# Native Title Hot Spots

No.17, February 2006

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## Proposed determination of native title and party status – Bardi Jawi

### *Sampi v Western Australia (No 2)* [2005] FCA 1567

French J, 4 November 2005

**Issues**

This decision deals with matters arising from the Federal Court's reasons in *Sampi v Western Australia* [2005] FCA 777 (Sampi No. 1), namely:

- an application for joinder by the Jawi Aboriginal Corporation or, alternatively, certain individuals under s. 84(2) of the *Native Title Act 1993* (Cwlth) (NTA); and
- whether a determination of native title should be made in relation to what the court identified as traditional Jawi territory.

**Background**

The original application in this matter was lodged in 1995 on behalf of the Bardi and Jawi People. For further background to this case, see the summary of his Honour Justice French's reasons for judgement in Sampi No. 1, summarised in *Native Title Hotspots* Issue 15.

In those reasons, French J foreshadowed the form the determination of might take. The applicant was subsequently ordered to file and serve a draft determination and to inform the court as to whether native title was to be held in trust and, if so, to nominate a prescribed body corporate (PBC) to be the trustee of native title: see ss. 55, 56 and 57 of the NTA. However:

- the applicant filed submissions seeking a further determination in response to French J'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… the traditional territory of the Jawi—Sampi No 1 at [1047]; and
- on 19 September 2005, the Jawi Aboriginal Corporation (the corporation) and 24 individuals (20 of whom were members of the corporation) made joinder applications.

**Joinder application**

The court may join any person under s. 84(2) of the NTA if satisfied that 'the person's interest may be affected by a determination in the proceedings.'

The corporation's rules identified its members as all the traditional owners of Sunday Island, which is within the area identified by French J as traditional territory of the Jawi. The chairperson of the corporation swore an affidavit identifying the corporation's activities as directed to assisting persons who hold native title rights to Sunday Island in support of a submission that this gave the corporation a special interest in the proceedings. The corporation had an aquaculture licence on the south side of Sunday Island and it wanted to build infrastructure, including living quarters, accommodation for tourists and an airstrip on the island. However, the relevant land was a crown reserve subject to a 99 year

lease to the Bardi Community Inc. (now Ardyaloon Inc.) and Ardyaloon Inc. had not responded to the corporation's requests for 'land tenure' on Sunday Island—at [8] to [13].

The evidence was that, following the reasons for judgment, the corporation held a meeting (the Lombadina meeting) where it was resolved to withdraw its instructions to the Kimberley Land Council, (the KLC) the representative body acting for the claimants, in relation to the native title claim. A new legal representative was appointed, the corporation resolved to withdraw any authorisation given to the applicant in the claimant application and instructed its new legal representative that:

> [T]he Jawi people saw the determination of native title as separate to the determination made in favour of the Bardi and Jawi people in respect of Jawi country, including Sunday Island.

A further resolution stated that the persons at the meeting were Jawi people with authority under the traditional laws and customs to speak on behalf of those who had rights and interests in Sunday Island.

Four affidavits were filed on 25 August 2005 by members of the native title claim group stating they had not withdrawn instructions from the KLC and that they had not withdrawn authorisation from the current applicant. Two of the deponents were present at the Lombadina meeting and deposed that the minutes were not a true and accurate record of what had happened—at [17].

The submissions filed by the corporation were that the following issues were yet to be determined in the proceedings:

- whether it was open to the court to make a separate determination of native title in favour of Jawi people in relation to the area said to have comprised the traditional territory of the Jawi;
- in the event that such a determination was made:
  - the relationship between any native title rights and interests and the non-native title rights in respect of Sunday Island, including the lease held by Ardyaloon Inc;
  - whether that native title is to be held on trust and, in any case, the identity of the prescribed body corporate—at [19].

**Findings on joinder applications**

In finding that no case for joinder of the corporation had been made out, French J noted that:

- on the evidence, in did not appear that the absence of a native title determination would impact adversely upon the corporation's plans;
- the corporation's arguments for joinder should have been advanced a long time ago and it was now far too late for joiner as this would delay the final resolution of the claim with little apparent effect—at [20].

As for the alternative (joinder of 24 individuals), the court noted their submission that:

- they wished to put an alternative proposition to that put by the applicant, which was for a determination of native title similar to that made by the Full Court in *De Rose v South Australia (No 2)* [2005] FCFCA 110 *(De Rose)*, summarised in *Native Title Hot Spots* Issue 15;
- the evidence before the court was sufficient to establish they had group rights comprising native title in relation to Sunday Island that were possessed under traditional laws acknowledged and traditional customs observed by a larger traditional block which comprised the relevant society.

The state opposed joinder, pointing out that the persons seeking joinder included 12 individuals who jointly comprised the applicant bringing the claimant application and that to change the composition of the applicant, the provisions of the NTA must be followed or the application must be amended: see *Johnson v Minister for Land and Water Conservation (NSW)* [2003] FCA 981 per Stone J at [8], summarised in *Native Title Hot Spots* Issue 7.

Another of the respondents, in opposing the joinder application, submitted that it amounted to an attempt to recall the decision in Sampi No. 1. The applicant in the Bardi Jawi claimant application did not support the joinder application.

French J found there was no separate interest established by the material relied upon nor any evidence that made out a credible case to support joinder. Again, in exercise of the discretion available under s. 84(5), the court held it was, in any event, far too late to 'reopen and restructure these proceedings with a view…to securing an outcome different from that…already reached.' Sampi No. 1—at [28].

**Should a further determination be made?**

His Honour referring to his conclusions in Sampi No. 1 at [1046] to [1047] and [1082] stated that, absent further argument or agreement:

- the court was prepared to make a determination in favour of the native title claim group as defined in the application, which would include those Jawi people found to form part of the contemporary Bardi society;

- however, the area covered by that determination could not extend beyond the traditional territory of the Bardi since there were no rules of succession identified that would allow consideration of the incorporation of Jawi traditional territories into Bardi territory;

- the court did not consider that the case and evidence led to the identification of a distinct Jawi society presently in existence which acknowledges traditional laws and customs under which native title rights and interests are possessed;

- none of the islands forming part of the traditional Jawi territory would be the subject of the determination—at 28] to [31].

The applicant made submissions in support of a further determination in relation to traditional Jawi territory in which De Rose at [38] was relied upon, where it was said that:

> If it is necessary for the purposes of proceedings under the NTA to distinguish between a claim to communal native title and a claim to group or individual native title rights and interests, the critical point appears to be that communal native title presupposes that the claim is made on behalf of a recognisable community of people, whose traditional laws and customs constitute the normative system under which rights and interests are created and acknowledged. That is, the traditional laws and customs are those of the very community which claims native title rights and interests—at [33].

