Native Title Hot Spots

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Determination of native title—Ngaanyatjarra Lands

Mervyn v Western Australia [2005] FCA 831

Black CJ, 29 June 2005

Issue

This is a consent determination recognising the existence of native title in relation to some 187,000 sq km in Western Australia (the Ngaanyatjarra Lands determination). Before making it, His Honour Chief Justice Black considered whether it was appropriate to make the determination in the terms agreed by the parties.

Section 87 of the NTA

Section 87 of the *Native Title Act 1993* (Cwlth) (the NTA) provides that the Federal Court make an order in the terms agreed between the parties without holding a hearing if it is appropriate to do so. Black CJ noted that the preconditions to the exercise of the court's discretion are:

- the terms of the agreement must be in writing and signed by or on behalf of the parties;
- the agreement must be filed with the court; and
- the court must be satisfied that the order in those terms would be within its power—at [8].

In this case, the pre-conditions were met. The court was satisfied that:

- there was nothing in the agreed terms to suggest that the court's power would be exceeded;
- s. 94A was satisfied because the proposed order set out the matters required by s. 225, which defined 'native title determination'.

Thus, it only remained to decide whether it would be 'appropriate' to make the order sought. His Honour considered that the discretion conferred by s. 87(1) must be:

> exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose of the Act. The matters to be taken into account in the exercise of the discretion, and the weight to be given to those matters, may very well vary according to the particular circumstances of each case—at [11].

The factors the Chief Justice considered relevant in this case where that:

- the parties had independent and competent legal advice;
- there was no suggestion that the agreement had not been freely entered into—at [12].

His Honour commended the applicants on the clear and comprehensive way in which their application had been prepared and noted that it was only 12 months between filing and settlement of the terms of the consent determination.

After reviewing uncontested information in the application, which set out the factual basis for the claimed native title and was not contested, his Honour concluded that he was 'quite satisfied that it would be appropriate to make an order in the terms agreed between the parties'—at [13] to [16].

Decision

His Honour made the determination of native title in the terms sought by the parties. The claim group was defined as the men and women named in a schedule to the determination (some 2,700) and their descendants—the Peoples of the Ngaanyatjarra Lands. This description was adopted in the consent determination to define the common law holders of native title. It was then determined by consent that the Yarnangu Ngaanyatjarraku Parna (Aboriginal Corporation), a prescribed body corporate, is to hold the native title on trust for the common law holders of native title (see ss. 56, 57 and 224).

As the parties agreed there had been partial extinguishment of native title over an unvested reserve, in respect of that area, the native title rights and interests recognised were non-exclusive rights to:

- enter and remain on the reserved land;
- take flora and fauna;
- take water for personal, domestic, or non-commercial communal purposes;
- take other natural resources such as ochre, stones, soils, wood and resin; and
- care for, maintain and protect from physical harm, particular sites and areas of significance to the native title holders.

Over the remainder of the determination area, either there had been no extinguishment by the 'creation of any prior interest', or any such extinguishment must be disregarded for all purposes under the NTA (see ss. 47A and 47B). Therefore, with exception of rights to flowing and subterranean waters, native title is comprised of the right of possession, occupation, use and enjoyment to the exclusion of all others. In relation to waters, native title recognised in the determination is comprised of a non-exclusive right to take those waters for personal, domestic, or non-commercial communal purposes.

None of the native title rights and interests recognised includes rights in minerals or petroleum as defined in the relevant Acts.

Determination of native title—De Rose

De Rose v South Australia (No 2) [2005] FCFCA 110

Wilcox, Sackville and Merkel JJ, 8 June 2005

Issue

The issue before the Full Court of the Federal Court was whether or not the claimants had native title as defined in s. 223(1) of the *Native Title Act 1993* (Cwlth) (NTA) to the area covered by their application. In a joint judgment, their Honours Justices Wilcox, Sackville and Merkel found that native title existed. The decision is of significance for the findings on the interpretation of s. 223(1), in particular those relating to:

- the sufficiency of a 'spiritual' connection;
- the ability for the court to recognise native title even where those claiming it have been 'virtually' absent from the area covered by their application for a period of time; and
- the extinguishing effect of certain improvements on a pastoral lease.

Background

This case concerns a claimant application made in 1994 over three perpetual pastoral leases, collectively known as De Rose Hill Station (De Rose Hill), in north-west South Australia. The 12 people who made the application for a determination of native title did so on behalf of themselves and others who are *Ngururitja* for De Rose Hill, i.e. people who

belong to, or are traditional owners and custodians of, the area covered by the application.

At first instance, his Honour Justice O'Loughlin dismissed the application on the ground that the claimants had not satisfied s. 223(1)(b). On appeal, in a joint judgment, their Honours Justices Wilcox, Sackville and Merkel set aside that decision with the result that questions remained about whether both ss. 223(1)(a) and (b) were satisfied. *Native Title Hot Spots* Issue 3 and Issue 8 provide further background to this matter and, respectively, the findings at first instance and on appeal.

Since O'Loughlin J had retired by the time the appeal was determined, the Full Court decided to hear further argument on the outstanding issues rather than refer the matter to a single judge. The parties to the appeal were the native title claimants (the claimants), the State of South Australia (the state) and the proprietary limited company that held the leases (the Fullers).

Common ground on ss. 223(1)(a) and (b)

Given the Full Court's findings on appeal in *De Rose v South Australia* (2003) 133 FCR 325 were binding on them, for the purpose of these proceedings the state and the Fullers accepted that:

- the claim was to be assessed by reference to the traditional laws and traditional customs of what is known as the Western Desert Bloc which had, respectively, been acknowledged and observed by the Aboriginal people of the Western Desert region without any substantial interruption since sovereignty was asserted;
- under those laws and customs, there is no rule that failure by *Ngururaritja* for a particular site or *Tjukurpa* (dreaming) to discharge custodial responsibilities led to loss of *Ngururaritja* status or the rights and interests that flow from that status;
- it was only necessary for **one** of the seven remaining people who made the application (or one of the persons on whose behalf the claim was made) to show they satisfied s. 223(1)(a) and (b). That being the case, the Full Court concentrated on Peter De Rose, the 'principal' claimant—at [21] to [24].

Issues dealt with in this case

The main issues dealt with were:

- whether the claim should be classified as one for 'communal', 'group' or 'individual' native title rights and interests—see s. 223(1);
- whether the claimants had to establish that they acknowledged and observed the particular normative rules relating to their status as *Ngururaritja* in order to succeed in a claim arising from that status (a 'narrow' reading of s. 223(1)(a) suggested by the Fullers' counsel);
- the relationship between responsibility under traditional law and custom for an area and connection to that area;
- assuming ss. 223(1)(a) and (b) were satisfied:
  - the effect of certain 'improvements' to parts of the area subject to the pastoral leases, such as the construction of an airstrip, homestead or dam, on native title rights and interests;
  - whether a native title right to control access and use of the leased area by other Aboriginal people could be recognised—at [9] to [21], [52] and [127].

Communal, group or individual rights and interests

The Fullers submitted that this was a claim to 'individual' rights because the claimants were 'a collection of individuals' united only by their claim to have native title by virtue of their status as *Ngururaritja*. The claimants submitted it was a claim to group, but not communal, rights and interests. The state did not think it necessary to pursue the question.

The court noted (among other things) that:

- the 'starting point' is s. 223(1) of the NTA;
- the fact that the 'chapeau' (the 'hat' or opening lines) to s. 223(1) and paragraphs (a) and (b) are based on what was said in *Mabo v Queensland* (No 2) (1992) 175 CLR 1 could be taken into account but could not control the interpretation of s. 223(1);
- the reference to 'communal, group or individual rights and interests' in the chapeau recognised that native title may include group or individual rights or interests, provided they are 'in relation to land or waters';
- classification of what is claimed 'depends on the body of normative rules of the relevant society which gives rise to rights and interests in land or waters';
- it is 'hardly likely' that a traditional system would use classifications like 'communal', 'group' or 'individual' and, as such, any such classification is a statutory construct;
- in this case, the claimants 'disavowed' any claim to communal title, describing themselves as 'individuals who fulfil the criteria of *Ngurarityja* according to traditional law and custom'—at [27] to [34], referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (Yorta Yorta) at [28] to [40], summarised in *Native Title Hot Spots* Issue 3.

It was held that, if it was necessary to classify the rights and interests claimed, then they were 'best regarded' as group rights and interests:

> [T]he appellants claim to be *Ngurarityja* for the claim area and, by virtue of that status, they have common rights and responsibilities under the laws and customs of the Western Desert Bloc in relation to the claim area (although not necessarily in relation to precisely the same sites or tracks)—at [44].

Given that finding, it was not necessary to decide how a claim to 'individual rights' should be approached. However, their Honours identified three reasons why it might be important to do so in another case:

- it may be necessary to decide whether each and every claimant satisfied s. 223(1) if 'individual' rights are claimed;
- it is 'arguable' that a determination that native title exists made under s. 225 must specify whether the rights and interests are communal, group or individual (presumably only 'arguable' because s. 225(a) requires the determination to specify who holds the 'common or group' rights comprising the native title and does not mention 'individual' rights);
- because authorisation of those named as the applicant was required by 'the native title claim group'—see s. 61(1). In this case, the court held that the question of authorisation did not arise because the application was made under the old Act (i.e. the NTA as it stood before amendment in 1998) when no authorisation by a native title claim group was required—at [48] and [50].

Comment

On the issue of whether an old Act application is required to be authorised, the three cases the court referred to deal with applications for strike out or summary dismissal. While it is true that s. 84C cannot be used as a basis for striking out an old Act application for failure to comply with (among other things) s. 61(1) of the new Act, the application considered in this case is *taken to have been made to the Federal Court*. Therefore, it is to be 'treated as *if* it were made to the Federal Court under the *relevant provisions* of the *new Act*': sub-item 36(a), Schedule 5, *Native Title Amendment Act 1998* (Cwlth) (the transitional provisions), emphasis added and see item 21 in relation to strike out under s. 84C of the new Act. Therefore, it would seem that in all cases other than an application for strike out under s. 84C, the 'relevant' provisions of the new Act do

apply to old Act applications. However, in this context, perhaps it can be said that s. 61(1) is not a 'relevant' provision.

Effect of interruption to use and enjoyment of area claimed

One of the factual issues that arose in this case was the significance of an interruption in the use and enjoyment of the area covered by the application, e.g. as a result of an absence from country for a period of time. Their Honours noted what was said in *Yorta Yorta* at [84] to [85]:

- the exercise of native title rights or interests may 'constitute powerful evidence' of both the existence of native title rights and their content;
- evidence that at some time since sovereignty, some of the people who claim native title (or those they claim through) did not exercise the rights or interests claimed does not 'inevitably' answer the statutory questions, which are directed both to possession, (not exercise) of rights or interests and to the existence of a 'relevant' connection between the claimants and the area in question;
- the fact that both ss. 223(1)(a) and (b) are in the present tense is relevant but that is not to say that the continuity of the chain of possession of rights and interests and the continuity of the relevant connection is irrelevant—at [59].

