# Native Title Hot Spots

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## Proposed determination of native title

### *Gumana v Northern Territory* [2005] FCA 50

Selway J, 7 February 2005

**Issue**

The key issue in this application for a determination of native title was whether the claimants had the right to exclude others from the intertidal zone and from the sea around certain sites of significance (the *djalkiri* areas) and temporary exclusion areas.

**Background**

The claim area consists of 1,489 sq km of land and waters in the northern part of Blue Mud Bay in east Arnhem Land. The applicants were members of the Yolngu people, who had a long history of political and legal action asserting their claims to land. Although the area in dispute in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 did not involve Blue Mud Bay, some of those having traditional rights in the area of Blue Mud Bay had been involved in that case either as witnesses or as interpreters—at [11] to [16] and [27].

Pastoral leases had previously been granted over parts of east Arnhem Land including the land portion of the area covered by the application and in 1931 that area formed part of the newly created Arnhem Land Reserve—at [11] and [12].

A grant of fee simple was made in 1980 under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (the Land Rights Act) to the Arnhem Land Aboriginal Trust (the Trust) over land, including the 'land' area of Blue Mud Bay. The seaward boundary of the relevant land was defined as the low water mark—at [19] and [20].

Earlier proceedings were brought to control fishing in Blue Mud Bay:

- seeking orders that the Director of Fisheries did not have power to grant fishing licences allowing fishing in tidal waters within the area of the land grant; and
- to assert and establish the claims of the Yolngu people to the area.

The former matter lead to the decisions of his Honour Justice Mansfield in *Arnhem Land Aboriginal Land Trust v Director of Fisheries* (NT) (2000) 170 ALR 1 and the Full Court of the Federal Court in *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCA 488. The latter matter involved the making of a claimant application—at [21] to [29].

In order to refine the issues in dispute further, the applicants issued two new proceedings. In the first proceeding (the NTA proceeding) the relevant applicants sought a determination of native title under the *Native Title Act 1993* (Cwlth) (NTA) in respect of a reduced area. In the second proceeding (the Judiciary Act proceeding) the relevant applicants sought declarations under the *Judiciary Act 1903* (Cwlth) (Judiciary Act) of their rights under the land grant and orders to restrain the Director of Fisheries from issuing fishing licences in

relation to parts of the area covered by the native title application. The two proceedings were heard together—at [26] to [30].

The respondents conceded that the applicants have a native title right of exclusive possession to that part of the application area to the landward side of the high water mark excluding rivers and estuaries that are subject to the tides. As well, the respondents accepted that the Trust and the other applicants have an exclusive right to occupy the area pursuant to their grant in fee simple under the Land Rights Act, except in relation to the inter-tidal zone—at [34] and [35].

The applicants conceded that, following *Commonwealth v Yarmirr* (2001) 208 CLR 1 (Yarmirr) they could not succeed in their claim for exclusive possession of all of the area seaward of the low water mark, but this concession was qualified in relation to 'two or maybe three [types of ] areas' of spiritual significance—at [36].

Given those concessions, his Honour considered that the following issues remained in relation to both proceedings:

(a) Do all of the issues raised in the Judiciary Act proceedings raise a 'matter' for the purposes of Chapter III of the Commonwealth Constitution?

(b) If they do, does the land grant confer on the Land Trust the exclusive right of occupation over the whole area of the grant? In particular, does it exclude any subsisting public right to fish over the whole area of the grant? If not, does it do so:

- between the high water mark and the low water mark;
- in those parts of rivers affected by the flow and reflow of the tide and, if so, in which parts?

(c) If there is a 'matter', does s. 73 of the Land Rights Act limit the powers of the Northern Territory Parliament in relation to the regulation of fisheries within the area of the grant and/or within two kilometres seaward of the area of the grant?

(d) For the purposes of s. 225 of the NTA, what are the native title interests of the claimants in relation to the area covered by the grant? In particular, do the applicants have a native title right of exclusive occupation to the inter-tidal area? Do they have a right to exclude persons from the *djalkiri* areas?

(e) For the purposes of s. 225 of the NTA, what other rights and interests exist in relation to the area covered by the grant?

In light of the answer to issue (d), what is the effect of s. 47A of the NTA? Is s. 47A of the NTA within the powers of the Commonwealth Parliament? In particular, is s. 47A invalid for being inconsistent with the separation of judicial power implicit within Chapter III of the Commonwealth Constitution?

In light of the answers in relation to the above issues, does the *Fisheries Act 1988* (NT) (Fisheries Act) authorise the Director of Fisheries to grant licences in relation to:

- the inter-tidal zone within the claim area;
- the *djalkiri* areas?

And, in light of the answers to the above issues what determination of native title should be made pursuant to ss. 81, 94A and 225 of the NTA?—at [44]

**The Judiciary Act proceedings**

In relation to the first three issues above, his Honour concluded:

- The court has jurisdiction to determine whether the Fisheries Act validly permits the issuing of fishing licenses authorising fishing in the inter-tidal zone of the land grant, or waters of the sea within two kilometres of the external boundaries of the land grant and whether the Fisheries Act has any application to waters of the sea adjoining, and within two kilometres of the

boundaries of the land grant and to make appropriate declarations in that regard—at [46] to [50].

- He was bound by the decision and reasons of the Full Court in *Commonwealth v Yarmirr* (1999) 101 FCR 171 (Commonwealth v Yarmirr). Therefore, he was bound to hold that the fee simple in the foreshore is qualified in that the rights of the native title applicants do not include rights to exclude those exercising public rights to fish or navigate. Further, they were not excluded by s. 70 of the Land Rights Act. In this decision his Honour approved the reasoning of Mansfield J in *Arnhem Land Aboriginal Land Trust v Director of Fisheries NT* (2000) 170 ALR 1—at [51] to [85].

- His Honour also considered himself bound to conclude that the applicants do not have the right, pursuant to the grant, to exclude those exercising public rights to fish or navigate from estuaries or navigable rivers which are tidal—at [87].

His Honour was clearly not comfortable with the conclusion of the Full Court in *Commonwealth v Yarmirr.* Indeed his Honour was of the view that the common law rights to fish or navigate in the inter-tidal zone had been abrogated by the creation of the reserves over the area. Selway J postulated two possible explanations for the Full Court's reasons and orders:

- the land grant under the Land Rights Act is only of solid land and does not extend to the (sea) waters above it. However, this presented conceptual problems—at [81] and [82]; or

- the grant of a fee simple to the low water mark includes the right to exclude persons from the land and the water above it, but that right is qualified in relation to the public rights to fish and to navigate, but not as to other activities, such as bathing—at [83].

Paragraph 73(1)(d) of the Land Rights Act confers powers upon the Territory to make laws controlling fishing in waters, 'including waters of the territorial sea of Australia, adjoining, and within two kilometres of, Aboriginal land, but so that any such laws shall provide for the right of Aboriginals to enter, and use the resources of, those waters in accordance with Aboriginal tradition'. In his Honour's view, the conferral of powers of self government on the Northern Territory by the *Northern Territory (Self Government) Act 1978* (Cwlth) and extension of these powers to coastal waters by the *Coastal Waters (Northern Territory Powers) Act 1980* (Cwlth) should not be read down by reason of s. 73(1)(d) of the Land Rights Act so as to invalidate licences issued under the *Fisheries Act 1988* (NT)—at [113] and [115].