Reference was also made to *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (Alyawarr), summarised in *Native Title Hot Spots* Issue 16, where the Full Court upheld a communal or claim group level claim by a community which did not include all individuals affiliated with the four language groups with which the seven landholding groups and their countries had affiliation.

The applicants submitted, among other things, that:

- whether the entire native title claim group involves and, at sovereignty involved, two societies or one may not matter in the context of this case because the closeness of the normative systems in this case 'indicated an inherent capacity for cross-recognition';

- jurisprudentially, this allowed the claim group to comprise an overlap of two 'societies' or, in the alternative, for two native title claim groups to substantially overlap in respect of a claim area;

- applying the *Alyawarr* 'principle', it did not matter if 'one and a half' societies or one were involved, so long as it collectively included those who possessed rights and interests in the collective parts of the claim area under laws and customs the origins of which could be traced to a normative system at sovereignty—at [34] to [36].

French J found there was no basis upon which a further determination could be made in respect of the islands:

> The evidence supported a finding that there is one and only one extant traditional society. That is the Bardi society. Its traditional country was found not to include the islands to the north and north-east of the Peninsula. There was no basis for a finding of a Jawi society 'overlapping' the Bardi society and retaining the requisite connection to the claimed islands—at [37].

**Competing draft determinations**

French J considered various points of difference in regard to the proposed draft determination, including:

- the demarcation of the landward side of the intertidal zone (which divided exclusive from non-exclusive native title rights and interests), with 'mean high water mark' being preferred by the court;
- whether 'use and enjoyment' should be included as part of the description of a right to 'exclusive possession', with his Honour reaffirming his view that it should not;
- whether a native title right to 'live on waters, 'whatever that means', should be recognised, with French J concluding there was no factual basis to support it;
- whether the determination should expressly state that certain areas were excluded from the determination area because native title was extinguished, with the court holding it was unnecessary to do so;
- whether a 'fluid', rather than fixed, description of the seaward boundary should be used, with the court preferring to include 'a proviso to the effect that non-exclusive native title rights and interests are exercisable seaward of the mean low water mark on any reef exposed at low tide only when that reef is exposed or covered by water to a depth not more than two metres';
- whether to add 'non-commercial' to the qualifier that the native title rights and interests recognised were exercisable 'for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes', with the court deciding this was unnecessary;
- whether 'the right of any person to use…any road in the Determination Area over which…the public has a right of way according to the common law' should be recognised in the determination, with the court holding it should not unless there was at least a precise identification of the 'roads' in question which, in this case, there was not;
- whether a new paragraph recognising the public right to use any road in the determination area, with French J accepting the applicant's submission that it should not, given the potentially significant impact of such a clause on native title rights and interests—at [45] to [113].

**Conclusion**

His Honour decided that a determination of native title in accordance with his reasons would be made on country but allowed a short time for the making of further submissions on technical or drafting issues, with his Honour noting that this was not 'an invitation to canvass these reasons'—at [116].

The determination itself, made in *Sampi v Western Australia (No3)* [2005] FCA 1617, is summarised below.

## Determination of native title – Bardi Jawi

### *Sampi v Western Australia (No 3)* [2005] FCA 1716

French J, 30 November 2005.

**Issue**

This decision deals with the making of a determination of native title under the *Native Title Act 1993* (Cwlth) (NTA) recognising the existence of native title over part of the West Kimberley region in Western Australia.

## Background

For the background to this determination, see *Sampi v Western Australia* [2005] FCA 777 (Sampi No. 1), summarised in *Native Title Hot Spots* Issue 15, and *Sampi v Western Australia (No 2)* [2005] FCA 1567 (Sampi No. 2), summarised in this issue of *Native Title Hot Spots*. It was formally handed down on country at One Arm Point on the Dampier Peninsula, north of Broome.

## Vacation of dismissal of Brue Reef application

On 10 June 2005, the court dismissed a second application made by Bardi Jawi over Brue Reef. However, as a result of the findings made in Sampi No. 1 that native title did not exist in the area covered by that application, it was pointed out to the court that a s. 225 determination in those terms should be made in relation to the area it covered. Therefore, on 21 November 2005, his Honour Justice French vacated the order to dismiss the application so that a determination reflecting the finding could be made over Brue Reef.

## Application adjourned in on 47A issue

On 25 November 2005, a problem arose about the potential application of s. 47A to certain small areas that was not raised at trial and could not be resolved prior to the on-country determination. French J ordered that the application should be adjourned in relation to those areas—at [4].

## Determination

Before handing down the determination, the court noted that:

- the Bardi and Jawi People of the Dampier Peninsula had struggled long and hard for the recognition of their native title and should be congratulated for achieving it;
- they had established the existence of native title rights and interests held by Bardi Jawi people as a group that had observed one set of traditional laws and customs under which their native title rights and interests arise;
- their existence as a society of Aboriginal people and their traditional laws and customs 'may be traced back to before the time at which Western Australia was colonised'—at [5] to [8].

His Honour acknowledged that some claimants would be disappointed that the native title determination did not extend to traditional Jawi territory but noted that:

> The proof of native title rights and interests is not an easy matter and the Court is only empowered to make determinations on the evidence before it. The absence of any determination on the islands does not, of course, prevent Bardi and Jawi People from continuing their association with them or even from making arrangements with government about the use of some or all of them—at [8].

## Existence of native title

Native title was recognised in relation to parts of the determination area, which can be generally described as the northern part of the Dampier Peninsula and certain intertidal areas and adjacent reefs and islets, together with the waters in the immediate vicinity. Over the remainder of the determination area, a determination was made that native title did not exist: see ss. 94A and 225.

## Common law holders

Where native title was recognised to exist, the native title holders were determined to be the Bardi and Jawi people, described as the descendants of certain named ancestors and persons adopted by those descendants in accordance with the traditional laws and customs of the native title holders.

## Nature and extent of native title rights and interests recognised

Over what can be very generally described as that part of the determination area landward of mean high water mark on the mainland, native title was recognised as being the right to possession and occupation as against the whole world, including rights to:

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

Over the other parts of the determination area where native title rights and interests were recognised (generally described as certain intertidal areas, adjacent and offshore reefs and islets and the waters in the immediate vicinity), they consist of non-exclusive rights to:

- access, move about in and on and use and enjoy those areas;
- hunt and gather, including for dugong and turtle;
- access, use and take any of the resources thereof (including water and ochre) for food, trapping fish, religious, spiritual, ceremonial and communal purposes.

In areas seaward of the mean low water mark, the preceding native title rights and interests are limited to reefs and islets within that area when they are exposed or covered by not more than two metres of water.