What must be established— s. 223(1)(a)

After rehearsing the various arguments put to it, the court held that:

- references to 'Aboriginal peoples' in s. 223(1) are references to 'Aboriginal peoples who have a connection to the [relevant] land or waters by the traditional laws and customs that those peoples have acknowledged and observed';
- s. 223(1)(a) requires those making a native title claim to establish they have rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by that *community or group*;
- it may not be necessary to prove every member of the relevant 'claimant community or group' has acknowledged and observed the relevant traditional laws and customs (this is a question of fact and degree) and it is 'likely' that some claims will succeed even if not all members of the 'community or group' have acknowledged and observed traditional laws and customs';
- in these cases, the question is likely to be whether the claimant 'community or group, *as a whole*, has *sufficiently* acknowledged and observed the relevant traditional laws and customs' (emphasis added)—at [55] to [56] and [58].

However:

- if none of the members of the native title claim group have *ever* acknowledged traditional laws or observed traditional customs, they could not succeed in a native title claim, even in a case where there were traditional law and customs that identified them as 'possessing' rights and interests in particular land or waters;
- given that to hold otherwise would allow for the recognition of native title being held by people who not only had no physical connection to the land or waters, but have never acknowledged or observed traditional laws or customs. The same could be said where a native title claim is made by one or more individuals 'who do not assert a communal or group claim'—at [57].

The court went on to note that:

- paragraph s. 223(1)(a) contemplates a link between the rights and interests in relation to land or waters said to be possessed by those claiming native title and the traditional laws and customs they claim to have acknowledged and observed;

- acknowledgement and observance of traditional laws and customs that are unconnected with the possession of rights and interests in land or waters may not be enough;

- given the centrality of the relationship between Aboriginal people and their country, it may be difficult to establish any dichotomy between traditional laws and customs that are connected with rights and interests possessed in land and waters and those that are not. (Although not noted, the finding by the majority in *Western Australia v Ward* (2002) 213 CLR 1 (Ward) at [60] in relation to preventing misuse of cultural knowledge falls into the latter category and, in this decision, their Honours later say at [91] that rules about kinship and marriage may also fall into that category);

- if there are traditional laws and customs that are unconnected with the possession of rights and interests in relation to land and waters, it will perhaps be unusual for members of Aboriginal groups or communities to acknowledge and observe *only* those laws and customs—at [60] to [61].

The court noted that it was 'reading too much into' s. 223(1)(a) to require the claimants to show a continuing *physical* connection to the application area—at [62].

Although the court did not, it is worth noting that the ordinary English meaning of 'acknowledge' and 'observe' as used in s. 223(1)(a) are, respectively:

- to admit to be real or true; recognise the existence, truth or fact of, as in *to acknowledge belief in God*; to own as binding or of legal force;

- to keep or maintain in one's actions, conduct, etc., as in *you must observe the formalities*; to obey, comply with, conform to, as in *to observe a law*; to show regard for by some appropriate procedure, ceremonies etc., as in *to observe a holiday*; to perform duly, or solemnise (ceremonies, rites, etc.)—Macquarie Dictionary, 2nd ed).

This may explain their later emphasis on the genuineness of the evidence of Aboriginal witnesses when determining whether there has been a substantially uninterrrupted acknowledgement of traditional law and observance of traditional custom as required by s. 223(1)(a).

What must be established— s. 223(1)(b)

Having noted that s. 223(1)(b) is directed to whether Aboriginal peoples have a connection to land or water by the traditional laws acknowledged and the traditional customs observed by them and not to how they use or occupy land or water, the court found that:

- it is possible that Aboriginal peoples continued to acknowledge and observe traditional laws and customs during periods when they did not maintain a physical connection with the claim area;

- however, the length of the period of absence from country may have an 'important bearing' on whether traditional laws and customs have been acknowledged and observed;

- given that s. 223(1)(a) and (b) involve questions of fact, 'everything will depend on the circumstances';

- the community or group claiming native title must show it has acknowledged and observed those traditional laws and customs that recognise them as possessing rights and interests in relation to the area covered by their application—at [62] to [63].

Recapping the findings on appeal

The court identified findings from the trial at first instance that supported the claimants' case and evidence that was either accepted or not doubted by O'Loughlin J. Their Honours also noted (among other things):

- O'Loughlin J gave considerable weight to Mr De Rose's 'virtual' absence from De

Rose Hill after 1978 but little weight to his spiritual links;

- the Full Court in *Western Australia v Ward* (2000) 99 FCR 316 at 243 said that acknowledgement of law and observance of custom may be proved by evidence that traditional practices and ceremonies are maintained by the community, insofar as that is possible, off the land, and that ritual knowledge including knowledge of the Dreamings that underlie traditional laws and customs, continues to be maintained and passed down from generation to generation;

- Peter De Rose 'plainly' had detailed knowledge of the concept of both *Nguraritja* and the *Tjukurpa* and had participated in the ritual ceremonies, stories, dances and songs that showed (as O'Loughlin J found) the participants 'once had a religious or spiritual connection' with the relevant sites;

- making the native title determination application in 1994 involved asserting rights to the application area and, after the application was lodged, Mr De Rose was involved in a dispute with the Fullers about disturbance of sites, which showed he asserted his rights and discharged his responsibilities in relation to sites of special significance at that time;

- the fact that, when he could, Mr De Rose was involved in establishing a homeland very close to De Rose Hill because it was close to 'his country' was significant and it was 'difficult' to see this as anything other than 'strong evidence' of a 'spiritual' connection;

- there was no finding that Peter De Rose's spiritual connection with places of importance on his country was not genuine—at [68] to [71].

Additional matters showing acknowledgement and observance

Additional submissions made by the claimants drawing on evidence accepted or not rejected at the trial (all of which the Full Court appears to have accepted) included:

- Mr De Rose's 'detailed' evidence about his passage through the various ceremonial stages of life under Western Desert law and custom, so that he was now *wati pulka* (a senior initiated man) and evidence from others that they were also *wati pulka*;

- evidence as to the significance of particular areas, the rituals, ceremonies and other activities that must be carried out with respect to them, the cultural restrictions that applied to each and O'Loughlin J's findings that all of this would once have demonstrated the requisite connection. (In rejecting the Fullers' submission that this showed knowledge but did not demonstrate acknowledgement and observance, the court noted that findings and evidence from the trial pointed 'strongly' to a number of the claimants, including Mr De Rose, 'genuinely believing in the *Tjukurpa* and in the sacredness of particular sites';

- evidence showing the claimants acknowledged and observed Western Desert Bloc restrictions on disseminating secret knowledge and observed prohibitions on women and children visiting certain men's sites (and *vice versa*) and that breaking gender-restriction could lead to sanctions;

- evidence as to the importance of cultural practices such as 'smoking' a new-born baby. The witnesses giving this evidence were older and there was little evidence that it had recently been practised but 'the evidence suggests that the belief in the efficacy of the smoking ceremony has not

died'. Also of note was the practice of using *kunmanara* to refer to another person with the same name as a recently deceased person and evidence of laws and customs about preparing and eating 'bush tucker', which were said to be 'closely connected with the laws and customs governing who may hunt on and collect food from particular country', i.e. who has rights and interests 'in relation to' that country;

- the fact that the concept of *Ngurarityja* was recognised by the Indigenous witnesses as 'central to the rights and responsibilities of people under the laws and customs of the Western Desert Bloc' and that the trial judge found there could be 'no doubt that Peter De Rose…regarded himself as *Ngurarityja* for the claim area and accepted that, as such, he had certain rights and responsibilities in relation to the land';

- evidence demonstrating that the appellants observed rules relating to kinship and social organisation of the Western Desert, including avoidance relationships and marriage arrangements. However, note that it 'may be' that observance of rules of this kind only is *not* sufficient to prove acknowledgement and observance of traditional laws and customs connected with the possession of rights and interests *in relation to land and waters*, as required by the chapeau to s. 223(1). Rather, they form part of 'the network of relationships…sourced in the traditional laws and customs of the Western Desert Bloc' the observance of which 'lends support to the contention that the traditional laws and customs *more directly linked* with the possession of rights and interests *in land*' were also observed (emphasis added);

- evidence of recognition and adherence to the authority of senior men;

- evidence that 'clearly established' a number of the claimants had been taught traditional laws and customs by those who, under those laws and customs, were responsible for imparting that knowledge—at [77] to [96].

Effect of failure to discharge responsibilities

The court rejected the Fullers' submission that s. 223(1)(a) required claimants to prove they had continuously discharged their responsibilities as *Ngurarityja* under traditional laws and traditional customs, noting that:

- under the relevant traditional laws and customs of the group, it may be that native title holders do lose their rights and interests if they fail to discharge their responsibilities but proof of uninterrupted discharge of obligations is not otherwise a requirement of s. 223(1)(a);

- proof that obligations have been 'faithfully performed' provides 'powerful support' for a claim to possesson of native title rights and interests but evidence that members of the claimant group have not faithfully met their responsibilities will not necessarily be fatal to their claim;

- it is a matter of fact and degree as to whether a group has acknowledged and observed the traditional laws and traditional customs on which it relies to establish possession of native title rights and interests—at [63] to [64].

It was held that, in this case, the evidence of the claimants at first instance was that *Ngurarityja* were the traditional owners and had rights and responsibilities in relation to that land. It was 'true' that O'Loughlin J found that the claimants had not discharged their responsibilities for a number of years. However, in a statement of some significance, their Honours said that:

> [I]t is one thing to find that a person had not lived up to his or her religious or ethnical [sic] responsibilities. It is another to find that the person does not *regard* himself or

herself as *bound by the rules* imposing and defining those responsibilities. There are very many people in the Australian community who do not live up to what they *genuinely* consider and acknowledge to be their responsibilities. Their 'default' may continue for a long time, yet they may continue to *acknowledge* and *accept* the *binding force of the rules* imposing the unfulfilled responsibilities—at [89], emphasis added.

The court was of the view the O'Loughlin J's findings must be understood as accepting:

- that Mr De Rose and other claimants acknowledged and regarded themselves as bound at all times by the rules for determining *Ngurarítja* for particular country;
- the claimants observed the *Ngurarítja* recognition rules, which were founded in the traditional laws and customs of the Western Desert Bloc, a society that has existed since sovereignty by acknowledging and recognising particular individuals as *Ngurarítja* and by acknowledging and recognising that each such person had particular rights and responsibilities in relation to the application area—at [90].

It was also noted that Mr De Rose gave evidence that he intended to teach his grandchildren, who were *Ngurarítja* for his country, the *Tjukurpa*, which suggested he acknowledged the obligations he had failed to discharge in the past but 'intended in the future to comply with them'—at [95].

Their Honours concluded that: 'The fact that…*Ngurarítja* were, for a time (*even a long time*) less than diligent in discharging their responsibilities does not detract from these conclusions'—at [90], emphasis added.

