisements in the *Townsville Bulletin,* the *Northern Territory News* and the *Cairns Weekend Post* and advertisements on the local indigenous radio station.

Then, 'importantly', a meeting was held on 6 October 2004 at the Yarrabah Community Hall. The court accepted the evidence of what occurred in respect of that meeting, deposed to in various affidavits.

In summary, the meeting was chaired by a lawyer from a neighbouring representative body, Bernard Beston. All those who attended the meeting were given an information kit that made 'plain' both the history leading up to, and the purpose of, the meeting. The meeting commenced an hour later than scheduled. Some people said no decision could be made without Mr Noble (who had not yet arrived, despite the late start). Mr Beston, having formed the view that Mr Noble had had adequate time to get to the meeting, informed those present that they could proceed in his absence. It was made clear that Mr Noble would remain as a member of the claimant group even if removed from the applicant group. A discussion ensued as to the appropriate decision making process. Some said that Mr Noble could only be removed after a meeting of the descendants of one George Christian. Mr Garling then informed the meeting that 146 people from that group had met in Darwin and agreed that Mr Noble should be removed but he also pointed out that, if the group wanted to abide by law and custom, then he, as the elder, should make the decision for his group. Mr Mundraby then pointed out (among other things) that the decision rested with the whole claimant group—at [28] to [33].

The minutes of the meeting which were before the court recorded that, following this discussion, resolutions to remove Nr Noble and replace him with Mr Garling were passed unanimously—at [33].

Elements of s. 66B satisfied

His Honour was satisfied that each of the factors identified by French J in *Daniel v Western Australia* (2002) 194 ALR 278, summarised in *Native Title Hot Spots* Issue No. 2, were established by the evidence:

- the relevant claimant application is the native title determination application made by the Mandingalbay Yidinji-Gunggandji People;
- each member of the new applicant is a member of the native title claim group; and
- each applicant for the order under s 66B of the NTA is a member of the native title claim group—at [39].

Therefore, Spender J was satisfied that Mr Noble was 'no longer authorised by the claim group' and that the new applicant was authorised to bring the s. 66B motion—at [40].

Mr Noble's absence from the meeting was noted. However, the court pointed out that the absence or even dissent of various members of a native title claim group will not necessarily be fatal to a s. 66B application: e.g. *Ward v Northern Territory* (2002) 196 ALR 32, summarised in *Native Title Hot Spots* Issue No. 3; and *Wiradjuri Wellington v New South Wales Minister for Land and Water Conservation* [2004] FCA 1127, summarised in *Native Title Hot Spots* Issue No. 3—at [41].

The deciding point as to whether the resolutions were authorised by the claimant group requires consideration as to what was the appropriate decision-making process and whether it was followed:

> The question of authorisation, whether by a traditional decision-making process or by a process agreed to and adopted by the members of the claim group, has to be in respect of the members of the claim group and not a sub-group of the members of the claim group. In this case the conditions for the making of the order in my judgment have been met. It follows that the Court has a discretion as to whether or not to make the order—at [43].

His Honour considered the case to exercise the discretion was 'overwhelming':

> This will have the effect, in my opinion, of significantly raising the prospect of a successful consent determination to the benefit of all the members of the Yarrabah community. There are substantial funds, up to a $1 million, in respect of building projects which are in abeyance as a result of the lack of progress or obstructionism in relation to the evolution of a consent determination—at [45].

Decision

Spender J ordered the current applicant for the native title claim group, namely, a group of four persons acting jointly, be replaced by a new applicant pursuant to s. 66B(1) of the NTA, comprising three of the original group and one other—at [47].

Updating the Register of Native Title Claims

The court noted that ss. 66B(3) and (4) provide that:

- if the court makes an order under s. 66B(2), the Federal Court Registrar must, as soon as practicable, notify the Native Title Registrar of the name and address for service of the new applicant; and
- if the claim is on the Register of Native Title Claims, the Registrar must amend the register to reflect the order.

Simpson v Western Australia [2004] FCA 1752

French J, 17 December 2004

Issue

Should the court exercise its discretion under s. 66B(2) of the NTA to make an order to replace the applicant in a claimant application?