His Honour therefore determined it was inappropriate to make any of the declarations sought by the applicants in the Judiciary Act matter—at [118].

**Nature of a determination of native title**

In relation to issues (d) and (e), Selway J considered the nature of a determination of native title and discussed the elements of statutory native title with reference to existing authorities—at [119] to [151].

**Anthropological evidence**

Selway J made some interesting observations concerning the admissibility of anthropological evidence. His Honour observed that the description of anthropological evidence as 'expert' evidence has the potential to mislead. Contrary to the common assumption that 'expert' evidence is primarily a variety of opinion evidence, his Honour felt that much anthropological evidence was the direct consequence of significant field work over a lengthy period, and may not be evidence of opinion at all. Rather, it may be the direct evidence of the observations that the anthropologist has made—at [156].

Similarly, evidence given by anthropologists which is derived from what that person has been told by others is complicated by the hearsay rules of evidence. Selway J expressed the view that evidence of a 'custom' or tradition including evidence of what is believed about a custom or tradition is evidence of a fact and is not hearsay. It can be treated as evidence of 'reputation' for this purpose and so there was no prohibition under the *Evidence Act 1995* (Cwlth) of the admissibility of that evidence. 'It is direct evidence of facts and is admissible' as such. This approach is less applicable where the evidence arises from an investigation specifically for the purpose of giving evidence in particular litigation—at [157], [159], [160].

Selway J noted one problem often associated with anthropological evidence is that of partiality, in other words, whether it is 'evidence' or 'argument', but this should not lead to a discounting of the weight of anthropological evidence simply because other parties have not been able to provide other experts with the same knowledge and contact with the applicants. Indeed, '(i)f the respondents are not in a position to challenge the evidence, then it may be appropriate for them to consider whether they can properly dispute the claims based on that evidence'—at [163] to [164].

Another problem relates to the form in which written anthropological reports often seem to be prepared. His Honour agreed with Sackville J who commented in *Jango v Northern Territory (No 2*) [2004] FCA 1004 at [11]:

> "it is often difficult to discern whether the authors are advancing factual propositions, assuming the existence of particular facts, or expressing their own opinions"…close liaison between the lawyer and the anthropologist may be needed to ensure that the anthropologist's report not only properly reflects the views of the expert (rather than the hopes of the lawyer's clients), but that it is in a proper admissible form—at [165] and [166].

Many of the above observations applied to the applicants' anthropologist in the present case. His Honour had no concerns about accepting his evidence. His conclusions were entirely supported by the Aboriginal evidence; the conclusions drawn were generally supported by the (extensive) anthropological literature, and to the extent that the anthropological evidence involved matters of opinion, those opinions were confirmed by the other anthropologists for other parties—at [167] to [171].

Orders made for a 'hot tub' involving each senior anthropologist for each party under the supervision of the Deputy Registrar enabled the experts to identify the issues and principles about which they agreed or disagreed. This reduced areas of disagreement to two significant issues involving rights in the sea and whether a 'right of innocent navigation' is recognised by Yolngu law. These were eventually settled after hearing the evidence of the Yolngu witnesses or as the result of concessions made by the applicants—at [173] to [175].

**Yolngu evidence**

The applicants called six Yolngu witnesses, all experienced senior men. 'Individually and collectively they were impressive witnesses'—at [179] and [183].

His Honour saw advantages in the witnesses preparing written statements as part of their tender of evidence, in terms of time and prior preparation. Objections as to this involving evidence in narrative form and asking leading questions were overruled on the grounds that the Evidence Act permits such with leave of the court—at [180], [182] and [184].

**Maintenance of traditional law and custom—s. 223(1)(a)**

Concerning continuity of tradition:

> [u]ltimately the evidence of the existence of the relevant Aboriginal tradition and custom as at 1788, and of the rights held by the particular clans in 1788 and thereafter pursuant to that tradition and custom, is

based upon evidence derived from what the Yolngu claimants currently do and from what they have observed their parents and elders do and from what they were told by their parents and elders—at [194].

His Honour considered such a conclusion could be inferred from the witness evidence in this case, and that there was sound common law authority to do so—at [197] to [202].

Subject to what is said below in relation to succession, his Honour found that:

- the relevant clans had the same system of traditions, laws and customs as at 1788; and
- they have observed those traditions, laws and customs from that time to the present—at [202].

In relation to the claimed right by the clans to exclusive possession of their lands, his Honour concluded, subject to certain exceptions, that 'the evidence clearly established that the relevant clans have a right to exclude others, whether Aboriginal or not, from their land'—at [209].

His Honour accepted that it was clear from the evidence that Yolngu law makes provision for the succession of rights (and obligations) between clans and that such succession had occurred in relation to one clan which no longer had any living members, and another with no remaining senior men—at [217] to [220].

The evidence established that nine *djalkiri* sites did exist in the waters and tidal foreshores of the claim area and the claimants still observed rules in relation to them—at [221] to [224].

### Connection by those laws and customs—s. 223(1)(b)

His Honour broadly dealt with connection, observing that:

> [i]t is probably true to say that the connection between the Aboriginal group and its country in accordance with Aboriginal tradition and custom is ordinarily a "spiritual" connection. It is also true that that connection is usually reflected in the physical occupation of the relevant land. This does not mean, however, that every right or interest enjoyed by every Aboriginal has to have a "spiritual" aspect to it. "Cultural" and "social" connections may also be sufficient: see *Yanner* at 373[38] … Nor does it mean that every right must be reflected in the physical occupation and use of the land—at [228].

During a period between 1935 and the mid-1970s referred to as the 'mission period' there was a break in physical connection with the claim area. No party disputed, and his Honour accepted, that this physical break did not bring an end to 'connection' between the claimants and the claim area 'for the purposes of the NTA':

> …the clans retained their connection with the land under their traditions and customs. The evidence was clear that they continued to visit the area during that period and that they still treated the land as their country.

### Recognition of rights and interests by common law—s. 223(1)(c)

In relation to the inter-tidal zone, Selway J briefly discussed a 'difficult question' as to the effect of inconsistent common law rights upon a traditional right of exclusive occupation. His Honour felt that question raised the issue of whether the right of exclusive possession should be considered as one general right, or as a 'bundle' of separate rights, or whether its correct characterisation is a question of fact. This was relevant because, apart from certain exceptions, there was no evidence (or insufficient evidence to satisfy his Honour) that the claimants had any rights separate and distinct from the right of exclusive possession. However, given the concessions made by the parties referred to above, it was unnecessary for his Honour to consider this issue further—at [231] to [240].

In relation to the *djalkiri* areas, Selway J observed that the High Court in *Yarmirr* had not addressed this issue. His Honour was of the view that a traditional right to exclude from an area of the sea or from the inter-tidal zone is inconsistent with the common law public right to fish and navigate. This was so even though the areas involved were not great and possibly it would not be inconsistent with the public right to navigate to limit access to the *djalkiri* areas, particularly as many of them involved or included rocks, reefs and other hazards to navigation.