The Fullers' submissions on failure to fulfil the requirements of s. 223(1)(a) (all of which were rejected) were based on findings at first instance that:

- the claimants had not maintained a physical connection with the land for a period of at least twenty years where they were not forcibly dispossessed or 'locked out';
- the claimants had not visited or tended to sites outside De Rose Hill during the period they claimed to have been locked out;
- the evidence did not 'establish, as a matter of probability, that a particular individual still maintained a spiritual connection to the claim area' and a number of general findings that there were 'substantial gaps in the evidence about communal and social life and religious, social and ritualistic activities'.

In relation to the first, it was said that:

- an ongoing physical connection with the land is not essential to either ss. 223(1)(a) or (b);
- at least some of the claimants continued to acknowledge the traditional laws and customs of the Western Desert Bloc relating to rights and interests in land, especially the rules governing *Ngurarítja* for the area;
- the evidence went 'substantially' beyond merely demonstrating knowledge of traditional laws and customs and provided 'powerful support' for the view that the claimants acknowledged and observed those laws and customs;
- it could not be disputed that virtually all the claimants 'genuinely believed the stories of the *Tjukurpa* and acknowledged the sacredness of particular sites in the claim area';
- failure to maintain regular physical connection with the application area was due in part to a fear of the likely response from the pastoralists, particularly Doug Fuller, whose conduct 'provided a solid enough objective basis' for their apprehension—at [99] to [101].

As to the second, it was said that, while this was a significant finding that must be given due weight:

- the court needed to consider *all* O'Loughlin J's findings *and* any evidence not inconsistent with those findings;
- the failure to visit sites outside the application area was only one factor to take into account in making the 'evaluative judgment' required by s. 223(1)(a);
- a number of his Honour's findings and a 'good deal' of the evidence not rejected by him *supported* the claim that acknowledgement and observance of important aspects of the claimants traditional laws and customs continued;
- the failure to visit sites 'for a period of time, *even a lengthy period*, is not sufficient to counteract the affirmative evidence of acknowledgement and observance of traditional laws and customs'—at [103], emphasis added.

Interestingly, their Honours were critical of O'Loughlin J for not making more of the lodging of the claimant application in 1994 and the claimants' subsequent dispute with the pastoralists over alleged damage to sites as attempts by the claimants to assert rights and discharge responsibilities in relation to the claim area:

> In the absence of any finding that those actions were contrived or otherwise not genuine…they should…be taken into account [and]…(assuming their actions *genuinely reflected their beliefs*) [the dispute] is of particular significance because…s 223(1)(a)…is cast in the present tense—at [103], emphasis added.

It was said that the findings noted in the third issue raised by the Fullers also reflected an 'evaluative judgment' by O'Loughlin J of evidence about the practices, beliefs and conduct of the Aboriginal witnesses and that:

- they did not turn on an assessment of the credit or demeanour of the witnesses and were made in the context of satisfaction of s. 223(1)(b) rather than s. 223(1)(a);
- the conclusion that no claimant maintained a spiritual connection to the claim area rested largely on the lack of continued physical connection after 1978 and did not take into account that a number of the claimants 'showed the strength of their continued spiritual attachment to particular sites and tracks on the land';
- Mr De Rose's knowledge of the concept of *Ngururaritja* and of his own *Tjukurpa* led to a finding that he was *Ngururaritja* for a track on De Rose Hill and;
- Mr De Rose's choice of a homeland near De Rose Hill 'because he wanted to be close to his country' provided 'powerful evidence of his spiritual connection with that country';
- no finding was made that the claimants' beliefs were not genuinely held and any such finding 'would have been very difficult to reconcile with the evidence'—at [104] to [106].

As to the fourth, the general findings were influenced by an erroneous view and the court now had to reassess the evidence as a whole—at [107].

Paragraph 223(1)(a) satisfied

Since the parties agreed that the claimants would succeed if any one of them satisfied the 'acknowledgement and observance test', it was held that Mr De Rose 'possesses rights and interests in relation to the claim area under the traditional laws of the Western Desert Bloc acknowledged and the traditional customs of the Western Desert Bloc observed by him'. Therefore, s. 223(1)(a) was satisfied.

Paragraph 223(1)(b— connection

It was recognised that, if the claimants satisfied s. 223(1)(a), it was likely that they

would also satisfy s. 223(1)(b). The 'key' to s. 223(1)(b) is whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a 'connection' with the land or waters which requires:

- an identification of the content of traditional laws and customs; and
- the characterisation of the the effect of those laws and customs as constituting a 'connection' of the peoples with the land or waters in question—at [109] to [110], citing *Ward* at [64].

The court noted that, while the way land or waters are used may reveal something about the kind of connection that exists, absence of evidence of recent use does not, of itself, require the conclusion that there is no relevant connection because this depends upon the content of traditional law and custom and what is meant by 'connection' by those laws and customs—at [109] to [110] citing *Ward* at [64].

Their Honours started by finding that:

- Mr De Rose (and probably others) had acknowledged and observed the traditional laws and customs of the Western Desert Bloc by which a person becomes *Ngura*ritja for country and, under those laws and customs, he is *Ngura*ritja for the claim area;
- as such, he has defined rights and responsibilities for that area—at [111].

Those rights and responsibilities, as found by O'Loughlin J, included:

- the right to live on country, collect food, water and other resources, hunt and travel where they want to go so long as they did not offend the *Tjukurpa*;
- the right to erect shelters on the land, to gather shrubs and bushes for medicinal purposes, to use timber to make traditional implements;
- the right to instruct any *Anangu* (Aboriginal) visitor as to where they could go and where water and food may be obtained;
- the right to impose sanctions on a visitor who violates the rules;
- obligations to teach young people about country, 'clean' sites, learn the *Tjukurpa* for country and perform the appropriate ceremonies—at [112].

Their Honours concluded that:

> In view of these findings as to the content of the traditional laws and customs of the Western Desert Bloc, the effect of those laws and customs is…plainly to constitute a 'connection' between Peter De Rose (and any others who are *Ngura*ritja for the claim area) and the claim area. The traditional laws and customs confer rights and responsibilities on Peter De Rose over the claim area…[and] establish…he is inextricably linked to his country…The 'connection' required to satisfy s. 223(1)(b)…is present—at [113].

Extinguishment

The remaining questions about extinguishment revolved around the effect improvements on the three pastoral leases that make up the station, which were granted between 13 August 1953 and 27 February 1975, i.e. prior to the commencement of the *Racial Discrimination Act 1975* (Cwlth) (RDA) on 31 October 1975.

Their Honours canvassed the relevant legislation and rehearsed the parties' submissions. It was then held that the grant of each lease was a 'previous non-exclusive possession act' (PNEPA) for the purposes of s. 36I of the *Native Title Act (South Australia) 1994* (SA) (SANTA), the state analogue to s. 23F(2) of the NTA, because:

- it was valid when granted (there being no issue of invalidity by reason of the operation of the RDA);

- it was granted prior to 23 December 1996; and
- the lease was a non-exclusive pastoral lease within s. 248B of the NTA—at [140].

Section 36I of the SANTA was the relevant provision because the grants of the leases were acts attributable to South Australia: see ss. 23I and 239 of the NTA—at [141].

Since the leases were entered into before the RDA commenced, it was noted that Div 2 of Part 2 of the NTA (the past act provisions) and analogous provisions of the SANTA were irrelevant in assessing the effect of the leases on native title rights and interests—at [140].

Section 36I of the SANTA

The court noted that both s. 36I of the SANTA and s. 23G of the NTA deal with two situations:

- those where the relevant act involves the grant of rights and interests that are **not inconsistent** with native title rights and interests in relation to the land covered by the lease, in which case the rights and interests granted and the doing of any activity in giving effect to them prevail over the native title rights and interests, but do not extinguish them (Option 1);
- those where the relevant act involves the grant of rights and interests that are **inconsistent** with native title rights and interests in relation to the land or waters covered by the lease, in which case the act extinguishes the native title rights and interests if that would also be the case 'apart from' the SANTA. In any other case, the native title rights and interests are suspended while the lease remains in force (Option 2).

This was said to reflect a legislative intention to allow the courts to determine the effect of a PNEPA 'by reference to the position at common law', an intention recorded in the *Supplementary Explanatory Memorandum to Government Amendments [to the NTA] Moved in July 1998*—at [143] to [144].

The application of Option 2 has been resolved by the High Court:

- Limb 1 contemplates that a PNEPA may grant rights and interests that are inconsistent with native title rights and interests and, if it does, it extinguishes the latter to the extent of the inconsistency and no question of suspension of native title arises;
- Limb 2 addresses the case where there is an inconsistent grant of rights which, apart from the NTA and its state or territory analogue, would *not* extinguish native title rights and interests (e.g. a post-1975 grant which, by operation of the RDA, was ineffective to extinguish native title rights and interests): *Ward* at [192] and [82].

In this case, the native title rights and interests had already been identified in a draft determination. To determine the rights and interests granted by the leases to facilitate a comparison between the two sets of rights and determine the extent of any inconsistency, the court referred to their terms (which were substantially the same).

Extinguishing effect of improvements

Each pastoral lease:

- required the lessee to spend a minimum amount on unspecified 'improvements';
- expressly permitted the lessee to grow produce on the land 'solely for consumption on the... land';
- reserved to the Minister and all persons authorised by the Minister the right to undertake various activities on the land but, in two of the leases, not 'within one mile' of any improvement consisting of a well, reservoir, dam, dwelling house, factory or building of the value of £100 or more.

The court noted that:

- the leases conferred on the lessees 'the right and, to some extent, the obligation, to construct improvements on the leasehold land';

- two of the leases expressly envisaged that improvements could include a dwelling house, dams, reservoirs, factories or other buildings and the third referred to bores, dams, reservoirs and sheds and clearly contemplated the land being used for domestic purposes;

- all three 'plainly' conferred a right to construct an airstrip if that improvement was considered incidental to pastoral activities—at [148].

Their Honours went on to find that:

> The right to construct, and implicitly to use, improvements on the leasehold land, such as a dwelling house or storage sheds, when exercised, is *clearly inconsistent* with the native title rights and interests identified in the draft determination, *insofar as they relate to the particular land on which the dwelling house and storage sheds are constructed*—at [149], emphasis added.

While noting the 'problem' that the precise location of the improvements would not be known until the lessee exercised the right to erect improvements, the court relied in the joint judgment in *Ward* at [149] to[150] and [308] to support a conclusion that native title was wholly extinguished over the area where the improvement takes place—at [155].

It was found that:

- each lease granted the lessee the right to conduct and use improvements on the leasehold land, a right that, from the date of the grant, was 'potentially' inconsistent to some extent with native title rights and interests, e.g. when the right to build a house was exercised, the right was necessarily inconsistent with *all* native title rights and interests to the area on which the house was built;

- it was only after the improvement was made that the precise area of land affected by the exercise of the lessee's right could be ascertained;

- the operation of a grant of the right to conduct and use improvements should be regarded as subject to a condition precedent, i.e. the grant of the right becomes operative in relation to a particular area only when it is exercised and can only extinguish native title when exercised because 'it was only then that the precise area or areas of land affected by the right could be identified'—at [156].