Grounds made out

His Honour Justice French was satisfied that that grounds for replacement of an applicant set out in s. 66B of the NTA were satisfied:

- the application is brought by members of the relevant native title claim group in relation to a claimant application brought on behalf of the Wajarri Elders; and
- the order was sought on the ground that the current applicant is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it insofar as Lena Merritt was included— at [1].

Evidence

The court accepted evidence given of a meeting held on 17 March 2003 at which a number of resolutions were passed by members of the claimant group that demonstrated that Ms Merritt, one of the group named jointly as the applicant, was not authorised to make the application and to deal with matters arising in relation to it—at [2] and see ss. 61(2), 66B(1) and 251B.

The process of notification of the meeting, the anthropological evidence about the discussions that preceded meetings of this kind and the evidence of the 'agreed and conventional nature of the decision-making which took place in this case' satisfied his Honour that:

> [T]he resolutions were properly made by or on behalf of the native title claim group and that the replacement applicants who are named in the motion have been authorised by the claim group to make this application to replace the existing applicants pursuant to s 66B—at [3].

Decision

After noting that the court had discretion, even where the 'necessary' conditions identified in s. 66B(2) were established, French J held that:

> In this case…the basis for…the removal of Ms Merritt appears to be entirely reasonable. Her delay in signing an important agreement generated concerns within the group about the capacity of the named applicants, if they continued to include Ms Merritt, to respond in a timely way to agreements that might be seen as being for the benefit of the native title claim group and supported by the group as a whole—at [4].

The order sought was made.

Case management of claims in South West WA

Bennell v Western Australia [2004] FCAFC 338

Wilcox, French and Finn JJ, 23 December 2004

Issue

This case deals with a special regional case management conference held for 13 native title determination applications in the South West of Western Australia. One part of one of the areas subject to claim was part heard. Of particular interest are the court's comments about funding issues.

Background

His Honour Justice French had noted in an earlier case that:

> [T]he South West region of Western Australia has been bedevilled for many years with intra-indigenous conflict which has effectively prevented meaningful progress in the mediation of native title determination applications in that area. It is too early to venture any opinion on whether the first Noongar claim, which has now been filed, represents a breakthrough in this regard.... It... presents an opportunity to give new impetus to the development of a comprehensive resolution of native title issues in the South West: *Anderson v Western Australia* [2003] FCA 1058 at [24], summarised in *Native Title Hot Spots* Issue No 7.

Submissions

The South West Aboriginal Land and Sea Council (SWALSC), which represented many of the relevant claimant groups, submitted (among other things) that:

- it was unable to agree to the fixing of any hearing dates, or to prepare and present a case for hearing in relation to any area under claim in the South West;
- if the matters were to proceed to hearing, the applicants would be unrepresented by SWALSC as it did not have funding or permission from its funding body to represent the applicants in litigated matters;
- progress on matters listed for trial should continue in accordance with the broadly accepted standard litigation timetable i.e. the respondents should file expert reports and a response to the applicants' outline of case, after which the Federal Court Registrar should convene a conference of experts to limit issues in dispute;
- remaining matters should continue in mediation subject to any renewed applications to remove individuals no longer authorised and to combine the claims—at [23] to [25].

SWALSC was unable to provide a priority list for hearing but indicated a preference for prioritising areas where it had the best chance of proving native title.

The state submitted (among other things) that:

- SWALSC's Strategic Plan and Funding Operation, lodged in May 2004, sought no funding for litigation;
- the history of native title claims in the South West was characterised by a lack of substantive progress brought about by numerous applications for adjournments and amendments and non-compliance with programming orders;
- the focus of the regional case management conference should be on how to progress these claims to trial via a series of separate hearings and determinations, rather that a single trial over the whole of the South West, which would be unmanageable;
- the issue of the existence and content of a single system of Noongar law and custom covering the South West should be addressed at the first trial and any findings in that matter then relied upon in subsequent cases;

- the hearings should be conducted on the basis of a preliminary question as to 'connection' under O 29 r. 2 of the Federal Court Rules—at [29] to [33].