His Honour held:

> [h]owever, statute aside, it would not appear that the public right to fish could be limited to particular areas. In my view a right to exclude from djalkiri areas would be inconsistent with the common law right to fish. Consequently, the traditional right of the claimants to exclude from sites to the seaward of the high water mark (which area would include rivers and estuaries affected by the tides) was not recognised as a native title right by the common law at the date of settlement. On the basis of existing authority it is my view that the applicants' native title rights in relation to those areas are the same as those identified by Cooper J in Lardil *(Lardil Peoples v Queensland* [2004] FCA 298)—at [243].

Notwithstanding this, His Honour added that 'this does not mean, of course, that persons can access those sites'. On the evidence before the court, the nine sites would be 'picked up' by the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT)—at [244].

**'Extinction'**

Given the concessions made by the parties it was not necessary to consider extinguishment in any detail. 'For the sake of completeness', it was observed that any native title rights in minerals or petroleum were extinguished by the statutory vesting of minerals and petroleum in the Crown (following the High Court in *Western Australia v Ward* (2002) 213 CLR 1). His Honour also held that '[t]o the extent that the claimants or their ancestors possessed any exclusive or commercial right to fish, that right was extinguished in part by the various statutes dealing with fisheries which were applicable from time to time in the Northern Territory' leaving a non-exclusive right to take fish for non-commercial purposes (following *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 at 594-600 [137-157] and *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCR 488 at 15–18 [54]–[71])—at [247].

**Comment**

His Honour's use of the term 'extinction' is, with respect, idiosyncratic. The term has had some rare currency in the past as a loose synonym for 'extinguishment' in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (Brennan J at [63], [72], [73]; Dawson J at [34]), *Wik Peoples v Queensland* (1997) 187 CLR 1 (Gummow and Kirby JJ) and *Western Australia v Commonwealth* (1995) 183 CLR 373 (Native Title Act Case) (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at [101]), but the term 'extinguishment' has become the more accurate and descriptive judicial term of art in recent years. The NTA speaks exclusively in terms of 'extinguish' and 'extinguishment' (see, for example, s. 237A).

Further, his Honour's conclusion that the statutory fisheries regime extinguished in part any exclusive right to fish, with respect, appears to misinterpret what was said both in *Yarmirr* and the *Land Trust* case. In the former case, Justice Olney held that it was the common law that did not recognise an exclusive right to fish, and consideration of the statutory regime was only relevant in the context of a claim to non-exclusive rights. In *Yarmirr* his Honour said:

> Nothing about the history of the legislative and administrative control of fishing in relation to the claimed area is indicative of an intention to extinguish a non-exclusive, non-commercial native title nor to create inconsistent third party rights—at [154].

In relation to the latter case the issue before Justice Mansfield was whether the statutory regime had abrogated the public right to fish—at [71].

**Applicability of s. 47A**

Selway J accepted that s. 47A of the NTA applied to the area of the land grant, including the inter-tidal zone and the waters above it. A submission that the occupants did not 'occupy' the inter-tidal zone was rejected—at [249] and [250].

The applicants sought to have the effect of s. 47A extended so as to disregard the 'non-recognition' by the common law of the traditional right of exclusive possession in relation to the inter-tidal zone, thereby 'disregarding' the effect of the public rights to fish and navigate in that zone. This submission was rejected by his Honour—at [252] and [263].

His Honour carefully distinguished between 'non-recognition' of native title by the common law (notionally as at the date of settlement), and 'extinguishment' of native title by an exercise of 'sovereign will' since settlement—at [254] and [255].

In his Honour's view, an examination of the intention of Parliament suggested that 'the word "extinguishment" in s. 47A(2) NTA means extinguishment by an act of sovereign will (usually legislation or an act done pursuant to legislation) of a right capable of recognition by the common law as at the date of settlement'—at [261].

It was unlikely that the word 'extinguishment' was intended to include 'non-recognition' which is not limited to inconsistency with common law rights, but includes non-recognition on the basis that the rights claimed, or the traditions on which they are based, are ones that the common law would not recognise for reasons of judicial policy—at [256] to [257].

**Validity of s. 47A**

The High Court in the Native Title Act Case observed that the legislative power to enact the NTA is subject to implied limitations arising from the text and structure of Chapter III of the Commonwealth Constitution. These include the limitations that the Parliament cannot exercise judicial power and that the judiciary cannot exercise legislative power. The Northern Territory argued that s. 47A NTA does both. It said that the Parliament is exercising judicial power and that the courts are exercising legislative power—at [265] to [266].

Selway J considered that s. 47A of the NTA:

> does not direct the court as to the manner in which it is to exercise its jurisdiction. Instead, it directs what law is to be applied in the proceedings, subject to the ascertainment of various facts. It does not direct what findings should be made in that regard. The direction as to what law should be applied is a proper function of the Parliament. ….. (L)egislation in similar form to s. 47A NTA is relatively common. It is certainly not incompatible with the judicial function—at [267].

Alternatively, it was argued that s. 47A confers on the court the non-judicial function of creating rights. His Honour did not agree. To the extent that s. 47A may create rights, this is merely the consequence of applying the legislation following the judicial finding that the statutory pre-conditions have been met. 'It is s. 47A NTA, not this Court, that "creates" the relevant rights'—at [268].

**Decision**

In general terms the native title rights of the native title holders were found to be:

- a right of exclusive possession to the 'land' other than the inter-tidal zone (including the area of rivers and estuaries affected by the ebb and flow of the tides);

- and rights 'similar to those identified in *Yarmirr* as further explained in *Lardil*' in the sea and the inter-tidal zone (as extended above)—at [275].

All parties were given the opportunity to make further submissions as to the form of the final orders, including any determination under the NTA, after they had the opportunity to consider the reasons—at [274].

## Strike-out application

### *McKenzie v State Government of South Australia & Ors* [2005] FCA 22

Finn J, 27 January 2005

**Issues**

Whether the Kuyani native title determination application (the Kuyani claim) should be struck out under s. 84C(1) of the *Native Title Act 1993* (Cwlth) (the NTA) or otherwise dismissed under s. 84C(4) of the NTA and O. 20 r. 2 of the Federal Court Rules.

**Background**

The Kuyani claim was originally lodged in 1995 and has been amended on six occasions. The six amendments 'substantially altered its character'. The original claim was made by a body corporate, the Kuyani Association Incorporated, membership of which 'was open to Aboriginal people of the Kuyani tribe and (within limits) to persons who have descended from the Tribe. Membership was conferred by the decision of a membership committee and a membership fee was to be paid'. The claim area entirely overlapped a smaller area the subject of the Adnyamuthna people's claim—at [3] to [6].

An agreement between the Kuyani Association and the Adnyamuthna people had the effect of:

- excising the Adnyamuthna claim area from that of the Kuyani claim;
- including the Kuyani in the Adnyamuthna claim;
- recognising that the Adnyamuthna people had interests in the eastern part of the association's claim.

This required amendments to both applications.

The amended Kuyani application was filed in December 2000. In it:

- the name of the applicant was changed from the Kuyani Association to Mr McKenzie;
- a list of named members of the claim group excluded six of the 'principal families' included in the 1995 application; and
- the claim area was amended to exclude the area of the Adnyamuthna claim.