The parties accepted that any house, shed, building, airstrip, dam or constructed stock watering point was an 'improvement' and the claimants 'did not contend that if their extinguishment contentions failed, any native title rights and interests in respect of the land on which the improvements were constructed would survive'—at [157].

Therefore, native title rights and interests were held to be wholly extinguished over the areas of land where improvements authorised by the pastoral leases had been constructed:

> The previous non-exclusive possession acts…gave the lessees rights which, when exercised, were inconsistent with native title rights and interests…When the lessees constructed the improvements in accordance with the leases, the precise areas of land affected by the lessees' rights could be identified. *At that point of time*, apart from the operation of the [SANTA]…the grant of the leases operated to extinguish the native title rights and interests in respect of those areas of land. Accordingly, s. 36I(1)(b)(i)…confirms the extinguishment of native title rights and interests over those same areas—at [157], emphasis added.

It was also held that, since the grant of a right to erect or construct improvements carries with it 'those rights necessary for its meaningful exercise', native title rights and interests were also wholly extinguished over 'any adjacent land the use of which is reasonably necessary for or incidental to the operation or enjoyment of the improvements'—at [166].

Section 44H of the NTA

It was found that s. 44H was not intended to apply in a case such as this, i.e. where the *rights* granted under a lease extinguish the native title rights and interests which might otherwise be affected by the 'doing of any activity' in accordance with the lease because:

- if s. 44H applied in that situation, it would contradict s. 23G(1)(b)(i) of the NTA which confirms the extinguishment of native title rights and interests in the same circumstances;

- given the 'elaborate' scheme of Div 2B of Part 2 of the NTA and the analogous state legislation confirming extinguishment of native title by PNEPAs, it is hardly likely that a general provision such as s. 44H was intended to prevail over s. 23G(1)(b)(i).

Their Honours went on to note that:

- s. 44H is concerned with the non-extinguishment of native title rights and interests by reason of 'an activity' done in accordance with a lease or other instrument;

- the Explanatory Memorandum to the Native Title Amendment Bill 1997 at [6.21] to [6.28] supported construing s. 44H to restrict its operation to 'activities' carried out in accordance with rights and interests granted under a lease and *not* to the rights and interests granted by the lease—at [159].

However, as the court found s. 44H did not apply to the rights in question in this case, no final view on the construction of s. 44H was given. Nor was it necessary to decide whether or not s. 44H applied to an activity done before the amendments to the NTA in 1998 that introduced s. 44H but 'the better view…would seem to be that s. 44H is not intended to be so limited'—at [160] to [165].

Right to make decisions about use and access of certain Aboriginal people

The Fullers had argued that a right of this kind might be inconsistent with rights of access granted to Aboriginal people by s. 47(1) of the *Pastoral Land Management and Conservation Act 1989* (SA), which provides that, subject to certain geographical limitations, an Aboriginal person may enter, travel across or stay on pastoral land 'for the purpose of following the traditional pursuits of the Aboriginal people'. Their Honours found that:

- use of the pastoral land to follow traditional pursuits is not inconsistent with the native title rights proposed by the claimants, which 'ensures the use of the land is in accordance with traditional laws and customs'; and

- the limitation to 'traditional pursuits' indicated by s. 47(1) 'was not intended to extinguish any native title rights and interests that otherwise might exist'—at [170].

Therefore, the right to 'make decisions about the use and enjoyment of the determination area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by *Ngurarijta* was recognised in the determination of native title.

Costs

An order that both of the respondents pay the appellants' costs of the appeal will be made if written submissions on costs are not filed within 21 days of the date of this decision.

Summary of determination

It was found that native title exists in relation to De Rose Hill and is held by the Aboriginal persons who are *Ngurarijta* according to the relevant traditional laws and customs of the Western Desert Bloc people because:

- they were born there; or

- they have a long-term physical association with the area; or

- they possess an ancestral connection to the area; or

- they possess geographical and religious knowledge of the area: and
- they are recognised as *Ngurariţja* by the other *Ngurariţja*.

The native title rights and interests recognised in the determination area are non-exclusive rights to use and enjoy the land and waters in accordance with traditional law and custom being rights to:

- access and move about;
- hunt, gather and use natural resources such as water, food, medicinal plants, wild tobacco, timber, stone and resin;
- live, camp and erect shelters and to cook and light fires for all purposes other than the clearance of vegetation;
- engage and participate in cultural activities, conduct ceremonies, hold meetings and teach the attributes of locations and sites on the determination area;
- the right to maintain and protect sites and places of significance to *Ngurariţja* under their traditional laws and customs;
- the right to be accompanied on the determination area by certain other people, e.g. those with rights in relation to the area according to the traditional laws and customs acknowledged by *Ngurariţja*;
- the right to make decisions about the use and enjoyment of the determination area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by *Ngurariţja*.

The right to hunt, gather and use the natural resources and water resources were specifically identified as being limited to 'traditional rights exercised in order to satisfy personal, domestic, or communal needs, but do not include any commercial use of the determination area'.

Native title rights and interests were found not to exist:

- over any area that was a house, shed or other building, an airstrip, a constructed dam or any other constructed stock watering point and any adjacent area the exclusive use of which was necessary for the enjoyment of that 'improvement';
- in minerals as defined in s. 6 of the *Mining Act 1971* (SA) or petroleum as defined in s. 4 of the *Petroleum Act 2000* (SA).

The native title rights and interests are subject to and exercisable in accordance with the valid laws of the state and the Commonwealth, including the common law. The nature and extent of other interests to the determination area, such as three Crown Leases Pastoral and those of the Crown, were recognised in the determination. The relationship between the native title rights and interests and the other rights and interests is that:

- the other rights and interests co-exist with the native title rights and interests;
- the existence of the native title does not prevent the doing of any activity required or permitted to be done by or under the other rights and interests; and
- the other rights and interests and the doing of any activity required or permitted to be done by or under the other rights and interests prevail over the native title but do not extinguish them.

The native title is not to be held in trust and a proposed prescribed body corporate is to be nominated within 12 months of the order for the purposes s. 57(2) of the NTA.

Proposed determination of native title—Bardi Jawi

Sampi v Western Australia [2005] FCA 777

French J, 10 June 2005

Issue

The decision deals with a claimant application. One of the key issues in making a determination that native title existed was whether the society seeking the determination was one society acknowledging and observing one set of traditional laws and customs by which the members of that society has a connection to the area at the time sovereignty was asserted, i.e. in 1829.

Background— two trials

The original application in this matter was lodged on 1 September 1995 on behalf of the Bardi and Jawi People. The claim area consists of 5,500 sq km of land, reefs and waters in the North Dampier peninsula and King Sound regions of the Western Kimberley, covering Cape Leveque and the bays and the islands in the Buccaneer Archipelago.

The matter originally went to trial on 8 May 2001 before the Honourable Justice Beaumont. Final submissions were adjourned to await the outcome of the High Court decision in *Western Australia v Ward* (2002) 213 CLR 1 (Ward).

The claimants then sought leave to reopen their case to take further evidence following the decisions in *Ward, Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (Yorta Yorta) and *Commonwealth v Yarmirr* (2001) 208 CLR 1 on the basis that all three 'provided a more developed exposition of the matters to be proven in an application for a native title determination'. They submitted documents described as the 'substances of evidence' of the witnesses to be recalled. Beaumont J had difficulty with the generality of the arguments in support of the application to reopen and so made orders that evidence in the form of oral questions in chief, with cross examination, be taken on a preservation basis. He intended to hear submissions on what evidence, if any, should be allowed by way of reopening but illness forced him to retire before the evidence was taken.

A new trial was ordered by his Honour Justice French, to include (among other things) the adducing of the evidence set out in the 13 'substances of evidence', a court view of the area subject to the application. The evidence was also to include the transcript of the first trial—at [24].

The second trial commenced in Broome on 30 June 2003. The claimants sought to further amend their application by revising the native title rights and interests claimed and changing the description of the area claimed. Ultimately, a second native title application (Bardi Jawi No 2) was filed over as much of an area known as Brue Reef as had been inadvertently excluded from the first application. The two matters were heard together. An application to amend the Bardi Jawi No 1 claim group to include the Mayala People, who have an adjoining claimant application, was refused—at [26] to [36].

Oral evidence for the claimants

A total of 35 members of the native title claim group gave evidence in the first trial and a number gave further evidence in the second. It was given in relation to the traditional laws and customs of the Bardi and Jawi peoples, their islands, the waters subject of the claim and the Bardi lands on the northern Dampier Peninsula. There was oral evidence on, among other things, the traditional exploitation of the marine resources, initiation rites (including gender restricted evidence), sacred site identification and the establishment of the Sunday Island mission, on an island to the north of the Peninsula, in the 1930s.

The law concerning devolution of coastal family estates called *buru* (or *bur*), generally through paternal links and the use of the common lands called *pindan* or *nimidiman*

areas for hunting and gathering by the Bardi/Jawi was explained in the testimony, as were various aspects of the laws acknowledged and customs observed in relation to hunting and sharing of marine resources, avoidance relationships and access to *burus*—at [48] to [631].

Historical evidence

Historical sources confirmed the presence of Aboriginal People on the Dampier Peninsula from the time of Abel Tasman in 1644. Further historical evidence on the colonisation of the area, including the advent of pearling, missions and pastoralism in the area, acknowledged the presence and activities of the Bardi and Jawi peoples.

French J made a summary of findings of fact based on the historical evidence that confirmed a pre-sovereignty presence, and a strong association, with the traditional lands that continued into the twentieth century (as indicated by the history of Sunday Island and the Sunday Island mission). The present day strong association to the traditional lands was seen to continue with the activities of two organisations known as the Bardi Council and Bardi Association—at [642] to [717] and [718].

The historical evidence allowed for the inference that the people in occupation of the area at colonisation were, broadly speaking, the ancestors of the present occupiers. French J noted this conclusion allowed for the changing composition of the native title claim group through intermarriage but was careful to note that it did not extend to whether there were one or two societies in the claim area at sovereignty—at [718].

Linguistic evidence

Both the linguistic reports filed (one each by the claimants and the state) concluded that Bardi and Jawi languages were related but one inferred that Jawi traditionally had a dialect status to Bardi. It was not disputed that the languages reflected extensive knowledge of the tides, marine resources, tropical climate change, flora and the regional groupings of the claim group to their country. French J accepted that the linguistic evidence:

- was indicative of knowledge of the environment over a long period of time supporting a continuous connection of both Bardi and Jawi people with the claim area since before 1829;
- supported the importance of the immediate offshore marine environment to their country—at [760] to [782].

Archaeological evidence

Archaeological reports and published works provided evidence of the existence of middens, fish traps, campsites on the coastal strip, tools and artefacts of stone and shell. French J accepted the archaeologists' conclusions that were based on direct observation and listed his findings of fact which included:

- that the archaeological record, when considered together with the oral testimony of the Bardi and Jawi, support the inference that the applicants have occupied the claim area since before colonisation;
- they have had a marine economy since prior to contact with Europeans;
- cultural continuity is reflected in the continuing use of the marine resources, artefacts and campsites—at [719] to [759].