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

- traditional laws and customs of the native title holders; and
- laws of the State of Western Australia and the Commonwealth, including the common law.

**Limits on rights to waters**

The court determined that notwithstanding anything in the determination, there are no exclusive native title rights or interests in:

- flowing waters;
- any natural collection of water that a river, creek, stream or brook flows through;
- any underground water source.

**Relationship between native title and non-native title rights and interests**

The relationship between native title and non-native title rights and interests is that:

- to the extent of any inconsistency, the native title rights and interests continue to exist but, to that extent, have no effect on the non-native title rights and interests;
- recognition of native title does not prevent the doing of any activity required or permitted to be done by or under non-native title rights and interests and those rights and interests, and any activity required or permitted by them, prevail over native title rights and interests and any exercise thereof but do not extinguish them.

## Determination of native title – Wotjobaluk People in Western Victoria

### *Clarke v Victoria* [2005] FCA 1795

Merkel J, 13 December 2005

**Issue**

The issue before the Federal Court was whether to make orders as agreed by the parties pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA) over an area of land and waters in Western Victoria. The significance of this was that that, if made, the

orders would constitute the first determination, whether by consent or otherwise, made recognising the existence of native title in Victoria.

### Background

The orders sought in this case would finalise three claimant applications, the first of which was made in 1995. The orders sought included:

- a determination recognising the existence of native title over part of the area covered by one of the applications; and
- a determination that native title did not exist over the remainder of the area covered by the applications.

### Court's power to make orders – s. 87

Pursuant to s. 87, if the parties reach agreement on the terms of an order, the court may make the order without holding a hearing. In this case, the pre-conditions to the making an order under s. 87 were satisfied in that:

- the terms of the agreement were in writing, signed by or on behalf of the parties and filed in the court;
- an order in the terms agreed upon was within the court's power – it had jurisdiction and there was nothing in the terms of the orders, which reflected s. 225, to suggest it did not have power;
- it was 'appropriate' to make the orders because 'the terms of the orders were clear and unambiguous and…freely agreed upon after the parties…had access to competent and independent legal advice' and the court was satisfied in relation to the 'substantive aspects' of the orders as a result of the written submissions filed by the applicant and the State of Victoria—at [4] to [10].

His Honour Justice Merkel 'strongly commended' the parties for resolving issues by mediation and consensus, rather than by an adversarial process involving 'great expense and conflict'. The National Native Title Tribunal was also commended for its role in resolving the dispute between the parties—at [10].

### Submissions to the court

His Honour noted the applicant and the state's written submissions relied upon certain affidavits and anthropological material, including material from one of the claimants, the late William John Kennedy (known as Uncle Jack Kennedy), who was born on the banks of Wimmera River in 1919 and was the senior Wotjobaluk elder. Uncle Jack Kennedy outlined the traditional laws and customs acknowledged and observed by the Wotjobaluk people, including teachings about *Bunjil*, the creator spirit.

The anthropological material referred to in submissions included:

- a description of the boundaries of the Wotjobaluk people's country and some of their customs and traditions, including their belief in *Bunjil*, from 1904;
- recognition that, in 1965, the Wotjobaluk peoples had a strong attachment to tradition and their language had been preserved;
- contemporary reports that explained why the native title claim group:
  - was a recognisable body of persons united in and by traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests are being claimed;
  - possessed communal native title rights and interests under the traditional laws and customs that have been acknowledged and observed by the applicants;
  - had, by those laws and customs, a connection with some of the land and waters covered by the claimant applications: see s. 223(1)(a) and (b)—at [8] to [10].

### Tradition and the 'tide of history'

Merkel J was of the view that the orders were:

> [O]f special significance as they constitute the first recognition and protection of native title resulting in the ongoing enjoyment of native title

> in…Victoria…These are areas in which the Aboriginal peoples suffered severe and extensive dispossession, degradation and devastation as a consequence of the establishment of British sovereignty over their lands and waters during the 19th century—at [2].

Merkel J went on to note that:

> The outcome of the present claim is testimony to the fact that the 'tide of history' has not 'washed away' any real acknowledgement of traditional laws and any real observance of traditional customs by the applicants and has not, as a consequence, resulted in the foundation of their native title disappearing…Indeed, the evidence in, and the outcome of, the present case is a living example of the principle that is now recognised in native title jurisprudence that *traditional* laws and customs…evolve over time in response to new or changing social and economic exigencies to which all societies adapt as their social and historical contexts change…In some cases…that adaptation may result in some of the evolving laws and customs no longer being characterised as *traditional*, and therefore no longer capable of founding a claim to native title...However…it is important to recognise that that is simply the criterion established under Australian law for the recognition and protection of native title. It does not follow that the tide of history has also washed away the evolving laws and customs that are acknowledged and observed by Aboriginal peoples. Although in some cases those laws may not found native title…they nonetheless remain fundamental to the identity of those persons as individuals belonging to a particular indigenous people or community—at [11], emphasis in original.

That said, Merkel J was careful to note that 'the continued existence, and the nature and extent, of that native title can only be resolved on a case by case basis'—at [12].

### Determination

The court determined that:

- non-exclusive native title rights and interests exist in what was designated Determination Area A, subject to the exceptions and qualifications noted below;
- native title does not exist in the area designated Determination Area B.

Determination Area A covers Crown reserves totalling 269km$^2$ along the banks of the Wimmera River. While native title was not be recognised over Determination Area B, under a number of agreements, the claimants will have other rights and receive certain benefits in relation to those areas.

### Who holds native title?

The Wotjobaluk People are the native title holders, defined as those Wotjobaluk, Jaadwa, Jadwadjali, Wergaeia and Jupagalk Aboriginal persons who:

- are accepted in accordance with their traditional laws and customs as descended from one of seven named ancestors; and
- acknowledge and observe Wotjobaluk traditional laws and customs.

### Native title rights and interests recognised

The native title rights and interests recognised over Determination Area A are non-exclusive rights to hunt, fish, gather and camp for personal, domestic and non-commercial communal needs. They are held in trust by the Barengi Gadjin Land Council Aboriginal Corporation (BGLCAC) on behalf of the Wotjobaluk People as the common law holders.

As required by ss. 94A and 225(e), it is specifically stated that the native title rights and interests do not confer possession, occupation, use and enjoyment to the exclusion of all others. The determination also states that native title rights and interests do not exist in:

- any waters, with it being noted this does not include the bed or subsoil under, or airspace over, those waters; and
- any lands on which validly created public works are situated.