The application at Schedule R stated that a certificate of the Aboriginal representative body for the area is to be attached. This was not the case. Instead Mr McKenzie's accompanying affidavit referred to his authorisation in accordance with traditional laws and customs which must be complied with, namely a process of consensus decision-making—at [12] and [13].

The amended application was combined with another application which had the effect of incorporating additional areas of land into the combined application. That application was further amended three times, so as to, among other things, further change the description of the native title claim group—at [15] to [20].

Leave was given to correct typographical errors in the last of these amended applications. His Honour Justice Finn observed that 'this seems to have been interpreted liberally'. The amended claim was filed in October 2004, and the composition of the claim group was further recast. The parties agreed to his Honour regarding this latter amended application as the subject of the present strike-out application—at [21].

The strike-out application was filed by the Aboriginal Legal Rights Movement (the ALRM). Among the affidavits filed by the ALRM were two from persons claiming to be Kuyani but nonetheless excluded from the claim group description.

**Whether the old or new Act applied**

The transitional provisions to the *Native Title Amendment Act 1998* (Cwlth) relevantly include the following clause 21:

> Section 84C of the new Act applies where the main application mentioned in that section was made either before or after the commencement of that section. If the main application was made before the commencement, the reference in that section to section 61 or section 62 is a reference to section 61 or section 62 of the old Act.

His Honour noted that, while a number of cases had dealt with the operation of the transitional provision and the principles to be applied when an old Act application has been amended after 1998, the principles are not yet settled. At the heart of the controversy is whether amendment of an old Act application under the new Act means that the transitional provision ceases to apply or whether that outcome only occurs if the amended application can be characterised as being, in substance, a fresh application—at [30].

His Honour was of the view that it was 'abundantly clear' from the evidence that the amended applications made in and after 2000:

- involved claim groups different from the 1995 claim and 1998 amendment, and
- related to a significantly altered claim area.

Thus, his Honour concluded that there was, in substance, a fresh application made in 2000 and therefore the s. 84C strike-out application was to be determined by reference to the provisions of the new NTA. This meant complying with s. 61 and s. 62 of the NTA—at [32] and [34].

When considering this compliance two issues arose:

- Did the October 2004 amended application, with supporting evidence, properly identify the native title claim group?
- Was the applicant properly authorised by the native title claim group?

**Describing/naming the native title claim group**

'Native title claim group' is defined in s. 61(1) as those persons who, according to their traditional law and custom, hold the common or group rights and interests comprising the particular native title claimed. Subsection 61(4) also requires that a native title determination application must name the persons in the native title claim group or otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons—at [38] and [39].

Finn J concluded that the applicant's own evidence indicated the individuals named in Schedule A to the October 2004 application were 'both under inclusive and over inclusive of the persons holding the group rights and interests comprising the native title claimed'. His Honour cited *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60] to [61] which says that a subset or part of what 'truly constitutes' a native title group cannot itself be a claim group under s. 61. The present case was not an instance where there may be good reason for hesitation in readily concluding that an alleged group is only a sub-group or part of a group for s. 84C purposes, as in *Colbung v The State of Western Australia* [2003] FCA 774—at [41].

Finn J could not, from the material before him:

> [D]ivine the descriptive criteria that makes the named persons members of the native title claim group. I would have to say that the fluctuation in the numbers of listed names in the various Schedules A since December 2000 does little to reassure that the naming process is one founded on ascertainable principles or criteria—at [44].

**Authorisation**

Finn J cited *Strickland v Native Title Registrar* (1999) 168 ALR 242 at 259, as saying that the

concept of a person being 'authorised' by all the persons in the native title claim group is 'fundamental to the legitimacy of native title determination applications' under the New Act—at [46].

His Honour observed that 'in the course of his making his various amended applications and in seeking registration of the application Mr McKenzie ascribed his authorisation to various disparate sources'—at [49].

Because his Honour was of the opinion that the amended application of December 2000 (therefore affecting all subsequent amended applications) was 'in substance a fresh native title claim for a new native title claim group and for a new claim area,' the relevant authorisation had to be given by that ('new') claim group—at [56].

His Honour could not find any indication:

> in the evidence, let alone in the prescribed affidavit (see s. 62(1) of the Act) that this "group" has purportedly authorised Mr McKenzie in a way that satisfies the requirements of s. 251B of the Act—at [56].

In conclusion, his Honour was not satisfied that the requirements of ss. 61(4), 62(1)(iv) and (v) of the NTA had been met. His Honour was not prepared to allow a further opportunity to amend the application given its long history and the amendments made to it since the filing of the s. 84C application. It was unlikely that the application's flaws could be cured by further amendment—at [61].

His Honour noted in passing the inadequately completed affidavit accompanying the October 2004 application, preferring to rely on 'matters of substance, not form' although in saying that, his Honour made it clear that he did not wish to be taken as condoning such non-compliance with s. 62 of the Act—at [48].

**Decision**

Finn J ordered that the claimant application be struck out—at [62].

**Postscript**

In a postscript , 'a ruling on evidence', Finn J refused an application by the ALRM to tender under s. 86 the transcript of preservation evidence taken some time ago. His Honour refused the tender under s. 135 of the *Evidence Act 1995* (Cwlth) because 'it would be unfairly prejudicial to Mr McKenzie'. At the preservation hearing, which occurred after the filing of the s. 84C strike-out application, objection was taken by Mr McKenzie's counsel, to a line of questioning which seemed to relate directly to the strike-out application. Counsel for the ALRM disclaimed that such was his purpose.

Importantly, his Honour felt the preservation evidence:

> was there taken in a contextual vacuum. There was no issue being determined, no other evidence being put to support, contradict, or qualify what was being said by Mr McKenzie. In my view it would be quite unfair to use that evidence for the purposes the ALRM now proposes—at [63] to [65].

## Leave to reopen and public works

### *Daniel v Western Australia* [2005] FCA 178

RD Nicholson J, 4 March 2005

**Issue**

There were a number of issues before the Federal Court in respect of a Minute of Proposed Determination of Native Title. While there were a number of matters agreed between the parties for inclusion, this summary deals with the main issues of contention before the court. These relate to the inclusion of a pastoral lease omitted from a previous judgment in this matter and a notice of motion by the State of Western Australia (the state) to add to the definition of extinguished areas within the Minute of Proposed Determination.

**Background**

This decision is another from the court addressing the settlement of a determination of native title, a draft of which was handed down in *Daniel v Western Australia* [2003] FCA 666, summarised in *Native Title Hot Spots* Issue 6. See also Daniel v Western Australia [2003] FCA 1425, summarised in *Native Title Hot Spots* Issue 8 and *Daniel v Western Australia* (2004) 208 ALR 51; [2004] FCA 849, summarised in *Native Title Hotspots* Issue 11.

**Pastoral Lease 398/824**

The state submitted that pastoral lease 398/824 should be included within the First Schedule definition of 'Ngarluma Total Extinguishment Area' and the definition of 'Yindjibarndi Total Extinguishment Area' because, while it was previously omitted through oversight, it was indistinguishable from the other pastoral leases in those definitions.

The first applicants sought to contest the legal basis for the presence of any pastoral lease in the above definitions and argued that if leave were granted to argue the inclusion then the legal basis for that inclusion should also be re-argued.