The court was of the view that there was 'much force' in the submission by the state that there has been 'undue delay in progressing any part of the South West claims to trial' and that it should not contemplate any further delay in the trial (part heard) of the Perth Metropolitan part of the area covered by what is referred to as the Single Noongar claim—at [34].

Funding issues

The court noted that the difficulties in providing funding asserted by SWALSC seemed, at least to some extent, to be of its own making. Its application for funding in 2004 related to the funding of mediation. Although the trial of the Perth Metropolitan area claim was the subject of directions made in July 2004, no application for funding was initiated with the Commonwealth until 30 September 2004. Even then, it elicited a response which required it to address specific conditions for the grant of funds for litigation.

The court noted that:

> It is important to make the general point that the programming of native title matters…cannot be determined by the decisions of funding agencies or the views of representative bodies, the State or any other parties about appropriate priorities…[I]f it should happen that want of funding means that some applicants will be unrepresented at trial that is not a bar to proceeding with a trial although it will raise obvious difficulties in the management of the trial process—at [37].

Decision

Overall, the court formed the view that:

> [I]t is in the interests of justice that the hearing of the Perth Metropolitan area claim should proceed early in the second half 2005 at a date to be fixed. The SWALSC should, if it has not already done so, apply for litigation funding as soon as practicable.
>
> The applications jointly referred to in South West Area 1 should continue in mediation for the time being albeit South West Area 1 will, in all probability, be a priority for hearing after the completion of the Perth Metropolitan area hearing.
>
> The balance of the claims in the South West region which are still in the provisional docket are to continue in mediation. In the meantime the SWALSC should provide a proposed priority list of claims in the South West region which are to be progressed to trial in the event that mediation is unsuccessful—at [38] to [40].

Membership of Aboriginal & Torres Strait Islander corporation

Lawton v Bidgerdii Aboriginal & Torres Strait Islanders Corporation Community Health Service Central Queensland Region [2004] FCA 1474

Kiefel J, 16 November 2004

Issue

The issue before the Federal Court was whether an Aboriginal and Torres Strait Islanders Corporation could, without express provision within its rules of association, reject an application for membership by a person who qualified for membership and who had paid any necessary fees. It is of interest for whatever relevance it may have to the rules of incorporation of prescribed bodies corporate: see ss. 56 and 57 NTA and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (the PBC regulations).

Background

The Bidgerdii Aboriginal and Torres Strait Islanders Corporation Community Health Service Central Queensland Region (the association) was a community health association incorporated under the *Aboriginal*

Councils and Associations Act 1976 (Cwlth) (ACA Act), the same statute that applies (subject to the NTA and the PBC regulations) to the incorporation of prescribed bodies corporate: see reg. 4 of the PBC regulations.

On 7 February 2003, the applicant Margaret Lawton applied for membership to the association under the rules of the association. Her's was one of 18 applications for membership made on or before 14 February 2003.

On 14 February 2003, the membership fees for all 18 applications were returned to Ms Lawton and she was advised that, given the large number of applications received in bulk, together with talk of an impending 'take over', that the governing committee (the committee) had decided not to accept any membership applications lodged between 18 February (when most of the membership applications were received) and 7 March 2003 (the date of a special general meeting of members called to discuss the issue of membership). Neither Ms Lawson nor the other persons who applied during this time were admitted to membership.

At the time Ms Lawson and the others made their applications, sub-rules 8(1) and (2) of the association's rules provided, respectively, that:

- membership of the association shall be open to adult Aboriginal and Torres Strait Islander persons normally and permanently resident in Rockhampton and the Central Queensland Region; and

- the members of the association shall be those Aboriginal and Torres Strait Islander persons who qualify for membership and who apply to the committee and who pay an annual membership fee as prescribed by the governing committee of the association. A register of members shall be kept by the public officer.

On 4 April 2003, sub-rule 8(2) was amended to read:

> The members of the Association shall be those Aboriginal and Torres Strait Islander persons who qualify for membership, who apply in writing to the Committee and whom the Committee decides to admit to membership. An annual membership fee as prescribed by the Governing Committee shall be paid each year. The Committee will issue membership forms to those persons approved by the Governing Committee to apply for membership. The Governing Committee may seek more information from applicants to assist members of the Committee in considering applications for membership. The Governing Committee's decision is final.