Again French J carefully noted that these findings did not enable any conclusions about whether the Bardi and Jawi were one or two societies at sovereignty.

Anthropological evidence

The objections to the admissibility of the applicants' experts' anthropological reports is discussed at [796] to [805]. French J outlined the content of the reports, leaving aside material that it had been argued was inadmissible and referred to ethnographic maps, literature and accounts of earlier researchers. One of the reports described, among other things, the

extent of Bardi and Jawi country and their land and sea tenure system. It stated that, at the time of the report in 1999, the number of people who identified themselves as Bardi or Bard numbered 950, while there were 70 people who identified as Jawi.

The basic unit of organisation among both Bardi and Jawi was said to be exogamous patrifilial groups identified with mythologically inscribed estates called a *buru* or *bur*, with each *buru* being associated with loose-knit regional grouping. It was said that individuals generally identified with their father's broader cultural identity as either Bardi or Jawi and, as there were close links to mothers' and spouses' estates, there were many individuals with rights in other estates. Genealogies were included to show a long history of intermarriage between Bardi and Jawi people, which (in turn) was used as the 'principal empirical basis for characterisation of the Bardi and Jawi as a single community of kin'— at [802] to [882] and [826].

French J reviewed the anthropological reports and made findings of fact where the anthropological evidence was supported by the applicants' oral evidence. Those findings included the following:

- a significant proportion of the northern Bardi population has strong personal attachment to the Jawi territory of Sunday Island;
- the symbolic arrangement of individuals and estate regions at initiation and other ceremonies is a powerful expression of connection to country;
- Bardi and Jawi country is the source and locus of personal spiritual identity;
- the people believe that the offspring of Bardi and Jawi men inhabit the phenomenal world as incarnations of *ray* or *raya*, that is pre-existent spirit beings who live in specific locations in Bardi or Jawi country;
- cultural emphasis upon the *raya* as estate-specific and paternally instantiated entities is conditioned by, and consistent with, the closely related patrifilial estate inheritance and patrilocal residence;
- country is conceived of as an active physical and metaphysical entity;
- identification with a particular *buru* places the individuals concerned (the estate affiliates) under an obligation to ensure their *buru* is not damaged, defiled or used in any way inconsistent with customary practice;
- rights in country differ in scope and distribution, e.g. estate affiliates enjoy the greatest rights in a *buru*, while persons related by means other than patrifiliation hold rights in accordance with their culturally defined relational proximity;
- there is ongoing responsibility for deceased estates or vacant *burus* by people in the neighbouring *buru* and particularly by law men in respect of law grounds;
- traditional resources include fish, shellfish, crustaceans, dugong, turtle, bush foods and medicines, ochres and clay, fresh water and woods for weapons and cultural artefacts;
- there is a comprehensive traditional knowledge and use of the currents and cultural geography in the waters around the islands north of the Dampier Peninsula, although the knowledge and use of the currents may have declined;
- the Bardi and Jawi consider the right to be asked about country is a fundamental attribute and expression of territorial ownership;
- the movement of Bardi people to Sunday Island was closely related to the development of the mission there;

- the *ilma* genre of songs, dances and designs constitute an important expression of cultural attachment to the sea;

- the central peninsula hinterland, where there are no *bur*, is a significant community resource that is regarded as an integral dimension of the Bardi territorial domain. However, the same proposition was not made out in respect of the deep sea—at [829] to [908].

French J dealt with the southern extent of the application area later in his determination, as discussed below. See [912] to [937] for additional anthropological evidence on this issue.

Recognition

His Honour reviewed the statutory framework for the recognition of native title, noting (among other things) that:

- even allowing for extinguishment, the Preamble to the NTA 'stands as a continuing declaration of the moral foundation of the Act…informs its construction [and] evidences an intention to recognise, support and protect native title, rather than to confine it within nicely parsed verbal bonds';

- the idea of recognition of native title operates in a realm of legal discourse and 'may be seen as a kind of translation of aspects of an indigenous society's relationship to land and waters into a set of rights and interests which exist under non-indigenous laws';

- the grant or refusal of recognition at common law or under the NTA does not affect or modify the traditional laws and customs or the rights and interests to which in their own terms they may give rise;

- the use of the term 'extinguishment' has nothing to say about the rights and interests that arise under traditional law and custom and is a potentially misleading metaphor;

- the distinction between the existence of native title under traditional law and custom and its recognition by the common law was made in *Fejo v Northern Territory* (1998) 195 CLR 96 at 128;

- those rights and interests that continue in spite of non-recognition by the common law may be taken into account in the definition of the connection with land and waters which Indigenous people may have by virtue of their traditional laws and customs;

- the historical reality of an Indigenous society in occupation of land at the time of colonisation is the starting point for present day claims for recognition of native title rights and interests;

- the common law and NTA establish the rules for determining whether native title exist—they are the rules of recognition;

- the relationship between Indigenous societies and their land and waters is holistic in character;

- the communal nature of native title is not to be lost sight of by an undue concentration on the fractal detail of intra-societal allocations of rights and interests or the modes of their enjoyment;

- the recognition of the rights and interests of a subgroup or an individual which are dependent on a communal native title is not prevented by the absence of a communal law determining a point in contest, e.g. as a matter of custom, such points may be settled by community consensus or in some other manner prescribed by custom;

- given that ss. 223(1)(a) and (b) were taken from *Mabo (No 2)*, they 'could hardly have been intended to undercut the fundamental principle' of the communal character of native title rights and interests;

- the continuity in law and custom and the exercise of rights and interests required for proof of native title 'is not some simplistic absolute' because neither change to nor adaptation of laws and customs or some interruption of enjoyment or exercise of native title rights are necessarily fatal;

- proving continuity in both traditional laws and customs and the society to which they relate 'involves consideration of the historical, archaeological, linguistic and anthropological evidence in the light of the direct testimony of Aboriginal witnesses' and genealogies may be used to support an inference of continuity with the society that existed at the time of colonisation;

- a finding of fact as to whether there is a relevant 'society' of Aboriginal peoples today capable of being the subject of a determination of native title is 'evaluative in character'—at [942], [948] to [955], [964] and [970].

French J referred to the findings in *Yorta Yorta* [38] and [47] that:

- the rights and interests must derive 'from a body of norms or normative system— the body of norms or normative system that existed before sovereignty'; and

- the relevant normative system 'must have had a continuous existence and vitality since sovereignty'.

Therefore, according to his Honour, the s. 223(1) inquiry:

> [R]equires the consideration of the relationship between traditional laws and customs now acknowledged and observed and those which were acknowledged and observed before sovereignty. It must be shown that the society under whose laws and customs the native title rights and interests are said to be possessed has continued to exist from sovereignty to the present date '…as a body united by its acknowledgement and observance of the laws and customs'—at [963], quoting *Yorta Yorta* at [89].

Meaning of 'society'

Having noted that 'society' is not defined in the NTA, his Honour turned to the Shorter Oxford English Dictionary 95th ed., 2002 where 'society' is defined to mean 'a body of people forming a community or living under the same government'. It was noted that the High Court in *Yorta Yorta* used 'society' to designate a kind or group of Aboriginal peoples who observe a set of laws and customs under which the members of the group can be the subject of a determination that they hold, individually or in conjunction with others, rights compromising native title.

On the meaning of 'society' in a native title context, French J:

- warned against the use of taxonomies of 'societies' by reference to criteria other than those emerging from the terms of ss. 223 and 225 as they may import other criteria into the application of those sections which are not required by their terms or the common law which they incorporate by reference. To do so may restrict the beneficial application of the NTA 'to a field narrower than that defined by its words';

- noted that 'the identification of an Aboriginal society which can be said to have existed at the time of colonisation and which continues to exist today, united by traditional laws and customs, under which it and/or its members can be said to hold native title rights and interests is no easy matter';

- the use of the term 'society' imports a criterion of eligibility for the recognition implied from the NTA and the common law but 'must not become a Trojan horse for the introduction of elements or criteria foreign to the requirements of the Act and the common law for the recognition of native title';

- the term should be applied in accordance with its ordinary meaning, i.e. a body of people forming a community or living under the same government;

- the relevant community must be a community, which at the time of colonisation, observed a body of laws and customs that continue in existence today, subject to 'allowing for the evolution of both providing that the essential continuity is maintained'—at [969] and [1042].

His Honour noted that cases that predated *Yorta Yorta* involving single claims brought by multiple groups 'under one umbrella' were of little assistance in addressing the societal continuity question *Yorta Yorta* required the court to address—at [971] to [975].

One society or two?

In determining whether there was 'society' for the purposes of s. 223(1) in this case, French J identified two questions:

- whether there is society of the requisite kind in existence today; and

- whether that society can be said to have existed since sovereignty—at [968].

The applicant's submissions relied upon their belief that the Bardi and Jawi are one society united by law, intermarriage and culture and have been so since creative beings introduced their law ceremonies.

The state and the Commonwealth denied the existence of one traditional Bardi/Jawi society, raising the change in position of the claimants in the course of the extended trial process. Reference was made to the opening remarks made on behalf of the applicant that:

- identified Bardi and Jawi as 'two distinct yet closely related Aboriginal groups'; and

- stated that the land and waters in the claim area which were traditionally occupied by the Jawi people as the area north-east of Hadley Passage and Juwarnan and Murrudulun islands and that the Bardi people had a connection with the area south-west of Hadley Passage—at [978] to [987].

The Western Australian Fishing Industry Council (WAFIC) submitted there was evidence that two distinct societies had merged into one, supporting their argument with the testimony of some of the applicant's witnesses. On the basis of the Yorta Yorta decision, WAFIC submitted that it was arguable that the claim should fail as the Bardi/Jawi was a 'new' composite society—at [988] to [994].

French J reviewed the applicant's testimony at each trial and found evidence that the intermingling of Bardi and Jawi, as seen on Sunday Island, could be regarded as a process of historical change leading two distinct societies into becoming one—at [996] to [1016].

His Honour went on to note that:

> [I]t did seem to me at the hearing [post *Yorta Yorta*]…that the Aboriginal witnesses placed great emphasis upon the unity of the Bardi and Jawi people as one society and the one law…By that time…it was clear that the question whether there had been from the time of annexation, one society or two…was a matter of some importance…Their evidence…supports the view that the Bardi and Jawi people *today* see themselves essentially as one people united by common laws and customs…So, emphatic as it was, and to some degree formulaic and argumentative, I am satisfied that it represented the true state of mind of the witnesses…and that generally the Bardi and Jawi people who have responsibility today for maintaining and communicating traditional laws and customs regard themselves as one people, united by one law—at [1017].

This left open the 'critical' questions:

- on the facts, could the court conclude there has been 'one such society which can be traced back to the time of colonisation', or

- were there two societies that have become one via absorption of the Jawi people into Bardi society, or

- were they two societies with one (the Jawi) being now considerably diminished?—at [1017].

Two societies at sovereignty

From the historical, archaeological, linguistic and anthropological evidence, French J concluded there were limited inferences that could be drawn about the characterisation of the Bardi and Jawi communities at sovereignty. And the oral evidence did not enable him to make the necessary inference that there was one society at sovereignty and today—at [1017] to [1046].