His Honour Justice Nicholson had previously declined to re-hear argument on the issue of whether pastoral leases wholly extinguished native title. He stated that the first applicants should not now 'be allowed to make submissions in relation to the extinguishing effect of this pastoral lease separately from the decisions made in relation to other pastoral leases which have been held to extinguish native title'. His Honour found that the lease was relevantly indistinguishable from pastoral leases found to have wholly extinguished native title and accepted the submission from the state that the omission of this lease from previous judgments was an oversight brought about by its omission from the relevant submissions to the court. Pastoral lease 398/824 was included in the Total Extinguishment Area in the draft determination—at [6] to [8].

**Motion for Leave to Reopen**

Nicholson J held that despite the need to bring the process of reopening to an end and the fact that the evidence sought to be adduced could have been previously discovered, that the evidence presented by the state was so material that the interests of justice required that leave be granted to reopen.

Further, his Honour said that, the following support leave being granted:

- the evidence would most certainly affect the result to the extent of the interests concerned;
- there was no demonstrated prejudice to the first applicants in that the issues raised were the subject of submissions by them;
- there is a public interest in properly finalising the 'once up' opportunity for a determination of native title;
- the merits of the contentions on the matters the subject of the reopening—at [11] and [12].

Nicholson J then considered the matters raised by the state for inclusion.

**Wickham High School**

No contention was raised that Wickham High School should not be included as reserve 46193 in the First Schedule, definition of 'Ngarluma Total Extinguishment Area'—at [15].

**Church**

On 12 December 1975 the Under Secretary for Lands granted to the Bishop of Geraldton a Right of Entry to enable work to commence on the church. On that basis Nicholson J found that it was more probable than not that the church was constructed prior to 1980. This was relevant because, prior to 1980, s. 164 of the *Land Act 1933* (WA)(the Land Act), which dealt with the construction of a building on Crown land prohibited 'unauthorised' use of Crown land. After that year the provision was differently worded—at [16] and [17].

The state contended that the act of construction was valid and was a previous exclusive possession act under s. 23B(7)(b) of the *Native Title Act 1993* (Cwlth)(NTA) and s. 12J of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA)(the TVA). The first applicants contended that the words in the definition of public work in s. 253 of the NTA—'with the authority of the Crown' meant more than just with the approval or permit of the Crown, and that it referred to a concept of agency and acting for or on behalf of the Crown—at [20].

The state's submissions were:

- that the Macquarie Dictionary defined 'authority' to include 'a warrant for action; justification' which is the correct meaning in this context;

- that paragraph (a) of the definition of public work in s. 253 NTA refers expressly to things constructed 'by or on behalf of the Crown'. The change to 'with the authority of the Crown' in paragraph (b) signals a different meaning. To interpret the phrase in terms of a concept of agency was to read paragraph (b) as a mere restatement of paragraph (a)(i) which could not have been the legislative intent; and

- that to read paragraph (b) of the definition as confined to buildings that relate to the ultimate benefit of the crown, rather than simply works done by a private person is to add to the definition a criterion not expressed.

Nicholson J held that the reference to authority should be read as referrable to its normally understood meaning of providing justification by the grant of approval or permit—at [22].

The grant of a Right of Entry in December 1975 was expressly made to enable works to commence. Thus, his Honour held that the grant established that the church was a building constructed 'with the authority of the Crown'—at [23].

**Validity of church construction under state law**

His honour held that the authority to construct the church was sufficient in law for the purposes of s. 164 of the Land Act, even though at all relevant times the Land Act contained no provision for formality in granting authority to use or build on Crown land—at [24] and [25].

**Validity of church construction by reason of native title**

Nicholson J went on to consider whether the act was invalid by reason of native title. Section 12J of the TVA provided for confirmation of extinguishment in relation to public works where they were previous exclusive possession acts under s. 23B(7) of the NTA where those are attributable to the state. He therefore considered whether pursuant to s. 239(c) of the NTA the construction of the church was attributable to the commonwealth, a state or territory.

Nicholson J held that under s. 239 the reference to 'any person under a law of the commonwealth, the state or the territory' meant a person given authority of the 'state' to do that act. His Honour held that it was not addressing a person who has obtained the authority of the state under a provision in a law of the state but someone whose act is attributable to the state because the state by a law has authorised that person to do the act, not merely authorised all persons to apply for an authority by some process. Nicholson J held that the construction did not satisfy the requirement of s. 12J(1)(a) of the TVA that the act be a previous exclusive possession act which was 'attributable' to the state. His honour also concluded that the same requirements in s. 5 of the TVA which validated every past act attributable to the state was similarly not met—at [31].

**Creation of the church reserve**

The state submitted that if native title were not extinguished by the construction of the church, the creation of the reserve in 2002

would be a 'past act' under s. 228(3)(b)(ii) of the NTA, in that the act that took place on or after 1 January 1994, and gave effect to, or was otherwise done because of, an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993, and of which there was written evidence created at or about the time of the offer, commitment, arrangement or undertaking was made. The state submitted that the affidavit evidence established that there was a commitment, arrangement or undertaking given in the 1970s to the Roman Catholic Church that the area in question would be reserved for the church. Nicholson J accepted this submission and held that the creation of the reserve was a category D past act to which the non-extinguishment principle applied and reserve 46888 should be included in the Second Schedule as an 'other interest'—at [33] and [34].

**Comment**

While it will not apparently change the outcome, the analysis in this matter seems, with respect, incomplete. It does not consider whether the grant of a Right to Entry was a past act or not, nor come to any express conclusion as to the validity of the construction of the church.

**Roads**

Submissions were heard in relation to sections of the Point Samson-Roeburn Road and the Spinifex Drive and Tamarind Place and Hakea Roads. These submissions related to the dedication of sections of these roads under s. 28 of the *Land Administration Act 1997* (WA). These dedications were wider than the areas of road constructed in 1982 and 1984 respectively. It was accepted that where construction had occurred, this construction was valid and a previous exclusive possession act under s. 23B(7) NTA and s. 12J TVA had wholly extinguished native title over the constructed roads and the area necessary or incidental to the construction of the roads—at [35].

The state submitted that the whole of the dedicated area was necessary or incidental to the construction and maintenance of the road and was therefore part of the public work under s. 251D NTA. The state sought support from the decision in *Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory of Australia* (2000) 104 FCR 380 at [127] (Wandarang) where Olney J held that having regard to the physical environment in the remote areas of the Northern Territory where weather conditions may necessitate temporary diversions, it was not unreasonable to treat the area of the road as the whole of the area set aside to be used for the road.

In the alternative, the state submitted that to the extent some of the area dedicated as roads in 2002 were not the subject of earlier public works which had wholly extinguished native title, the dedications were valid under s. 24KA(3) of the NTA and the non-extinguishment principle applied—at [38].

The first applicants submitted that specific evidence should be tendered to establish that the areas are necessary or incidental and that *Wandarang* should be distinguished on the basis that the roads in question here were close to towns and built-up areas rather than remote areas—at [39].

Nicholson J followed *Wandarang* and held that it was appropriate to treat each of the road areas as having been set aside to be used for roads and therefore extinguish native title over the whole of the dedicated areas—at [40].