**Relationship between native title and non-native title rights and interests**

The nature and extent of other rights and interests were also set out in the determination, as required by ss. 94A and 225(c) and (d), with the relationship between native title rights and interests and other non-native title rights and interests being that the other rights and interests, and any activity done in exercise of a right conferred or held under the other rights or interests, prevail over the native title rights and interests and any exercise of those native title rights and interests, but do not extinguish them.

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

- the traditional laws acknowledged and the traditional customs observed by the Wotjobaluk People;
- the laws of the state or Commonwealth; and
- the terms and conditions of the proposed access agreement noted below.

**Subsequent agreements**

His Honour also noted that following the making of the determination:

- the state and the BGLCAC would enter into agreements to provide financial and other benefits to the Wotjobaluk People;
- the state, BGLCAC and certain other respondents would enter into an access agreement over Determination Area A regarding the co-existence of:

the Wotjobaluk native title holders' non-exclusive native title rights to hunt, fish, gather and camp;

- the rights of the state;
- the rights of the other respondents.

Further information about the settlement is available at http://www.nntt.gov.au/publications/WJJWJ_Determination.html

## Splitting proceedings under s. 67

### *Turrbal People v State of Queensland* [2005] FCA 1796

Spender J, 9 December 2005

**Issue**

The State of Queensland sought orders separating the Turrbal People's claimant application into two separate proceedings. It was proposed that the proceeding in relation to Turrbal Part A would deal with that part of the area covered by the application where there was no overlapping claimant application. That would be set down for trial. The proceeding dealing with Turrbal Part B, the balance of the area where there were overlapping claimant applications, would be adjourned to a later date. Most of the other respondents and the applicants in the overlapping claims supported the state's submissions and none of the respondents opposed them. The Turrbal people opposed the making of the orders.

**Background**

The Turrbal People's application covered an area of approximately 1,485 square kilometres comprised of 330 specific parcels of unallocated state land, state forests and parklands in and around Brisbane i.e. it was 'lot specific'. The area the state proposed as Turrbal Part A comprised 96 lots covering 522 kilometres. Both the Jinibara People's claim and Jagera People's No. 2 claim, neither of which was programmed to trial and both which were 'country claims' (i.e. not lot specific), overlapped parts of the area covered by the Turrabal People's claim.

After 'significant unsuccessful attempts' to resolve the Turrbal and Jinibara overlap via mediation, the court ordered that mediation cease – see s. 86C of the *Native Title Act 1993* Cwlth (the NTA). Subsequently, programming orders were made and the Turrbal People made significant preparations for trial, including identifying points of claim and delivering the

majority of their evidence to the state. The state's objections to the applicant's expert reports, the evidence it wanted led orally and its objections to the tender of documents or parts thereof had also been provided.

**The state's submissions**

In support of its application to have the two areas covered by the Turrbal People's application dealt with in separate proceedings, the state argued (among other things) that:

- the main steps for trial remaining to be taken by the respondents could be done expeditiously if the area covered by the hearing was confined to Turrbal Part A;
- a trial of Turrbal Part A would be relatively short and inexpensive e.g. only three Turrbal People apparently had a relevant connection with the claim area and it appeared the applicant proposed to call no more than four witnesses;
- apart from cross-examination, the time spent by the respondents at trial would be short, as their evidence was likely to be in documentary form;
- as Turrbal Part A covered only unallocated state land, state forests and parks, it was likely that fewer parties would be involved than would be the case if the whole of the Turrbal application area went to trial and the tenure research required for the extinguishment issues would be limited;
- if the whole of the Turrbal People's claim was heard at once, the involvement of overlapping claims would result in further delay and expense, primarily because of the nature and extent of the overlaps and the requirements of s. 67;
- the applicants in the overlapping claims had neither particularised their claims nor carried out the steps necessary to proceed to a trial; and
- because the overlapping applications were not lot specific, the state would have to carry out extensive tenure research and analysis—at [15] to [20].

**The Turrbal People's submissions**

The Turrbal People opposed the state's application, arguing that:

- subsection 67(1) required that the Jinibara, Jagera and Turrbal applications be dealt with in the same proceeding;
- dealing with their application in two separate proceeding was unjust because they had built their case for trial over the whole of the area and unreasonable because they would incur additional costs; and
- the notion of separating their traditional homelands into Part A and Part B was at odds with the principles of the Turrbal laws and customs—at [34] to [37].

**Court's power to make the orders**

His Honour Justice Spender noted that s. 67(1) required that, where there are two or more proceedings before the court relating to native title determination applications that have overlapping areas, the court 'must make such order as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding'. The court noted that, 'importantly', s. 67(2) (headed 'Splitting of application area') provides that, without limiting s. 67(1), the order of the court 'may provide that different parts of the area covered by an application are to be dealt with in separate proceedings'—at [18].

Further, s. 68 provides that, if there is an approved determination of native title in relation to a particular area, the court must not conduct any proceeding relating to an application for another determination of native title or make any other determination of native title in relation to that area or to an area wholly within that area, except in the case of an application to revoke or vary the first determination (see s. 13) or a review or appeal of the first determination—at [19].

In the court's opinion:

- the effect of ss. 67(1) and 68 was that, in relation to the overlapping area, the court could not hear and determine the Turrbal People's claim separately from the overlapping claims;
- it was unlikely the overlapping claims would be ready to be heard for some years;
- subsection 67(1) required overlapping applications to be dealt with in the same proceedings only to the extent that the applications covered the same area;
- it is possible to avoid the need to have the overlapping applications heard in the same proceeding by making an order that different parts of the area covered by the Turrbal People's application be dealt with in separate proceedings;
- by virtue of s. 67(2) and O 78 r 5(3) and O 29 r 2(a) of the Federal Court Rules, the court had power to split the area covered by the Turrbal People's application into two proceedings, with the unoverlapped portion dealt with in one proceeding and the overlapped portion dealt with in separate, further proceedings;
- those further proceedings could only be heard and determined in the same proceeding as the hearing and determination of the claims in respect of the overlap area;
- the orders sought were consistent with s. 67(2), notwithstanding a submission by the state that the orders involved only an 'administrative' separation;
- the orders would effectively split the Turrbal's People's claim into two proceedings i.e. into two parts, one part in respect of the area contained in Turrbal Part A, heard and determined separately from, and ahead of, the Turrbal People's claim in respect of the area contained in Turrbal Part B—at [25] to [26] and [33] to [34].

**Conclusion**

Spender J found:

- the court was empowered to make the orders the state sought and, on the evidence, it was just and convenient to do so, referring to similar orders made in other matters e.g *Wik Peoples v Queensland* [2004] FCA 1306, *Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229; and
- there were 'overwhelming reasons' why the court should make the orders sought, particularly since hearing the whole of the Turrbal People's claim, together with the overlapping claims, faced very considerable delay—at [28] to [32] and [40].