Ms Lawson contended that the rules did not give the committee power to reject applications for membership if persons fulfilled the description required and paid any necessary fees. In response, the association submitted that there must be discretion to prevent a person who might be likely to obstruct the association in the pursuit of its objectives from becoming a member. No particular object was said to be in question in relation to these applications.

Findings

Her Honour Justice Kiefel held that:

- while the rules made provision for the expulsion of a member, they did not permit the committee to prevent persons who might be likely to obstruct it in the pursuit of the associations objectives from becoming members;

- the mere fact of a person having to apply to the committee of the association does not provide the committee with wider powers of refusal or rejection than are marked out by the rules. The method of application was simply a procedure to be followed;

- it was not possible to read into the rules a discretion in the committee to reject a person's application—at [18] and [20].

Her Honour rejected a submission by the association that, if there were no discretion to

refuse membership, then a person who had been expelled could apply for membership again and would have to be accepted. It was held that expulsion from the association implied an inability to continue to be a member that could not be overcome by a fresh application unless the resolution was rescinded—at [15] to [16].

In relation to the amendment to rule 8, Keifel J indicated (obiter) that even after amendment, there may be no power in the committee to reject or suspend an application for membership unless the application was not in accordance with the rules—at [20].

Decision

The court declared that, with respect to the applications made prior to 4 April 2003, the committee of the association did not have the power to reject as a member any person who was eligible in accordance with sub-rules 8(1) and (2), who paid the annual fee and who was not the subject of a prior resolution of expulsion.

Right to negotiate applications

The determinations made by the Tribunal 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.

No submissions from native title party in future act determination application

Issue

In the two matters summarised below, the Tribunal considered whether it could proceed to make a s. 38 determination where the native title parties had not made any submissions or contentions in relation to the matters in s. 39 which the Tribunal 'must take into account' when making such a determination. Both concerned the grant of petroleum exploration permits. In both cases, the Tribunal determined that the future act could be done.

Gulliver Productions Pty Ltd; Indigo Oil Pty Ltd; Maneroo Oil Company Ltd/Hunter; Sebastian; Nangkiriny/Western Australia [2004] NNTA 105

DP Franklyn, 11 November 2004

Background

This application for a future act determination concerned land the subject of claimant applications by the Karajarri People, the Nyangumarta People and the Rubibi People. It also covered part of the area where the Karajarri People had been determined to hold exclusive native title rights and interests (the exclusive possession determination) but it made clear that rights to minerals and petroleum were not included: see *Nangkiriny v State of Western Australia* [(2002) 117 FCR 6. On 8 September 2004, the Federal Court made a finding that the Karajarri People had non-exclusive native title rights and interests over the remaining area covered by their claimant application: see *Nangkiriny v Western Australia* [2004] FCA 1156, summarised in *Native Title Hot Spots* Issue No 11.

On 19 April 2002, the grantee party lodged an application for a future act determination pursuant to s. 35 of the NTA, alleging inability to reach agreement with the native title parties, despite a lengthy period of negotiations. The Tribunal had earlier made a determination that the grantee party had negotiated in good faith.

Agreement was eventually reached between the negotiation parties over all but the area that was subject to the exclusive possession determination—at [6], [20] to [24].

In November 2003, the Kimberley Land Council, representing the Karajarri People, informed the Tribunal that the Karajarri People would not lodge contentions as directed in respect to the exclusive possession determination area. However, it expressed the view that the activities of the grantee party would necessarily impact on the Karajarri determined rights to possession, occupation, use and enjoyment of the land and waters to the exclusion of all others, particularly in relation to:

- the right to maintain and protect important places and areas of significance to the Karajarri People under their traditional laws and customs on the land and waters;
- the right to control access to, and activities conducted by others on the land and waters including the right to give permission to other to enter and conduct activities on the land and waters on such conditions as the Karajarri People see fit; and
- the right to make decisions about the use and enjoyment of the land and waters.

It proposed that certain conditions should be imposed on the grant of the permit, including the grantee party entering into a native title heritage protection agreement. The Tribunal advised the parties that it would not impose any such conditions as a result of the request. Whether any conditions could or should be imposed would depend on the evidence and submissions—at [9], [15], [19] and [23].