## Dismissal application—leave to appeal and extension of time

### *Wharton v Queensland* [2004] FCA 1761

Emmett J, 4 February 2004

**Background**

The Bramfield applicants had previously applied for dismissal of the claimant application under s. 84C of the NTA on the

ground of lack of authorisation. On 3 December 2003, his Honour published reasons concluding that cl. 21 of the transitional provisions to the *Native Title Amendment Act 1998* (Cwlth) applied and that the application need only comply with ss. 61 and 62 of the old Act. It was common ground that it did comply with those provisions. Accordingly, on 10 December 2003, he ordered that the motion be dismissed—at [3] and [4] (see *Native Title Hot Spots* Issue No 8).

### Application

In this application the Bramfield applicants sought leave to appeal from those orders and an order extending the time within which to make the application for leave. On the day of hearing counsel further requested that the whole of the motion be referred to a Full Court. The request was opposed by Mr Wharton—at [1] and [2].

### Decision

His Honour concluded that having regard to the history of the application, the question of authorisation should be resolved by a Full Court. While he did not doubt the conclusion he had reached on 3 December 2003, his Honour considered the matter was one of some significance and 'it may be that there would be, in some circumstances, a conflict between [his] reasons and reasons of other judges of the court'. For that reason he was be disposed to grant leave to appeal—at [5].

He was not, however, persuaded that the explanation for the failure to comply with the rules as to time was totally satisfactory. He noted however, that refusal of an extension would be fatal to any application for leave to appeal. Rather than form a final view as to the appropriateness of an extension of time, his Honour considered it preferable to accede to the request and refer the notice of motion to a Full Court—at [6].

On the question of costs he noted that the parties had prepared their case on the assumption that the motion would be dealt with on the day. It was not until the day of hearing that the applicants made clear the intention that the matter not proceed today. In the circumstances, his Honour considered it appropriate to order the applicants to pay the costs of the parties thrown away by a need to refer the notice of motion to a Full Court—at [9].

Accordingly his Honour ordered that:

- the notice of motion filed on 9 January 2004 be referred to the Full Court of the Federal Court;

- the applicant on the motion pay the costs of the parties thrown away by reason of the referral of the motion to the Full Court—at [10].

### Comment

This decision was handed down some time ago. It is included for completeness. The decision of the Full Court, in refusing to grant leave to appeal the decision of Emmett J, is summarised in *Native Title Hot Spots* Issue No 10 *(Bramfield v Wharton).*

## Authorisation of the applicant

### *Fesl v State of Queensland* [2005] FCA 120

Spender J, 22 February 2005

### Issue

Can a s. 66B application 'regularise' a claimant application that was not properly authorised at the time it was made?

### Background

Two notices of motion were before the court:

- one filed by the applicant, seeking leave to discontinue the claim; and

- a s. 66B application seeking to replace the applicant in the claim—at [1].

The application had been registered since 1999.

**Reasoning**

Spender J was of the view that he ought to consider the question of discontinuance first as the question of whether Dr Fesl's replacement was authorised pursuant to s. 66B was the 'subject of fierce controversy'—at [21].

**Leave to discontinue claim**

Order 22 r. 2(2), of the Federal Court Rules requires that: 'a party who represents any other person in the proceeding shall not discontinue his claim for relief under sub-rule (1) without the leave of the Court.'

The State of Queensland, one Indigenous claimant, and a large number of Indigenous respondents suppoprted the application for discontinuance but it was opposed by persons associated with the s. 66B application—at [17].

It was common ground that the original application had never been properly authorised as required by s. 61(1) of the Act. Consequently, his Honour was of the view that the proceeding was likely to be held to be 'flawed from the outset' or 'foredoomed to fail'. Further, his Honour was of the view that the application was not even a 'claimant application', as defined in s. 253 of the NTA. That section defines a claimant application to mean:

> [a] native title determination application that a native title claim group has authorised to be made, and unless the contrary intention appears includes such an application that has been amended.

If the application was not authorised it could not be a native title determination application as the essence of the latter is one which requires that there has been an authorisation by the native title claim group—at [2] to [4].

His Honour noted the comments in *Covell Matthews and Partners v French Wools Ltd* (1977) 1 WLR 876, at 879 where his Honour, Graham J said, among other things, the following:

> [T]he court will, normally, at any rate, allow a plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. It is not desirable that a plaintiff should be compelled to litigate against his will. The court should therefore grant leave, if it can, without injustice to the defendant, but in doing so should be careful to see that the defendant is not deprived of some advantage which he has already gained in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved—at [6].

His Honour was very conscious of the fact that discontinuance would deprive the present claimants of the 'benefits of registration'. In his Honour's view however, discontinuance would not:

> … deprive them of benefits already obtained, and it will not prevent a new claim being registered, assuming it satisfied the requirements of NTA. The native title holders, including any who were not claimants under the present claim, retained protections afforded by the future act provisions of the NTA—at [7].

**Section 66B application**

Spender J was not persuaded by the argument that because the applicant lacked authorisation to initiate the claim, she was powerless to seek to discontinue it—at [19].

His Honour noted that all parties were agreed that the applicant was not authorised by the claimant group, although there was a wide diversity of opinion as to what was the correct claimant group. In his Honour's opinion if the application was not a 'claimant application' s. 66B of NTA was incapable of application. This is because authorisation is a threshold requirement for the operation of s. 66B of NTA. The section is based on the condition that the applicant in a native title claim had authority to act which was conferred at the time when the claim was made—at [22] and [24].

His Honour was satisfied that the original application was not authorised as required by s. 61 of the NTA and did not constitute a 'claimant application' as defined by s. 253. It was appropriate in all the circumstances (including disagreement as to the identification of the proper claim group) to permit leave to discontinue the proceedings—at [27].

### Decision

The applicant was given leave to discontinue the proceedings pursuant to O. 22 r. 2(2) of the Rules of the Federal Court. Given the outcome, the court considered that it would be otiose to consider the motion seeking replacement of the applicant pursuant to s. 66B, and thus the relief sought by that motion was refused—at [28] to [30].

## Admissibility of evidence

### *Jango v Northern Territory of Australia* (No 5) [2005] FCA 281

Sackville J, 21 March 2005

### Issue

The parties sought rulings on the admissibility of paragraphs in a number of documents tendered as evidence by the Commonwealth in the hearing of a compensation application.

### Background

For information on previous decisions by his Honour Justice Sackville on the admissibility of evidence in these proceedings see *Native Title Hot Spots* No. 11.

### Prior inconsistent statement allegations—Field notes tendered pursuant to s.43 of the Evidence Act 1995 (Cwlth)

The Commonwealth sought to tender notes of a conversation recorded by Professor Tomlinson (Document 5) that it contended supported a prior inconsistent statement made by Dr Willis. Sackville J found the alleged inconsistency was not made out and the tender of the document was rejected—at [3] and [4].

Consultation notes recording a discussion between Windlass Kunamarra and Mr Allan were alleged to record statements that there were no women's sites in a particular area. Sackville J noted Windlass denied making the statement and the Commonwealth had not referred his honour to any passages inconsistent with the statement recorded by Mr Allan. Without a reference to such passages the tender of Document 6 was not supported by s. 43 of the Evidence Act—at [5] and [6].

### Diary notes

Diary notes of Derek Roff (Document 8(b)) were tendered to provide 'further information about the context of admitted facts'. Mr Roff had been cross-examined about observations made in his diary and what he meant by them. Sackville J proposed to reject the tender in the absence of greater specificity as to the relevance of the diary—at [7] and [8].