**Comment**

There have been unsuccessful attempts in the past to split a claimant application for the purposes of limiting the parties whose consent must be obtained for the purposes of s. 87 or to allow for parts of the area covered by overlapping claimant applications to be combined with parts of the area covered by other claimant applications: see Munn and *Champion v Western Australia* [1999] FCA 581. It should be noted that this case does not affect what was found in those cases. Subsection 67(2) only applies to overlapping applications and only provides for a splitting of the *proceedings*, not the *application*. So, in this case, there will be two proceedings that deal with one claimant application i.e. the Turrbal People's claimant application. And it is arguable that s. 87 will then only require to agreement of the parties to those *proceedings* (see s. 84 which makes it clear that persons are parties to proceedings rather than parties to the application). However, if amendment becomes necessary, then the application is still treated as a whole, as it is for the purposes of the application of the registration test under s. 190A(1). Indeed, there are no provisions in the NTA to deal with the registration of 'split applications' and if it were attempted it may produce a disjunction between the split applications in the Federal Court and the application as entered on the Register of Native Title Claims.

## Party status denied to illegal occupier

### *Walker v Queensland* [2005] FCA 1517

Allsop J, 2 November 2005

**Issue**

This case concerns an application to be joined as a party to a claimant application by a person in unlawful occupation of land subject to that application: see *Walker v State of Queensland* [2005] FCA 1316, summarised in *Native Title Hot Spots* Issue 16. The question here was whether the court should depart from the provisional view expressed in those reasons for decision i.e. the application for joinder should be dismissed.

**Background**

On 20 September 2005, his Honour Justice Allsop published his provisional view that a notice of motion for joinder brought by Rodney George Parker under s. 84(5) of the *Native Title Act 1993* (Cwlth) should be dismissed. The court gave the parties 14 days to make further submissions or request further hearings. The court was subsequently advised that none would be made. His Honour therefore saw no reason to depart from the provisional views.

**Decision**

The notice of motion was dismissed with no costs order.

## Determination of native title in non-claimant applications in NSW

### *Hillig v Minister for Lands (NSW)* [2005] FCA 1712

### *Hillig v Minister for Lands (NSW)* [2005] FCA 1713

Bennett J, 28 November 2005

**Issues**

The question was whether to make a determination that native title did not exist in relation to the area covered by two non-claimant applications made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (the NTA).

**Background**

Both non-claimant applications were made by the administrator of the Worimi Local Aboriginal Land Council (the council) and dealt with parcels of land in New South Wales transferred in the council under the *Aboriginal Land Rights Act 1983* (NSW) (the ALR Act). The transfer was subject to s. 36(9) of the ALR Act, which provides that it was subject to any existing native title rights and interests. Sections 40 and 40AA of the ALR Act prevent Aboriginal land councils from dealing with the land in question unless it is the subject of an 'approved determination' of native title, as defined by ss. 13 and 253 of the NTA.

The administrator of the council sought determinations that native title did not exist in relation to the areas covered by the non-claimant applications.

Her Honour Justice Bennett noted that there was evidence before the court showing that in both cases:

- the Native Title Registrar had given notice in accordance with s. 66 of the NTA;
- searches of the 'National Native Title Tribunal Register' (which is, presumably, a reference to the Register of Native Title Claims) disclosed no claimant application over the areas concerned;
- while the representative body for the area (New South Wales Native Title Services Ltd) was joined as a respondent to the application, no native title claimant had sought to appear or given the court notice of any interest in the proceedings; and
- the notice period specified in the notice given under s. 66 had expired—at [8] and [9].

**Unopposed applications – s. 86G**

Bennett J referred to s. 86G of the NTA, which empowers the court to make orders as sought

by the applicant in a s. 61(1) application at any stage of proceedings after the expiration of the period specified in the s. 66 notice if:

- the application is unopposed; and
- the court is satisfied it is within its power to make the order sought.

An application is 'unopposed' if either the applicant is the only party or all other parties give the court written notice that they do not oppose the making of the orders sought by the applicant. In both cases, the court was satisfied that it had power to make the orders sought because:

- the required notice had been given and the period specified in the notice had expired;
- pursuant to s. 81 of the NTA, the court had jurisdiction to hear and determine applications that relate to native title;
- an application may be made under Part 3 of the NTA for determination of native title, including an application by the holder of a non-native title interests for a determination that native title does not exist in relation to a particular area (see ss. 61(1) and 225);
- therefore, the applicant here, as a holder of non-native title interests in relation to the areas concerned, may apply for a native title determination;
- the solicitors for the respondents to the application had notified the court in writing that the application was unopposed—at [10] to [13].

Bennett J noted that orders of the kind sought by the applicant were made in *Deniliquin Local Aboriginal Land Council* [2001] FCA 609, *Kennedy v Queensland* (2002) 190 ALR 707 and *Application for Determination of Native Title made by the Metropolitan Local Aboriginal Land Council* [1998] FCA 402—at [14].

**Decision**

The court made orders that no native title exists over the areas in question– at [15].

### *Awabakal Local Aboriginal Land Council v NSW Native Title Services*

6 December 2005, Edmonds J, unreported, FCA, (P) NSD23/2005

### *Darkinjung Local Aboriginal Land Council v Minister for Lands (NSW)*

Jacobson J, 7 December 2005, unreported, FCA (P)NSD1249/2004

The question was whether to make a determination that native title did not exist in relation to the area covered by two non-claimant applications made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (the NTA). In both, the Federal Court determined that native title did not exist over certain lots in New South Wales, namely Lot 3211 DP 722246, Parish of Newcastle, and Lot 526 in Deposited Plan 1010370 at Blue Haven, Local Government Area of Wyong, Parish of Munmorah, County of Northumberland. The determinations were made essentially to facilitate the transfer of land under the *Aboriginal Land Rights Act 1983* (NSW) and were unopposed. See also *Hillig v Minister for Lands* (NSW) [2005] FCA 1712 and *Hillig v Minister for Lands (NSW)* [2005] FCA 1713, summarised in this issue of *Native Title Hot Spots*.

## Costs

### *Davidson v Fesl (No 2)* [2005] FCAFC 274

French and Finn JJ, 23 December 2005

**Issue**

The issue was whether the court should exercise its discretion under s. 85A of the *Native Title Act 1993* (Cwlth) (NTA) to make a costs order against the applicants.