In the absence of consent in relation to the exclusive possession determination area, the Tribunal proposed that it was appropriate to deal with the s. 35 application as '…a non-consent application in respect of the whole of the Karajarri land over which the grant of the exploration permit was sought' and all of the parties' representatives agreed—at [22].

The state and the grantee both made submissions and the state also provided information as to the land tenure, mining and petroleum tenements and recorded Aboriginal sites within the area of the relevant area.

The Tribunal was satisfied that the issue could be determined by considering, without holding a hearing, the documents and other material lodged with, or provided to, the Tribunal—at [36].

The Tribunal noted that both the Nyangumarta and Rubibi native title parties had entered into agreements with the state and the grantee party pursuant to which the grant of the exploration permit may be made. Neither of them lodged any submissions or had otherwise expressed concern as to the effect of the grant on the matters and things referred to in s 39(1) of the NTA:

> There was no evidence as to how any of the land the subject of the permit area is enjoyed by them, of their respective ways of life, culture and traditions, the development of social, cultural and economic structure, the carrying out of rites, ceremonies or other activities of cultural significance or of any area or site of particular significance—at [37].

It was noted that the agreements were entered into after a long period of negotiation throughout which each had legal representation—at [37].

The Tribunal took into account the submissions of the state and the grantee in respect of the matters referred to in s. 39(1)(c)(e) and (f) and found that the grant would have minimal effect on them:

> Taking into account the above matters, the respective registered native title rights and interests of the Nyangumarta and Rubibi people and the determination as to the rights and interests of the holders of "other rights and interests" in the two Karajarri determinations, I am satisfied that the effect of the grant of the permit in respect of the matters referred to in s 39(1) and (2) will be minimal and such as not to require any conditions on a determination that the act may be done—at [37].

The Tribunal noted that, while some of the native title rights and interests over Karajarri land were exclusive, the determination recognised that persons holding rights, such as mining rights, are entitled to exercise their rights. In the non-exclusive determination area, there were pastoral leases. The effect of the determination was that the rights of those pastoral lease holders prevailed over the native title rights of the Karajarri People to the extent of any inconsistency—at [38].

The Tribunal concluded:

> As the information provided by the State reveals, petroleum permits and other mining tenements have been granted within the areas where the Karajarri were recognised as having native title…Thus the native title holders of those lands would be conscious of any effect these grants would have in respect of the matters referred to in s 39(a) and (b)…I have taken into account all of the matters referred to in s 39…and the submissions of the State and the Grantee. I also have taken into account that the Karajarri Native Title Party makes no claim for compensation…The fact that no submissions have been made by the Karajarri…in response to the directions… together with the matters set out above leads me to the conclusion that the Karajarri…accept that the grant of the permit will not have any significant adverse effect upon the matters referred to in s 39(1)(a)(b) and (c)—at [38].

Western Australia/Hughes; Crowe/Rough Oil Pty Ltd [2004] NNTTA 108

DP Sumner, 1 December 2004

Background

In this matter, a s. 35 application for a future act determination was made by the grantee party. The two native title parties, the Gnulli and the Thalanyji, were both represented.

A heritage protection agreement in the form of a state deed had been made with the Gnulli native title party and lodged pursuant to s. 41A(1)(a). A s. 31(1)(b) agreement could not be executed because there was no agreement between all negotiation parties. The Thalanyji had advised that they would not be making any submission due to lack of resources.

The Tribunal advised that, in the absence of any submissions by the native title party, a decision under s. 38 would be made on the basis of the submissions made by the state and grantee parties and any other material before the Tribunal—at [13].

The Tribunal found that the state deed signed by the Gnulli native title party was sufficient evidence of their consent to justify making a determination—at [11].