In contrast, diary notes made by Ian Cawood, a ranger at Ayers Rock (as it was then called) (Documents 9(a)–(e),(g)) were supported by the questions asked in cross-examination that inaccurately described the recorded information or did not elicit certain information relevant to evaluating the significance of Mr Cawood's evidence. While his Honour thought that Mr Cawood could (and perhaps should) have been asked about these entries he proposed to admit them as they may be relevant to the issues—at [9] and [10].

### Dictionary exhibits

The applicants objected to the tender of dictionary extracts from Pitjantjatjara/Yankunytjatjara–English dictionaries on the ground the Commonwealth did not refer to the extracts in examination in chief of its witnesses. Sackville J noted the material tendered was all publicly available and some of it was prepared by witnesses called by the commonwealth. He admitted the exhibits—at [11] and [12].

# Section 211 as defence to prosecution

## *Lewis v Wanganeen and Harradine* [2005] SASC 36

Bleby J, 28 January 2005

### Issue

The relevant issue was whether s. 211 of the NTA provided a defence against a charge of being in breach of s. 44 of the *Fisheries Act 1982* (SA) (the Fisheries Act).

### Background

This is an appeal against a decision of a magistrate to make a finding of no case to answer on the charges and dismiss them. The magistrate made his decision without hearing submissions from the respondents, although they had foreshadowed a defence relying on s. 211 of the NTA. His Honour Justice Bleby interpreted s. 211 to mean:

> [I]f the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on hunting, fishing and gathering, and some other law prohibits or restricts persons from carrying on that class of activity other than in accordance with a licence, permit or other instrument granted or issued under the law… in those circumstances the law does not prohibit or restrict native title holders from carrying on the class of activity where they do so … for the purpose of satisfying their personal, domestic or non-commercial communal needs; and in exercise or enjoyment of their native title rights and interests—at [1] to [3] and [35].

The parties agreed that:

- officers of the Fisheries Department stopped a vehicle which was seen leaving a beach;
- the vehicle was then occupied by the respondents; and
- in the vehicle there were found 250 greenlip abalone, of which 64 were undersize for the purpose of regulation 7(1) of the Regulations under the Fisheries Act—at [12].

The prosecution had tendered evidence that included statements made by one of the respondents which referred to his being engaged in 'hunting and gathering' to 'feed my family'—at [20].

Bleby J considered that the 'evidence before the Magistrate fell far short of establishing rights under s. 211 of the NTA'. His Honour observed that there was no evidence from the defendants as to the following:

- that the respondents were Aboriginal people;
- of the nature of their native title rights and interests as defined in s. 223 of the NTA;
- that such a large quantity of abalone was for the purpose of satisfying their personal, domestic or non-commercial communal needs.

His Honour indicated that the above points were not necessarily exhaustive—'[t]here may well be other evidence that would be necessary to establish the protection afforded by s. 211'. In the absence of proof to the contrary, his Honour held that the magistrate was required to presume that the abalone was in the defendants' possession for sale in accordance with s. 44(2aa) of the Fisheries Act—at [37].

### Decision

The appeal was allowed on a number of grounds, the order dismissing the charges set aside and the matter remitted to the magistrate to be dealt with according to law—at [52].

# 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

at http://www.austlii.edu.au/au/cases/Cwlth/NNTTA.

## Extension of time to comply with Tribunal directions—confidential information

### *Leonne Velonic; Widji People/ Western Australia/International Goldfields Ltd* [2005] NNTTA 7

DP Sumner, 23 February 2005

**Issue**

Can the issue of confidentiality be raised as a basis for an extension of time to comply with the Tribunal's directions?

**Background**

In the course of an inquiry into an expedited procedure objection application, the native title party raised concerns regarding the confidentiality of material submitted to the Tribunal, in particular affidavits—at [11].

The concern was raised on 22 February 2005 as a reason for non-compliance with directions requiring the native title party to provide a statement of contentions, documentary evidence and witness statements by 21 February 2005—at [10].

The Tribunal noted the original directions of 31 August 2004 advised the parties that an objection may be dismissed pursuant to s. 148(b) of the NTA for, among other things, a failure to comply with a direction of the Tribunal. The directions also require that documents containing information of a confidential nature should be submitted separately in a sealed envelope with details given of the documents supplied, and their intended use by the Tribunal—at [5].

**Confidentiality of evidence before the Tribunal**

In explaining their concern, the native title party referred to an incident of a copy of an affidavit being released by the Tribunal to a third party. The Tribunal understood the document in question was a copy of a Tribunal determination which contained details of an affidavit submitted as evidence. The native title party expressed the view that it now wished to formulate its affidavits and contentions in a way to ensure confidentiality was maintained and this would be time consuming as additional consultation was required. The native title party's representative had instructions not to file the documents until the issue of protection of confidential information was sorted out—at [12].

The Tribunal did not accept the native title party's reasons for requesting a further extension of time to comply with the

directions. The Tribunal referred to the provisions of the NTA with regard to:

- the right to negotiate hearings being public unless there is a direction for a private hearing (ss. 154(1) and (3));
- in making such a direction the Tribunal must have due regard to the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders as the case may be (s. 154(4)); and
- directions may be made requiring any evidence given before the Tribunal or contents of any document produced to it not be disclosed etc. (s. 155).

Both the Tribunal and the Federal Court have enunciated principles on the making of confidentiality orders. In this matter, no requests for confidentiality orders were sought nor any documents submitted using the confidential information procedure. The Tribunal found no basis in the native title party's correspondence on which a further extension of time to comply should be granted—at [13].

### Dismissal for failure to comply with directions

The Tribunal considered one of the factors to be taken into account in the use of the power to dismiss under s. 148(b) is the previous conduct of the objector, such as previous failures to comply with directions. The Tribunal noted that since May 2004 it had dismissed a number of objection applications lodged by the Widji people where native title compliance was an issue—at [14].

### Decision

The Tribunal was satisfied that the native title party had failed to proceed within a reasonable time with its objection application and failed to comply with the directions of the Tribunal and dismissed the application under s. 148(b).

## Heritage agreements—relevance to the expedited procedure

### *Linda Champion; Central West Goldfields People/Western Australia/Vosperton Resources Pty Ltd* [2005] NNTTA 1

DP Sumner, 1 February 2005

### Issue

What relevance is a heritage agreement to an inquiry into whether or not an act attracts the expedited procedure?

### Background

The Central West Goldfields People (NTP) objected to the expedited procedure being applied to the grant of E26/108 which overlapped their registered native title claim area. The proposed tenement also overlapped the areas claimed by two registered and two unregistered native title parties. The grantee had entered into a Regional Standard Heritage Agreement (RSHA), which had been agreed between the government party, the Goldfields Land and Sea Council and peak bodies to provide appropriate protection of Aboriginal heritage. The RSHA related to only one registered native title party. The NTP had provided the grantee party with an alternative heritage agreement which the grantee party initially did not agree to execute. The grantee party stated it was, however, willing to enter an RSHA with the NTP—at [5] to [10].