**Background**

On 30 August 2005 the Full Court of the Federal Court, comprising French, Finn and Hely JJ, dismissed an application for leave to appeal against a judgment of Spender J given on 22 February 2005—see *Davidson v Fesl* [2005] FCAFC 183 summarised in *Native Title Hot Spots* Issue 16. At that time:

- counsel for the respondents sought an order for costs, which counsel for the applicants resisted on the basis of s. 85A of the NTA;
- the court commented that there was no demonstrable benefit to indigenous interests flowing from the bringing of the application for leave and expressed the view that collateral litigation of the kind does not serve the purposes of the NTA.

The parties were given leave to make submissions on the question of costs. However, one of the members of the Full Court died on 1 October 2005. By consent, the remaining members Full Court handed down this decision—at [1].

It was noted that:

- the 'ordinary rule' is that, where the court has a discretion to award costs unfettered by any legislative presumption, as is the case with s. 43 of the *Federal Court Act 1976* (Cwlth), costs ordinarily 'follow the event' i.e. a successful litigant gets costs in the absence of circumstances justifying some other order;
- the language of s. 85A of the NTA lies against the application of the ordinary rule i.e. the starting point is that each party bears their own costs;
- one basis upon which the court may order a party to bear costs is that the party has engaged in 'unreasonable conduct' of the kind caught by s. 85A(2)—at [8] to [9].

Their Honours Justices French and Finn observed:

> It suffices to say that this is a case in which the motion was not only without merit. It seemed to serve little, if any, practical purpose. In the circumstances the first respondent and the state should be entitled to their costs. The third respondents did not seem to have any distinct interest to pursue in resisting the motion and it does not seem appropriate that they should be entitled also to costs—at [12].

**Decision**

The applicants were required to pay the costs of the first and second respondents—at [13].

# Right to negotiate applications

The determinations made by the National Native Title 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.

## Major disturbance—future act determination appeal

### *Little v Oriole Resources Pty Ltd* [2005] FCAFC 243

French, Stone and Siopis JJ, 5 December 2005

**Issue**

These appeal proceedings to the Full Court of the Federal Court relate to a determination of an expedited procedure objection application by the National Native Title Tribunal. The question raised was whether the grant of a Miscellaneous Licence (the licence) under the Mining Act 1978 (WA) was an act attracting the expedited procedure under the *Native Title Act 1993* (Cwlth) (NTA) and, therefore, not subject to the right to negotiate process under that Act. In particular, the appeal deals with the proper interpretation and application of s. 237(c) of the NTA.

**Background**

The licence, for mining camp infrastructure and associated facilities, was to be granted to Oriole Resources Pty Ltd (Oriole) over an area of 120 hectares. Oriole's stated intention was to rely upon pre-existing mining camp accommodation at the site and to use the licence for the purpose of a possible power line easement, access tracks and rubbish disposal.

The State of Western Australia asserted in its notice under s. 29 of the NTA that the proposed grant was an act attracting the expedited procedure. The registered native title claimant representing the Badimia People lodged an objection to the application of the expedited procedure which was dismissed by the Tribunal. An 'appeal' under s. 169 to the Federal Court (the 169 appeal) on questions of law was dismissed: *Little v Oriole Resources Pty Ltd* [2005] FCA 506 per Nicholson J, summarised in *Native Title Hot Spots* Issue 16. The grounds of the s. 169 appeal to the court were directed to the Tribunal's approach to the construction of s. 237(c). The registered native title claimant then brought an appeal against aspects to that decision to the Full Court. This is the decision in relation to that appeal.

**Section 237**

Section 237 provides that A future act is an act attracting the expedited procedure if:

(a) the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and

(b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and

(c) the act is not likely to involve major disturbance to any land or waters concerned [first limb] or create rights whose exercise is likely to involve major disturbance to any land or waters concerned [second limb].

**Construction of s. 237**

Their Honours observed that s. 237 had been amended by the *Native Title Amendment Act 1998* (Cwlth) by the insertion of the phrase 'is not likely to' so as to override the construction of that section in *Dann v Western Australia* (1997) 74 FCR 391, which the court said was essentially the same as that argued by the appellant.

One the proper construction of s. 237(c), the court noted that:

- the class of 'rights' created by the future act referred to in the second limb could logically be defined as, alternatively, rights comprised in and coming into existence upon the doing of the future act or rights that may or may not come into existence after the doing of the future act;
- a future act will often, if not always, be an act creating rights e.g. the grant of the licence would confer a right upon the holder to do the things authorised it, namely to construct mining infrastructure and associated facilities;
- if the creation of these rights is the future act, the second limb of s. 237(c) appears to be otiose (or superfluous) and the likelihood of major disturbance is a matter to be assessed in light of the act i.e. there is no occasion for a two step analysis by reference to rights created by the act;
- in these cases, this construction renders s. 237(c) consistent in terms of policy and structure with s. 237(a) and (b)—at [42] to [43].

In relation to the second limb, it was said that:

- a construction that may give it some work to do would apply it to cases where rights are created not by the future act itself but as a consequence of things done under that act;
- for example, a particular legislative or executive act may empower a person to make decisions or elections or to do things upon which certain rights subsequently come into existence;
- the second limb is best construed as requiring the same kind of predictive assessment as the first limb and as the other paragraphs i.e. there appeared to be no rational basis for a distinction to be drawn under which the second limb would be construed according to the pre-amendment position—at [44].

After consideration of the relevant cases and materials, it was found that there was nothing in the legislative history or prior judicial interpretation of s. 237 that operated against such a construction to the second limb of s. 237(c)—at [45] to [50].

However, in this case:

- there was no suggestion that there were any relevant grants, other than those comprised in the grant of the licence, that may come into existence upon some post-grant contingency; and, therefore
- the only question before the Tribunal was whether 'the act is not likely to involve major disturbance to any land or waters' i.e. only the first limb was relevant—at [44].

The court was critical of the approach taken by the Tribunal because it:

- did not cite the authorities relevant to the construction of s. 237(c) in its amended form;

- assessed the likelihood of 'major disturbance' by reference to what could be done under the licence rather than what was likely to be done;
- it embarked upon its task on an assumption, unduly favourable to the claimants, based upon its misconstruction of s. 273(c);
- acting on that false assumption, it found the hypothetical possible effect of the grant not to constitute a major disturbance—at [34] and [51].

Therefore, the court was of the view that;

- if the Tribunal applied a wrong legal test for 'major disturbance', the requisite predictive assessment would have to be undertaken on a basis less favourable to the claimants;
- this required consideration of whether the Tribunal did err in its approach to its assessment of 'major disturbance'—at [51].