His Honour was prepared to accept that:

- intermarriage between the Bardi and the Jawi was extensive and dated back to the time of sovereignty;

- there were similar cosmologies and similar laws and customs defining the rights and responsibilities of clans and families with respect to particular *burus*;

- there were similar patterns of exploitation of marine resources, although Jawi relied more than Bardi on resources beyond the intertidal and reef zones and used rafts to a much greater extent for that purpose;

- there were common ceremonies in relation to initiations;

- the contemporary practice of initiation ceremonies relies upon a common creation cosmology for both Bardi and Jawi which is reflected, *inter alia*, in the seating arrangements of those being initiated—at [1043] to [1044].

However, it was held that:

- at all material times there were two distinct but closely related groups, the members of which identified either as Bardi or Jawi;

- Bardi and Jawi were for the most part different territories, the Bardi mainland and the Jawi archipelagic;

- the Bardi went to Sunday Island in post-sovereignty times but there was no real indication of any historical perception of Sunday Island as part of the country of a single society;

- the inference could not be made that there was a unified Bardi/Jawi society occupying the claim area at sovereignty united by a single set of traditional laws and customs acknowledged and observed by that society today—at [1043] to [1046].

Only Bardi society had continuity

It was further held that:

- there was at sovereignty a society of Bardi people which, under its traditional laws and customs, was able to receive into its membership (at least by a process of intermarriage) people from the Jawi community and that process was probably in place at sovereignty;

- the area covered by a determination of native title cannot extend beyond the lands and waters of the Bardi people at sovereignty;

- there were no rules of succession identified in the evidence allowing the court to consider the incorporation of Jawi traditional territories into Bardi territory;

- having regard to the way in which the applicant's case has been put and the evidence led in support of it, a present day Jawi society could not be identified;

- as a consequence, the Jawi people were subsumed into Bardi society at some time since sovereignty—at [1046] to [1048].

Of significance was his Honour's statement that:

> Absent further argument or agreement, I am not prepared to make a separate

determination in favour of the surviving Jawi people in relation to Sunday Island or other islands within the claim area said to have comprised the traditional territory of the Jawi—at [1047].

Therefore, French J appears to have left it open to the parties to reach agreement on the existence of a Jawi society based on the evidence and any other material that the parties have that would satisfy them that such an agreement should be made.

His Honour was prepared to make a determination in favour of Bardi/Jawi people. The inclusion of the Jawi people in the Bardi society had not destroyed that society's continuity with the original Bardi society. Further, on the basis of the evidence, his Honour was satisfied that there was a body of laws acknowledged and customs observed by the Bardi society which have existed, substantially uninterrupted, since the time of sovereignty—at [1048] and [1051].

Rights and interests possessed under traditional law and custom and connection by those laws and customs

French J was of the view that:

- based on the evidence, native title subsists in the Bardi people in respect of the whole of their country, i.e. is not limited to the families associated with particular estates;
- *buru*-by-*buru* mapping of native title rights and interests would involve a descent into fractal detail not supported by the policy of the legislation and the process of recognition it seeks to advance and, in any case, was at odds with the evidence—at [1069].

French J concluded that the evidence supported the inference that the Bardi people have, under their traditional laws and customs, rights of possession and occupation of the land as against the whole world. Having found that the reference to 'use and enjoy' in the concept of exclusive possession was too broad and may encompass rights not supported by traditional law and custom, his Honour identified the rights supported by the evidence as the right to:

- live on the land;
- access, move about on and use the land;
- hunt and gather on the land;
- engage in spiritual and cultural activities on the land;
- access, use and take any of the resources of the land (including ochre) for food, shelter, medicine, fishing and trapping fish and weapons for hunting and otherwise for ceremonial cultural and artistic purposes;
- refuse, regulate and control the use and enjoyment by others of the land and its resources;
- have access to and use the water of the land for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes—at [1073].

In relation to intertidal and offshore areas the claimants conceded that the native title rights are non-exclusive. The native title rights held in respect of those areas that were supported by the evidence were the right to:

- access, move about in and on and use and enjoy the zone, the reefs and the associated waters;
- hunt and gather including for dugong and turtle;
- access, use and take any of the resources thereof (including the water of the intertidal zone) for food, trapping fish, religious, spiritual, cultural, ceremonial and communal purposes—at [1074].

The court rejected the claimed right to care for, maintain and protect the land as it did not define 'with any useful precision' the nature of the entitlement which it confers. In any case, his Honour's comments in relation to Alarm Shoals indicate that, even if the right 'to care

for and protect' was sufficiently precise, it would be inappropriate to recognise it in relation to areas for which only non-exclusive native title rights and interests can be recognised because the right was really directed at a need to exclude people from the relevant area—at [1073] and [1112].

In relation to s. 223(1)(b), French J found that the Bardi community had the necessary connection at the communal level, noting the required connection involves the continuing internal and external assertion by the group of its traditional relationship to the country defined by its laws and customs and which may be expressed by its physical presence there or otherwise—at [1079].

Land to be included in the determination

Having found that the Jawi people have been integrated into Bardi society, a society with no apparent succession laws for incorporation of Jawi traditional territories, French J concluded that none of the islands to the east of Hadley Passage could be included in the determination. This left the mainland area and the islands to the west of Hadley Passage—at [1082].

The court noted that the evidence as to whether Bardi territory extended south of Pender Bay was ambivalent. His Honour indicted the appropriate southern boundary was defined by a line joining a particular site on Pender Bay in the west and Cunningham Point in the east but was prepared to take further submissions on the point—at [1083] and [1110].

Islands and offshore areas

His Honour found that the evidence did not support the view that the islands north of the mainland were Bardi country at sovereignty. In offshore areas, the court indicated native title would be recognised over the intertidal area and adjacent reefs, noting that evidence of the Bardi use of the sea was limited to the low water mark and the adjacent reefs but asked the parties to help better define these areas—at [6], [1104] and [1108].

Restricted evidence was led regarding the spiritual connection to Alarm Shoals and the right under Bardi traditional law and custom to care for and protect the reefs from unauthorised access. As indicated above, French J held that the rights being asserted were essentially a right to exclude people from the area. This type of right, in respect of offshore areas, could not be recognised at common law—at [1111].

In regard to Brue Reef, included in the Bardi Jawi No 2 application, French J held that the existence of a mythological story did not establish traditional laws and customs of either Bardi or Jawi people in respect of the area. French J found there was no basis disclosed on the evidence of native title rights in Brue Reef and hence the Bardi/Jawi No 2. claim would be dismissed—at [1116].

Extinguishment and ss. 47A and 47B—occupation of the inter-tidal zone

The state accepted that one or more members of the native title claim group occupied the claim area at the date that the application was made, as required under ss. 47A and 47B and the court was satisfied that those sections applied the areas identified by the state—at [1117] to [1118] [1130] to 1131] and [1134].

In relation to 'occupation' of the inter-tidal zone, French J found that the nature of the native title rights that can be recognised in the intertidal zone does not determine whether occupancy of the intertidal zone was possible 'in the relevant sense', noting that:

> [F]rom the point of view of the Bardi people the intertidal zone is part of their country and perhaps the most important part of it because of the sustenance it has always provided to them…[and] occupation of the intertidal zone can occur if occupation is understood in the broad sense relevant to the kind of uses that indigenous people make of their land—at [1136].

Aquaculture and pearling interests impact on native title rights and interests

WAFIC raised several arguments about the extinguishing effect of various tenures, including pearl oyster farm leases granted prior to 23 December 1996, arguing these were commercial leases within the meaning of s. 23B and, therefore, previous exclusive possession acts (PEPAs) for the purposes of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (TVA).

French J found that:

- the definition of PEPAs did not extend to commercial leases that were agricultural leases;
- the definition of agricultural lease in s. 247(2) expressly includes leases permitting the use of land or waters primarily for aquaculture;
- the expression 'aquaculture' should be read widely and construed beneficial, rather than in a way that would 'maximize extinguishment';
- the extensive infrastructure for aquaculture and the protection from intruders were unaffected by any absence of permanent extinguishment of native title rights and interests—at [1138] and [1139].

Without categorising the pearl farm leases, French J held they were not PEPAs and did not attract extinguishment under the TVA—at [1139].

However, what he did not consider was whether the leases conferred a right of exclusive possession over the land and waters concerned—see s. 23B(2)(viii) of the NTA. Presumably they did not.

Where expired special leases for pearling covered areas including the intertidal zone, French J confirmed his earlier finding that ss. 47A and 47B applied where the land had reverted to unallocated Crown land. It was noted that:

- pearl oyster farm leases granted after 23 December 1996 were found to prevail over any native title rights and interests to the extent of any inconsistency as provided by s.44H [on this section, see *De Rose (No 2)* summarised above];
- aquaculture licences granted under the *Fish Resource Management Act 1994* (Cwlth) will also prevail over any native title rights and interests to the extent of any inconsistency—at [1141] to [1142] and [1144].

WAFIC submitted:

- expired pearling licences under the *Pearling Act 1912* were akin to leasehold rights and, therefore, they extinguished native title to the extent of any inconsistency, including commercial or subsistence rights to take oyster shells;
- there had been 'global' extinguishment of any native title right to take pearl oysters or pearl shell for subsistence or ceremonial purposes (largely relying on the Western Australian Pearling Acts of 1912 and 1990).

French J rejected both submissions because:

- in relation to the first, the licences did not evince an intention to extinguish native title; and
- in relation to second, this was a 'draconian' interpretation—the legislation did not create an absolute prohibition but rather a licensing regime not intended to exclude the ceremonial usage by the Bardi people. It was noted that s. 211 NTA would apply to preserve such rights in the context of contemporary legislation—at [1143] to [1147].

Conclusion

His Honour is prepared to make a native title determination along the lines indicated above in relation to mainland areas, the relevant intertidal zone and adjacent reefs exposed at low tide as well as other reefs in the area which

are exposed and particularly those visible from the shore or from the intertidal zone.

The door was left slightly ajar on the issue of a separate determination for the remaining Jawi people in respect of their traditional lands—see [1047].

His Honour identified three areas which needed to be resolved before the determination could be made:

- the extent of the offshore areas that could be included in the determination;
- the position of the southern boundary of traditional Bardi country; and
- the specific identification of extinguishing tenure areas—at [6], [1151] and [11].

Decision-making under traditional law and custom

Taylor v Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation [2004] FCA 1010

Lee J, 26 November 2004

Issues

This case examines the role and responsibility of Aborignal/Torres Strait Islander native title representative bodies in performing their assistance and facilitation functions and the position of people who can 'speak for particular country' in authorising agreements.

Background

The three applicants, members of the Njamal native title claim group in Western Australia, sought an urgent interloctutory injunction against *Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation* (Yamatji), a representative body under the NTA that represents the claim group in the claimant's application.