### Regional heritage agreements and s. 237(b)

The Tribunal discussed the heritage protection agreements and the evidence of the government party on the Department of Industry and Resources (DoIR) procedure in relation to RSHA or alternative heritage agreements and the expedition of applications for exploration and prospecting licences. DoIR only required one RSHA to be executed even where there is more than one registered claim over the area—at [19] to [22].

In regard to the heritage agreements the Tribunal held as follows:

- The existence of an RSHA executed by a grantee does not form a basis for finding in every case that the expedited procedure is attracted even if s. 237(b) is the only matter in issue—at [29] and [49].

- The existence of an RSHA is not irrelevant to a s. 237 inquiry. (See the discussion of *Leonne Velickovic; Widji People/Westex Resources Pty Ltd/Western Australia,* [2004] NNTTA 13 Mr Dan O'Dea, 4 March 2004)—at [47] to [50].

- The proposed government condition on the grant—that within 90 days of the grant, if the NTP requests in writing that the grantee execute an RSHA, the grantee will do so within 30 days of the request—can be taken into account as one of the relevant factors in determining s. 237(b)—at [24] and [33].

- The Tribunal's task in relation to s. 237(b) will be to assess the evidence regarding whether there are sites of significance in the area and whether the regulatory regime is sufficient to make interference with them unlikely—at [34].

- In making a predictive assessment in relation to s. 237(b), the Tribunal can have regard to a grantee's attitude to entering an RSHA and other evidence of the grantee party directed toward Aboriginal heritage—at [30], [34] and [49].

- What weight will be given to the execution of an RSHA will depend on the circumstances in each case—at [31].

- It is not the role of the Tribunal to endorse one heritage agreement over another—at [46].

- There is no statutory or legal obligation on a grantee party to fund or facilitate an Aboriginal heritage survey and the fact that a grantee party refuses to sign a heritage agreement does not automatically mean that the expedited procedure is not attracted because interference with sites of significance would be likely—at [48].

In regard to other issues raised, the Tribunal said the following:

- There was no basis to dismiss the objection under s. 147(a) on the ground that it was frivolous and vexatious—at [36] to [42].

- The government submission that to find the expedited procedure was not attracted was a waste of time and resources contrary to s. 109, was misconceived. The government submitted that if the Tribunal found the expedited procedure did not apply and the s. 31 negotiations did not result in agreement, it was unlikely that the native title party would receive any better outcome pursuant to a Tribunal determination than what the RSHA could provide. Section 109 operates in the procedural sense and not in relation to the substantive and specifically defined issue. To follow this submission would in itself not be consistent with s. 109, as depriving the NTP of the right to negotiate would not be fair or just—at [43] to [44].

- Although the objection application is based primarily on s. 237(b), the contentions relate to three limbs of s. 237. The Tribunal must consider the evidence tendered and not make pre-emptive determinations—at [45].

**Finding on the evidence**

The Tribunal findings in relation to s. 237(a) were that there was evidence of prior mining and pastoral activity and no evidence of a prior detrimental effect on community and social activities in the area. Evidence that traditional punishment will probably be levelled against the traditional owners if there is damage to special places was not supported by any evidence of traditional punishment having been administered, despite years of exploration activity in the area—at [62] to [64] and [66].

The Tribunal findings in relation to s. 237(b) was that it prepared to infer on the evidence that the women's sites associated with the Milyura Dreaming are likely to be sites of particular significance—at [73].

The Tribunal noted the 'Guidelines for Consultation with Indigenous People by Mineral Explorers' (July 2004), distributed by the Tenure and Native Title Branch of the Department of Industry and Resources to all applicants for mining and exploration tenements. The guidelines summarise provisions of the relevant legislation and clarify the government policy with respect to the protection of Aboriginal heritage, and the consultation and survey process. Sites of particular significance are unlikely to be interfered with because of the regulatory regime in place and the NTP can insist on a heritage survey under the terms of the government party's proposed condition. The Tribunal, having perused both heritage agreements, could see no reason to suggest that Aboriginal heritage would be protected more effectively by one than the other—at [66], [69] to [72] and [74].

In regard s. 237(c) the Tribunal had regard to a number of factors and found there is not likely to be a major disturbance to land.

**Decision**

The Tribunal determined that the grant was an act attracting the expedited procedure.

## Form 4 acceptance issues

### *Norman Brown & Ors; Barada Barna Kabalbara and Yetimarla People#4/ Queensland/ Midas Resources Ltd* [2005] NNTTA 3

Member Sosso, 4 February 2005

**Issues**

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.)

Can the Tribunal accept an expedited procedure objection application where, on its face, it is not apparent that the native title party as a whole had knowledge of the objection being lodged?

**Background**

The expedited procedure objection application (Form 4) was made in the name of only one of the eleven persons who are collectively the Applicant, and lacked any statement that the other persons who comprised the Applicant had knowledge of, or acquiesced in, the lodging of the objection.

**Calculation of time for acceptance of Form 4**

The Tribunal accepted the Form 4 lodged outside the four-month period from the notification date specified in s. 32(3) of the NTA. The Tribunal referred to authority on the interpretation of 'within' to exclude the day of the act in question. Further, the *Acts Interpretation Act 1901* (Cwlth) s. 36(2) provides for additional time when the four-month period for lodging an objection application expires on a weekend, as it did in this matter—at [5] to [7].

**Did the objector act with the knowledge of others?**

The Tribunal convened a conference to determine if the objector was acting unilaterally or with authority. The Tribunal referred to s. 61(2)(c) requiring the persons who jointly comprise the Applicant to act collectively, not individually. Any one of the persons who are collectively the Applicant has no individual authority to lodge a Form 4. Such a Form 4 could not be accepted as it had no legal status and consequently the Tribunal would lack the jurisdiction to conduct an inquiry—at [23] to [25].

Two remedies were proposed by the objector's legal representative, amendment of the Form 4 and receipt by the Tribunal of further information to explain the circumstances of the Form 4.

The Tribunal considered the Form 4 requirements and noted that various Federal Court decisions have made it clear that the NTA, where possible, is to be given a beneficial interpretation *(Kanak v NNTT* (1995) 61 FCR 103 at 124). The Tribunal confirmed the power implied by s. 109 to allow amendments to the Form 4 which are designed to cure technical or typographical error. Substantive amendment would not be allowed. *(Richard Evans on behalf of the Koara People/Western Australia/Australian Gold Resources Ltd,* [2000] NNTTA 84 (28 February 2000), Hon. C. J. Sumner)—at [29].

Leave of the Tribunal is required to amend the Form 4 after the closing date. The proposal to amend the objection to make it clear it was lodged collectively, was not granted. The Tribunal held that to allow an amendment after the closing date which is intended to grant to the Tribunal a jurisdiction which it otherwise lacks, is inappropriate and unsustainable—at [30].

Before deciding whether to accept a Form 4, the Tribunal may grant leave to any party to provide information or make submissions, the object being not to amend or supplement the Form 4, but to explain it. The Tribunal heard the objector's submissions that the objector was not acting unilaterally and had acted with the full knowledge and support of the persons who comprised the Applicant—at [31] to [32].

**Decision**

The Tribunal held that the Form 4 complied with the requirements of s. 76 of the NTA and the Tribunal has jurisdiction to conduct an inquiry into the expedited procedure objection inquiry.