**Major disturbance**

Their Honours observed that the words of s. 237(c) were not affected by the 1998 amendments. The court noted (among other things) that:

- while the word 'major' is an adjective of degree, and necessarily involves an element of subjective assessment as to the degree of disturbance, that assessment is not entirely subjective;
- the Tribunal accepted that the grant of the licence would create rights whose exercise 'may involve major disturbance' i.e. the Tribunal was referring to the range of things that *could* be done under the rights conferred notwithstanding that the Oriole did not intend to go beyond using the additional land subject to the licence for a powerline easement, access tracks and rubbish disposal—at [55].

**Tribunal erred in law**

It was held that:

> The substantive reasoning of the Tribunal on this point turned critically upon the absence of any concerns expressed or evidence given on behalf of the claimants or other Aboriginal people who might have an interest in the area. However, while the concept of 'major disturbance' involves judgments of degree these are not entirely subjective. Just because a view may be imputed to the 'Australian community' that the establishment of a significant mining camp and accommodation facilities in an area already the subject of extensive mining activity is not a 'major disturbance'…that does not answer the question whether it is or not. On the hypothesis on which the Tribunal proceeded which allowed for the possibility of the extensive exercise of rights under the Miscellaneous Licence…it is hard to see how the potential disturbance could be described as other than a 'major disturbance'. Whilst it is difficult to identify any expressed error in the reasoning in this respect, it is sufficient to say that the conclusion is sufficiently unreasonable to demonstrate underlying error—at [56].

**Decision**

While the court did find there was an error of law on the Tribunal's part, this did not mean that the appellants won the case because their Honours went on to find that:

- had the Tribunal undertaken a predictive assessment as required, it could not have come to any conclusion on the evidence other than that the proposed works would be limited in the way asserted by the Oriole;
- in particular, it could not have come to the conclusion that the Oriole would be likely, for some 'idiosyncratic reason contrary to its stated intention', to duplicate existing mining camp accommodation facilities;
- On that basis, the Tribunal would undoubtedly have found the act to be one which was not likely to involve any major disturbance to the land—at [57].

Therefore, the appeal was dismissed.

# Expedited procedure on Aboriginal reserve land in WA

## Chimera/Heron Resources Ltd/Western Australia [2005] NNTTA 99

Member O'Dea, 22 December 2005

### Issue

The issue arising in this matter which is summarised here is whether the expedited procedure applied to the grant of an exploration licence under the *Mining Act 1978* (WA) (Mining Act) over reserve land vested in the Aboriginal Lands Trust (ALT).

### Background

The government party contended (among other things) that two proposed exploration licences were acts attracting the expedited procedure: see ss. 29(7) and 237 of the *Native Title Act 1993* (Cwlth) (NTA). The area covered by the first of the proposed licences was entirely within a reserve vested in the ALT under Part III of the *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPA Act) for the use and benefit of Aboriginal inhabitants (the Balanggarra reserve). Thirty–eight percent of the area covered by the second proposed licence fell within the Balanggarra reserve. The remainder fell wholly within an area subject to a pastoral lease. The Tribunal's determination in relation to that area is not summarised here.

The government party submitted that:

- subsection 24(7) of the Mining Act provides that mining (which includes exploring for mineral) is subject to the written consent of the Minister for State Development, and, before that consent is given, the minister must consult with the Minister for Indigenous Affairs, who administers the ALT;

- upon receipt of such a request from the minister for Indigenous Affairs, the ALT seeks the advice of the relevant affected Aboriginal community;

- if that community has reached an agreement with the relevant mining company, they will advise the ALT to recommend to the minister that he advise the Minister of State Development to give consent pursuant to s. 24(7) of the Mining Act;

- pursuant to s. 31 AAPA Act and Regulation 8 of AAPA *Regulations*, the grantee party must obtain a permit from the minister for Indigenous affairs before accessing land subject to Part III of the AAPA Act;

- in practice, the Minister for Indigenous Affairs requires an agreement between the relevant Aboriginal community and the grantee party before such access can be granted, with the agreement forming the basis for any conditions to be attached to that permit;

- while the Minister for Indigenous Affairs has a discretion to grant permission for access, if their decision differs from the views expressed to the Minister by the ALT, the Minister must provide reasons to the ALT and lay them before both Houses of Parliament as soon as practicable: see AAPA r. 8(3)—at [10].

The process for consultation with the relevant Aboriginal community was explained in affidavits lodged in support of the native title party's objection i.e. there was a memorandum of understanding (MOU) between the ALT, the Department of Indigenous Affairs (DIA) and the Kimberley Land Council (the representative body for the area concerned). Under the MOU, DIA contacted the grantee party and suggested they consult directly with the KLC to obtain the consent to the grant of an entry permit to the reserve in question. The KLC noted that, in practice, the Minister for Indigenous Affairs had never granted access to the Ballengarra reserve without ALT consent and a signed heritage protection agreement (HPA).

The Tribunal noted (among other things):

- Previous findings that the regulatory regime applicable to reserves subject to Part III of the AAPA Act is such that an exploration licence is unlikely to cause the interference or disturbance referred to in s. 237 of the Act;
- The relevant provision of the HPA which, for the purposes of the MOU, constitute consent;
- That, under the HPA, the grantee party's work programme must be submitted to the native title party and be assessed by the relevant Aboriginal community;
- In this case, the relevant community included a 'significant' number of those who are members of the native title claimant group in the claimant application brought by the native title party—at [21] to [23].

**Determination in relation to Aboriginal reserve land**

The Tribunal determined that:

- It was likely that exploration on the reserve would be permitted only if an appropriate agreement with the native title party is in place;
- Permission to enter the reserve would not be granted by the native title party unless the issues of concern have been satisfactorily dealt with and appropriate conditions imposed;
- The Minister for State Development was unlikely to consent to mining until the Minister for Indigenous Affairs had authorised access to the exploration licence area;
- Due to the existence of this regulatory regime, it was not likely that any of the three limbs of s. 237 would be offended in relation to the grant of the tenements in so far as they affected the reserve;
- Therefore, the expedited procedure applied—at [24].

## Expedited procedure did not apply

### *Turramurra/Western Australia/Wrasse* [2005] NNTTA 90

Deputy President Sumner, 2 December 2005

**Issue**

The issue in this Tribunal inquiry was whether the proposed grant of exploration licence under the *Mining Act 1978* (WA) (Mining Act) was a future act attracting the expedited procedure: see ss. 29(7) and 237 of the *Native Title Act 1993* (Cwlth) (NTA)?

**Background**

The proposed exploration licence was located near Fitzroy Crossing in the Kimberley region of Western Australia. The State of Western Australia had issued an s. 29 notice which included a statement that it was of the view that the expedited procedure applied to the proposed grant. For the expedited procedure to apply to the grant of the licence, three criteria found in s. 237 of the NTA must be satisfied.