Two of the three applicants in this case are authorised by the claim group to make the native title claim as required by s. 61(1) of the NTA. They are, therefore, persons who, with others, jointly comprise the applicant and the registered native title claimant see s. 61(2) and 253. They claimed a superior right, under traditional law and custom, to speak for a part of the area covered by the application that included the Woodie Woodie Mine.

The native title claim group instructed Yamatji to assist it in the conduct of negotiations with the operator of the mine, Consolidated Minerals Ltd (CML), about future operation of the mine site. In June 2004, those attending a meeting of the native title claim group instructed Yamatji to 'liaise' with CML and to prepare an agreement to be signed by the registered native title claimant. A meeting was scheduled for November 2004 for the claim group to consider the proposed agreement—at [8] and [9].

The applicants claimed that:

- under the traditional law and custom of the claim group, they have the sole right to speak for the use of that part of the claim area that included the mine site;
- the representative body had failed to inform the claim group that the decision must be obtained in accordance with traditional law and custom and not by another process not consistent with that law and custom—at [10] and [11].

Pending determination of an application for judicial review of the respondent's decision in relation to s. 203BC(2) of the NTA, the applicants in this case sought, among other things, an interlocutory injunction to restrain the respondent from representing or assisting the native title claim group by advising that they may direct the registered native title claimants to execute the proposed agreement with CML—at [12].

Obligations of the representative body

The applicants contend that the respondent has failed to carry out the facilitation and assistance functions under s. 203BC (1) by allowing the native title claim group to use a

decision-making process that is not consistent with their traditional laws and customs—at [11].

His Honour Justice Lee reviewed ss. 203BB(1), 203BC(1) and 203BI of the NTA which deal with a representative body facilitation, assistance and internal review functions. His Honour was satisfied that:

- on the material before him, there was a serious issue to be tried, i.e. that Yamatji failed to carry out the facilitation and assistance functions required by the NTA;
- there was an arguable case that Yamatji had not consulted with, or given due regard to, the interests of persons who may hold native title who are affected by the negotiations and proposed agreement with CML;
- it was arguable that Yamatji had failed to properly advise the claim group on the consequences of entering the agreement without the consent of the applicants;
- it was arguable that Yamatji had failed to carry out the internal review functions as required by ss. 203B(1)(f) and 203BI of the NTA;
- the material filed in these proceedings showed that there was no action taken on the applicants' request for internal review of the decision to advise and represent the native title claim group and suggested that Yamatji may not have in place a process for review of its decisions or actions—at [16] to [18].

Decision

Lee J held:

- the balance of convenience weighed in favour of the applicants
- a potential result of the conduct of the proposed November meeting would be an irreversible circumstance under the NTA for which the applicants could not obtain redress if they succeeded in their substantive application—at [19].

Therefore, Yamatji was restrained from:

- providing representation or assistance to the claim group by convening the November meeting; and
- advising the claim group that it could hold such a meeting and engage in decision-making at that meeting that may not be in conformity with their traditional laws and customs—at [20].

Combined Gunggandji Claim v Queensland [2005] FCA 575

Dowsett J, 31 March 2005

Issue

The issue in this case was whether the applicant to a claimant application could be removed and replaced with a new applicant pursuant to s. 66B of the NTA.

Background

The people who jointly comprised the applicant on the Combined Gunggandji Claim, Q6013/01, were Leslie Vivian Murgha, Stewart Eric Harris and Frederick (Ricko) Noble. The proposed removal of Mr Noble from that group was considered at a meeting of the native title claim group, where it was allegedly decided in accordance with traditional law and custom to refer the matter to the elders for their decision and to abide by that decision. The elders agreed unanimously that Mr Noble should be removed and Leslie Vivian Murgha and Stewart Eric Harris be authorised as the applicant. The claim group adopted this resolution.

A traditional process under s. 251B(a)?

In this case, Mr Noble contended that the decision to remove him as a person who jointly comprised the applicant was not in accordance with traditional law and custom because, in his view, there were two claim groups with different laws and customs.

His Honour Justice Dowsett held that:

if there were no accepted law or custom within the claim group (because there were

conflicting practices within that group), then section 251B(b) would apply;

in effect, the claim group agreed to refer the matter to the elders for decision and chose to abide by the resulting decision—at[2].

Decision

Dowsett J accepted that all the requirements of s. 66B had been satisfied and ordered that the previous applicant be replaced by a new applicant comprised jointly of Leslie Vivian Murgha and Stewart Eric Harris—at [4].

Party status

Kokatha Native Title Claim v South Australia [2005] FCA 826

Mansfield J, 24 June 2005

Issues

There were two issues examined in this matter:

- whether the applicant to a claimant application that was struck out, who was a respondent to an overlapping application, ceased to be a respondent because of the strike out; and
- whether other persons who would also have been members of the claim group for the application that was struck out could be joined as respondents.

Background

Two claimant applications, the Kokatha claim made by Daniel Clifton and Roger Thomas on behalf of the Kokatha people and the Kuyani claim made by Mark McKenzie on behalf of the Kuyani people, overlapped in respect of an area of land north-east of Port Augusta in South Australia.

The Kuyani claim was struck out on 27 January 2005. Prior to the strike out, Mark McKenzie had become a respondent to the Kokatha claim because he was a registered native title claimant: s. 84(3)(a)(i). The Kokatha claimants and the Aboriginal Legal Rights Movement (ALRM) contended that Mark McKenzie ceased to be a party to the Kokatha claim when the Kuyani claim was struck out.

Is Mark McKenzie still a party to the Kokatha claim?

His Honour Justice Mansfield held that:

- subsection 84(8) may be exercised to remove a party if the person no longer has interests that may be affected by a determination in the proceedings;
- however, it clearly contemplated no automatic removal of a party if the interests which previously led to that person becoming a party ceased to exist—at [6].

The Kokatha claimants submitted that s. 66(4)(b) applied directly to Mark McKenzie so that he ceased to be a party. Mansfield J held that it did not because:

- subsection 66(4) was intended to avoid the extensive notification requirements in the event that the relevant state or territory minister applies to the court within a limited time and succeeds in getting the native title determination struck out;
- the submission by the Kokatha claimants required that s. 66(4) be read so that the 'and' be read as a disjunctive 'or';
- there was no contextual or practical reason why the clear and normal meaning should not be given to that provision;
- the fact that a person has become a party by the eligibility criterion in s. 66(3)(a)(i) and s. 84(3)(a)(i) [i.e. because they were a registered native title party] and that native title claim has been struck out does not necessarily mean that the person would not otherwise have been eligible for automatic party status under ss. 84(3)(a)(ii) or s. 84(3)(a)(iii)—at [7] to [8] and [10].

Applications to become a party

Three notices of motion were brought by persons seeking to become respondents to the Kokatha claim. They claimed:

- an interest in the area concerned either as Kuyani/Wilyaru or Adnya-Kuyani men under the Wilyaru-Kuyani traditional laws and customs; and

- that their interests were inconsistent with the rights claimed by the Kokatha claimants in the Kokatha claim.

The Kokatha claimants contended that:

- subsection 84(5) did not permit the joining of parties who assert native title rights and interests which were inconsistent with those claimed by the Kokatha claimants;

- persons with such an interest could only attain party status under ss. 84(3)(a)(i) and 84(3)(a)(ii) during the notification period;

- the court should decline to make the orders sought as the interests claimed to be affected were inherently communal in character, so that no one person (unless authorised under s. 251B) should be permitted to assert them.

Mansfield J held that:

- there was no provision in the NTA expressly limiting an authorised native title claimant to become a party to a competing native title claim, or requiring a non-authorised native title claimant from becoming a party to such a claim, only within the notification period;

- subparagraph 84(3)(a)(ii) should not be read to exclude persons who claim eligibility to party status under that provision but who are not by then authorised under s. 251B to pursue a claim for native title rights;

- the court has a discretion under s. 84(5) to join each of the party-applicants as a party to the Kokatha claim notwithstanding that, as individuals, they were each asserting that their interests which were or may be affected by a determination of native title in the proceedings were apparently native title rights and interests;

- where there may be a competing native title group who claim communal rights and interests which may be affected by a determination, but there was no application by that group over the claim area, the members of that group should not be precluded from putting forward their claim in a defensive attempt to avoid the dilution of those interests;

- as power in s. 84(5) was discretionary, it would often be a matter for evidence as to whether any one individual has either a particular status or a particular perspective or particular circumstances which warrant that person's joinder as a party, including that person's status within the putative or competing claim group;

- it may be relevant to know the extent to which that person or persons has the support of, or is entitled to represent, the interests of the putative or competing claim group;

- no hard and fast rules could be laid down;

- in this case, there was no persuasive evidence that Michael McKenzie or Cecil Brady assert a particular status or perspective supporting their joinder as parties in addition to, or instead of, Mark McKenzie—at [19], [24], [26] and [27].

The court will further consider this matter on 8 September 2004—at [28].

Ward v Western Australia [2005] FCA 523

French J, 15 March 2003

Issue

The issue in this matter was whether an Aboriginal corporation should be joined as a party to a claimant application.

Background

The Miriuwung Gajerrong Families Heritage Land Council Aboriginal Corporation (the

Corporation) applied to become a party to the Miriuwung Gajerrong (No 4) application, arguing it had a right to be a party because it possessed rights and interests:

- pursuant to s. 106(2) of the *Land Act 1933* (WA) (taken to refer to s. 104 of the *Land Administration Act 1997* (WA), which creates a reservation in favour of Aboriginal persons over certain lands);
- Sections 5 and 6 of the *Aboriginal Heritage Act 1972* (WA) (which applies to places of significance to persons of Aboriginal descent and to objects of significance) and the appointment of honorary wardens under s. 50 of the *Aboriginal Heritage Act*; and
- 'improper authorisation' under s. 251B of the NTA—at [6] and [7].

His Honour Justice French found that the evidence did not provide any support for the proposition that the Corporation has any relevant interest which would warrant its joinder as a party:

> The reservation under s. 104…confers a general right upon Aboriginal persons which would be unaffected by any native title determination. The appointment of honorary wardens…is a matter in the discretion of the Minister. It has no logical connection with any interests of the Corporation. So far as the question of authorisation is concerned, that is not a matter which goes to the standing of this Corporation to become a party. Challenges to authorisation are matters which can be raised in other ways, but certainly not by the process of joinder—at [8].

Decision

French J held that the Corporation should not be joined as a party to the application.

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 brought in relation to future acts to which subdivision P of Div 3, Pt 2 applies. Significant Tribunal determinations are also reported in the Federal Law Report. 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
http://www.austlii.edu.au/au/cases/Cwlth/NNTTA.

Acceptance of Form 4 applications and the application fee

Fisher (Birri People)/Queensland/ Kitchener Mining NL [2005] NNTTA 33

Member Sosso, 5 May 2005

Issue

Where an applicant contends that the application fee for making an expedited procedure objection application to the National Native Title Tribunal under s. 75 is not payable, what factors are relevant in determining whether the period allowed for the supply of material to substantiate the assertion is reasonable?

Background

The Queensland Government issued a s. 29 notice on 8 December 2004 that included a statement that the government considered the act attracted the expedited procedure. Within the relevant period, the native title party (applicant for the Birri People native title application) lodged an expedited procedure objection application (Form 4). The application was not accompanied by the prescribed fee: see s. 76(d).