As to the Thalanyji, it was said that:

- the Tribunal must act on the basis of evidence which ordinarily will be provided by the parties;
- there is no onus of proof as such—rather, a 'commonsense' approach to evidence, which means that parties will produce evidence to support their contentions, particularly where facts are peculiarly within their knowledge;
- the Tribunal will not normally conduct its own inquiries and obtain evidence, particularly where a party is represented;
- if a party fails to provide relevant evidence, the Tribunal is normally entitled to proceed to make a determination without it;
- the Thalanyji native title party was represented throughout by someone who, although not a legal practitioner, had experience in acting for native title parties, was fully aware of the consequences of non-participation and who said he had specific instructions from his clients not to participate;
- in these circumstances, the Tribunal fulfilled its statutory obligations under the NTA by

giving the native title party an opportunity to provide contentions and evidence and then proceeding to make a determination on the papers if that opportunity was not taken up;

- the task of the Tribunal in making a determination is a discretionary one which involves weighing the various factors in s. 39 based on evidence produced;
- there was no evidence from the Thalanyji native title party with respect to any matters to be considered pursuant to s. 39;
- it had been impossible to balance the various interests properly because the native title party had chosen not to use the process available under the NTA;
- nevertheless, the Tribunal was satisfied, given the large area involved, the nature of the activities to be undertaken, the non-exclusive nature of any native title rights and interests and the requirement to protect Aboriginal sites, that the grant of the proposed permit could proceed—at [18], [19] and[39].

The Tribunal went onto say that:

> The attitude of the Thalanyji…creates an unsatisfactory situation and is inconvenient to the other parties who are required to commit resources to complying with directions in the normal way. A question arises whether in these circumstances the matter could be dealt with in a more summary way. There is nothing specific in the Act to permit this course of action and neither the Government nor grantee parties made any submission to this effect... [However,] I leave open the possibility that in future matters a different, more summary procedure might be considered to dispose of similar matters, particularly if non-participation by native title parties were to become commonplace—at [14].

When is an application 'lodged' with the Tribunal?

Neowarra/Western Australia/ Thundelarra [2004] NNTTA 102

DP Sumner, 5 November 2004

Issue

Can the Tribunal accept an objection to the application of the expedited procedure that was not lodged 'within the period of 4 months after the notification day': see s. 32(3) of the NTA.

Background

The native title party asserted that, in response to a s. 29 notice which included a statement that the government party considered that the act being notified was one that attracted the expedited procedure, they had posted an objection application within the four-month period specified in s. 32(3). The period ended on 10 July 2004. The Tribunal records indicated the native title party's letter enclosing the objection application was not received until 22 July 2004— at [8] to [13].

When is an application 'lodged'?

The Tribunal considered the ordinary meaning of the word 'lodge' as discussed by the Full Court of the Federal Court in *Angus Fire Armour Australia Pty Ltd v Collector of Customs (NSW)* (1998) 19 FCR 447 at 488. The Tribunal concluded that an objection application is lodged when it is received by post and processed by officers of the Tribunal. The Tribunal found the date of posting could not be said to be the date of lodgement. Therefore, the objection application was not lodged within the prescribed time—at [16] to [17].

The Tribunal confirmed it is the native title party's responsibility to ensure an application is lodged with the Tribunal on time—at [18].

Does the Tribunal have the power to extend the time of lodgement?

The Tribunal held that:

- it has no inherent power to exercise its discretion in this way and even if it did have such a power, it could not do so if it contravened the terms of a statute;
- the words of s. 32(3) of the NTA are clear, import a time limit on the lodgement of objection applications and create a condition precedent to the Tribunal's jurisdiction to conduct an inquiry;
- further, if an objection application lodged out of time was accepted, the Tribunal would be obliged to dismiss the application under s. 148(a) on the basis that the Tribunal was not entitled to deal with it—at [20] to [21].

This interpretation was said to accord with the intention of Parliament and the purpose of the right to negotiate provisions of the NTA:

> The Tribunal has accepted that Parliament intended that proposals to do future acts subject to the right to negotiate provisions should be dealt with in a timely manner…It also accepts that in a procedural sense objection applications are to be dealt with expeditiously *(…Western Australia v Ward & Ors* (1996) 70 FCR 265 at 278…; *Little v Western Australia* [2001] FCA 1706…at [84]-[85]…)
>
> These policy considerations, reflected in the Act generally, support the interpretation that the time limit imposed by s 32(3) is strict; something which is in any event plain from the ordinary words of the Act and the lack of any power or specified circumstances under which the time may be extended—at [22] to [23].

Decision

The application was not accepted.