The Native Title (Tribunal) Regulations 1993 prescribe the fee but also specify, among other things, the circumstances in which the fee is not payable. Subreg 8(b)(i) provides that a fee is not payable if the person liable to pay the fee is the holder of one of the following cards issued by the Department of Social Security:

- a health care card;
- a health benefit card;
- a pensioner concession card;
- a Commonwealth seniors health card.

An application for 'relief from payment' of the fee was made on the basis that 'one or all of the persons liable to pay the fee fall within part (b) of that regulation'—at [9].

The closing date for lodgement of objection applications was 8 April 2005. No material supporting application for waiver of the fee was received by that date. The legal representative for those seeking waiver was contacted on 19 April 2005 and again on 27 April 2005 by Tribunal staff and documentation in support sought. Relevant information was then to be provided by 29 April 2005 but none had been received by the date of the member's decision—at [11].

The Tribunal considered that two situations could arise where no fee was paid:

- the applicant does not contend that the fee is not payable;
- the applicant contends that the fee is properly waived.

In the former case, Member Sosso was of the view that:

- a failure to assert that the fee is not payable by a native title party does not result in any obligation being placed on the Tribunal to make enquiries or to do anything further other than submit to the presiding member the material to hand so that an acceptance decision can be promptly made;
- payment of the fee is mandatory and, unless the native title party has paid the fee or can rely upon the circumstances in the regulations, the objection application will not be accepted;
- in the latter case, the native title party is obliged to provide material to the Tribunal to substantiate the assertion;
- procedural fairness requires that the objector be given a reasonable time to submit the material and what is a reasonable time will depend upon the circumstances of each case—at [14].

The relevant factors identified included:

- the time elapsing between the lodging of the Form 4 and the conclusion of the four-month notification period;
- whether the native title party is legally represented;
- whether the native title party has previously lodged expedited procedure objection notices;
- whether the Tribunal has made contact with the native title party, either orally or in writing seeking the relevant documentation;
- the previous history of the native title party in dealing with such matters; and
- the practice of the Tribunal in the particular jurisdiction.

The member was of the view that, in the context of expedited procedure objection applications, decisions need to be made promptly.

Decision

The native title party failed to support its assertion that no fee was payable. Thus, the Tribunal proceeded on the basis that the fee was payable. No fee was paid and therefore the Form 4 was not accepted. Member Sosso stated that:

> A native title party who assert that the prescribed fee is not payable should provide documentation supporting that assertion *either at the same time that the Form 4 is lodged or by the expiration of the notification period* (s. 32(3)). However, if supporting material is lodged after the closing date but before an acceptance decision is made, then the Tribunal will take that material into account—at [29], emphasis added.

Other future act determinations

Section 24MD(6B)—hearing by independent person

Gobawarrah Minduarra Yinhawanga People & Innawonga People v Western Australia

Heath SM (Independent Person), 2 May 2005

Issues

The main issues covered in this determination made by an 'independent person' appointed by the State of Western Australia are:

- the role of an 'independent person' under section 24MD(6B) of the NTA;
- the nature of consultation under section 24MD(6B)(e).

Background

The State of Western Australia intended to grant Hamersley Iron a miscellaneous licence under the *Mining Act* 1978 (WA) for the construction of 'infrastructure', i.e. a gas pipeline and access track. The state notified the relevant registered native title claimants under s. 24MD(6B)(c) that the act was to be done. The claimants objected to the grant and the state 'ensured' the objection was 'heard by an independent person' as required by s. 24MD(6B)(f).

The objectors, the Gobawarrah Minduarra Yinhawanga People (WC97/43) and the Innawonga people (WC98/69), argued that the independent person:

- only had jurisdiction to make a determination if the facts come within the terms of s. 24MD(6B);
- was under a duty to inquire into the question of jurisdiction, relying on *Mineralogy v National Native Title Tribunal* (1997) 150 ALR 467 and *Risk v Williamson* (1998) 87 FCR 202, where it was held that the National Native Title Tribunal (NNTT) has such a duty if one of the parties before it raised the question;
- is a statutory body carrying out a statutory function in the same way as the NNTT.

It was submitted that proper consultation had not been undertaken as required under s. 24MD(6B)(e).

Hamersley Iron argued that the independent person was appointed by the state to perform a particular statutory function to enable the state to ensure compliance with s. 24MD(6B).

SM Heath referred to the state's 'helpful' submissions on the future act provisions of the NTA before setting out the following propositions:

- the future act provisions include procedural steps to be followed to ensure that any 'future act' that 'affects native title' is 'valid';
- neither a failure to follow the 'correct' procedure nor a failure to follow any procedure when doing a future act is 'actionable *per se*. It is only the doing of the… "future act" that may give rise to a cause of action'—at [9] to [10].

With respect:

- an act can only be a 'future act' if it affects native title—see s. 227 and *Lardil Peoples v Queensland* (2001) 108 FCR 453 (Lardil Peoples) at [47], [58], [70] and [114], *Mineralogy v National Native Title Tribunal* (1997) 150 ALR 467 at 478; and
- the Federal Court has said on several occasions that, if the NTA does not provide an effective or adequate statutory remedy for a failure to afford procedural rights, 'equity can intervene to protect or give effect to them', e.g. *Lardil Peoples* at [73].

Role of the independent person under s. 24MD(6B)(f) and objections to 'jurisdiction'

SM Heath went on to consider the role of the independent person, noting that:

- there are no statutory requirements found in s. 24MD(6B)(f) and no formal appointment of the 'independent person' is required by the NTA;
- the position carries no powers other than those contained in that provision;
- by way of contrast, the NNTT is an independent statutory tribunal created and given 'powers' by the NTA;
- the independent person's 'ability' to consider a matter under s. 24MD(6B)(f) 'only arises' upon referral by the state and that 'ability' is governed by that section;
- a hearing under s. 24MD(6B) 'is not a forum in which relief may be sought on the basis that the party has not complied with a provision of the NTA' but, rather, it is 'limited to considering the objection';
- the hearing takes place 'not as an exercise in determining the legal rights of the parties but as a means of ensuring that any concerns of the Native Title Claimants [sic] are considered before the act is done—at [12] to [13].

Support for this view was drawn from s. 24MD(6B)(g), which provides that the independent person's determination (including any recommendation) must be complied with unless the relevant minister (i.e. state, territory or Commonwealth) responsible for indigenous affairs is consulted, the consultation is taken into account and 'it is in the interests' [as defined in s. 24MD(6C)] of the state, territory or Commonwealth not to comply with it. However, note that the Tribunal's determinations can be 'overruled' in a similar, albeit more formal, way for similar reasons—see s. 42.

As a result of accepting and adopting the state's submissions, it was determined that it is not necessary for the 'independent person' to consider objections to 'jurisdiction'; that person need only consider the 'substantive issues'—at [14].

Scope of the reasons for upholding objections and imposing conditions

The objectors argued the independent person was not confined to considering the matters set out in s. 24MD(6B)(e), i.e. to taking into account the ways of minimising the future act's impact on registered native title rights and interests and (if relevant) any access to the land or the way in which anything authorised by the act might be done. Rather, it was argued, an objection could be 'upheld for various reasons assessed on all the circumstances of the case and weighing up all the factors for and against the grant which affects such native title rights and interests'. These submissions were rejected, i.e. the relevant criteria are those found in s. 24MD(6B)(e)—at [16], referring to *Thalyani Native Title Claim Group v Western Australia.*

What is consultation for the purposes of s.24MD(6B)(e)?

The objectors submitted that:

- consultation required the provision of full information of the proposed act to facilitate a native title party being in a position to give a meaningful response, referring to Canadian cases that discuss the meaning of a duty to consult; and
- it was necessary for the land to be surveyed and for them to know precisely where the proposed 'infrastructure' would be situated in order to minimise the impact of, and disturbance by activities done under, the grant of the miscellaneous licence and discuss access;
- the applicant should have provided detailed information or suggestions about either minimising the impact of the future act or access.

Hamersley Iron:

- pointed to information provided about the proposed infrastructure, meetings and correspondence about obtaining the objectors' views and providing its response to those views, opportunities provided to appoint appropriate claimants to consult with the company and funds provided to the objectors for obtaining professional advice and assistance;

- submitted that the concept of consultation in subdiv. M of Pt 2 Div 3 of the NTA must be distinguished from the 'right to negotiate' found in subdiv. P.

SM Heath accepted that the New Zealand Court of Appeals in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 provided a 'good summary' of what s. 24MD(6B) required of the party obliged to consult, which includes:

- allowing sufficient time and making genuine efforts so that consultation is a reality, not a charade;

- not merely telling or presenting;

- ensuring the party consulted is to be 'adequately informed so as to be able to make intelligent and useful responses';

- keeping an open mind and being ready to change or even start afresh (while still being allowed to have a plan in mind at the outset)—at [23] to [24].

This was qualified by the comment that what is required will depend on the facts in each case.

The objectors submitted that, under s. 24MD(6B), in most cases a heritage survey and 'on country' meetings would be required to explain what is proposed and where. It was also suggested that consultations had taken place with the 'negotiation teams' rather than the 'working groups' for the objectors. Hamersley Iron submitted (among other things) that the onus was on the objectors to provide information about any particular consultation process to be followed and that, as the objectors were legally represented, it need only inform their legal representatives that it wished to consult with the appropriate persons—at [25].

SM Heath noted that the NTA requires consultation with any 'registered native title claimant' (among others) who objects. He was satisfied that there was the requisite consultation in this case, particularly given the objectors' legal representatives arranged the various meetings and also attended—at [28] and [31].

SM Heath determined (among other things) that:

- the objectors were given sufficient information to enable consideration of the proposed future act;

- there was 'significant' conflict in the evidence as to whether a survey was requested or not but 'at no time did the objectors request the survey proceed or ask that the consultation be delayed until the survey was conducted';

- the objectors could not 'leave responsibility for heritage survey as the sole province' of Hamersley Iron when the conduct of the survey was 'necessarily in the control of the objectors';

- until sites were identified by a survey, no further consultation as to ways to minimise the impact of the infrastructure could take place;

- the conduct of a heritage survey is 'required in any event' by the *Aboriginal Heritage Act 1972* (WA) (AHA) and would occur 'regardless of the objection' (with respect, such a survey is not a requirement of the AHA but often done by way of 'risk management' to prevent contravention of the AHA);

- Hamersley Iron had indicated it intended to take steps to minimise the impact of the pipeline on both sites of significance and the environment
- The AHA and *Environmental Protection Act 1986* (WA) (EPA)applied and placed relevant restrictions activities that could be done under the miscellaneous licence—at [32] to [37].

Determination

Given the 'additional' restraints imposed by the AHA and the EPA, SM Heath was satisfied that 'as far as possible', Hamersley Iron had tried to minimise the impact of the proposed future act on the objectors' registered rights and interests and the other matters covered by s. 24MB9(6B). Therefore, the objection was dismissed—at [38] to [39].