There were seven Aboriginal communities within 10 kilometres of the area of the proposed grant, which includes Geake Gorge and Brooking Gorge Conservation Park. There were some earlier mining tenements in the area. A petroleum exploration licence overlapped a large portion of the area. There were six sites registered under the *Aboriginal Heritage Act 1972* (WA).

Affidavit evidence given by elders of the Bouba and Gooniyandi claim groups deposed to the regular community use of the area for camping, collecting, hunting and fishing, as well as historical and current ceremonial uses—at [13] to [15].

**Likelihood of interference with community or social activities – s. 237(a)**

The Tribunal considered earlier decisions where it had been held that prior mining and pastoral activities may be taken into account in assessing whether an additional grant is

likely to further affect the community or social activities of the native title parties in the area concerned, referring to s. 237(a) and *Smith v Western Australia* (2001) 108 FCR 442 at [26] to [28]; *Walley v Western Australia* (2002) 169 FLR 437; [2002] NNTTA 24 at [12] to [21].

Despite restrictions which may have been caused by these earlier activities, the Tribunal was of the view that the native title parties in this matter still carried on a broad range of social and community activities with a high level of intensity in the area concerned—at [22].

The Tribunal had regard that the fact that the native title parties' access to an area would be limited and temporary while exploration is taking place and that, depending on the nature and extent of the community or social activities and because of the relatively limited exploration activity, the Tribunal has often found in other cases that it was not likely there would be direct interference with the native title parties' activities in any but an insubstantial way. However, the substantial activities deposed to in this matter were such that the Tribunal held there was likely to be direct interference by the grant of the proposed licence—at [22].

The Tribunal also noted it could not have regard to evidence of spiritual and emotional distress and consequent interference with community and social activities as these were outside the scope of s. 237(a): see *Freddie/Western Australia/Adelaide Prospecting Pty Ltd* [2003] NNTTA 120. However, in this matter, the evidence of interference with actual physical activities was sufficient to uphold the objection—at [24].

**Likelihood of interference with sites – s. 237(b)**

The Tribunal found the native title parties' evidence corroborated the sites registered with the Department of Indigenous Affairs as sites of particular significance. The Tribunal was satisfied that the area was relatively rich in Aboriginal sites—at [25] to [32].

The government party submitted that the provisions of the *Aboriginal Heritage Act 1972* (WA) made it unlikely that there would be interference with any areas or sites of particular significance. As the grantee party had not submitted any evidence of its intentions, the matter was determined on the basis that the rights under the *Mining Act* will be exercised to the full extent—at [33], referring to *Western Australia v Smith* (2000) 163 FLR 32 at [50] to [51]. On the Tribunal's approach to 'site rich' areas, see *Ward v Northern Territory* (2002) 169 FLR 303 at [82].

The Tribunal found there was real risk of interference, even if inadvertent, unless there were s. 31 negotiations between the parties and agreement is reached about the doing of the act, or the issues are fully explored in an arbitral inquiry—at [34].

**Decision**

The Tribunal held the grant of the proposed exploration licence was not an act attracting the expedited procedure and noted its findings were consistent with findings of the Tribunal in some other objection applications in the Kimberley region—at [35] to [37].

## Negotiation in good faith – relevance of prior dealings

### *Cameron/Hoolihan, Illin, Thompson/Queensland* [2005] NNTTA 84

Member John Sosso, 16 November 2005

**Issues**

Among other things, this Tribunal determination dealt with:

- where certain agreements were made prior to a s. 35 application being lodged under the *Native Title Act 1993* (NTA), did s. 37 prohibit the making of a future act determination by the Tribunal?;

- was past conduct of the grantee party a relevant consideration in determining

whether there had been good faith negotiations as required by s. 31(1) prior to the s. 35 application being made?

**Background**

The grantee party, Robert Cameron, had applied for the grant of a mining lease (ML10290). This was the proposed future act relevant to the Tribunal's inquiry. The native title party was the applicant in a claimant application brought on behalf of the Gugu Badhun People.

In 2000–2002, Mr Cameron had acted on behalf of Ebony Ridge Marble Pty Ltd in negotiations with the Gugu Badhun People in relation to the proposed grant of a different mining lease over the same area of land (the previous negotiations). These negotiations were ultimately unsuccessful and the application for that lease was abandoned. In this matter, the native title party alleged that the Gugu Badhun People had provided financial support to Mr Cameron during the previous negotiations and that money was still owed to them as a result. The Tribunal noted the previous negotiations were seen by the native title party as a key issue in the determination of whether the grantee party had negotiated in good faith in relation to ML10290—at [17].

Charles Reinalda, the representative for and financial backer of Mr Cameron's current venture, entered into negotiations about ML10290 with the Gugu Badhun People. Due to the prior relationship between Mr Cameron and the native title party, Mr Reinalda was the main point of contact for negotiations over the ML10290 and undertook to pay the money allegedly owed to the Gugu Badhun People from the previous negotiations.

A s. 31(1)(b) state deed and an ancillary agreement/indigenous land use agreement had been signed by the native title party and Mr Cameron and Mr Reinalda by 9 June 2005. The state deed had been lodged by that date but had not yet been executed by the State of Queensland. On or around 14 June 2005, Mr Cameron's and Mr Reinalda's business relationship was terminated, at which point Mr Reinalda contacted the native title party's legal representative and indicated he would no longer be funding the terms of the agreement reached between the parties.

On 20 June 2005, the native title party's legal representative informed Mr Cameron by email that there would be no further progress toward an agreement until Mr Cameron gave a guarantee of payment of certain costs incurred to date and a statement of his capacity to 'meet the upfront payments under the agreement'. Less than an hour after sending that email, the native title party's legal representative contacted the state and confirmed that the ancillary agreement was 'withdrawn' because it was entered into with 'a partnership' that was now in dispute and 'therefore the parties are no longer in agreement'. The Tribunal took this to be repudiation or the unilateral termination of the agreement by the native title party—at [30] and [42].

Twelve days later an amended s. 31(1)(b) agreement, which was the same as the earlier agreement except that references to Mr Reinalda had been removed, was forwarded to Mr Cameron by the native title party's legal representative but it was not accepted.

On the material before the Tribunal, it was concluded that, although Mr Cameron was the grantee, both the negotiations engaged in and the expectations of the native title party were reliant upon Mr Cameron and Mr Reinalda acting in concert—at [24].

**Did agreement mean Tribunal could not make a determination?**

Subsection 37(a) of the NTA provides that the arbitral body (in this case, the Tribunal) must not make a determination if 'an agreement of the kind mentioned in paragraph 31(1)(b) has been made'.

As noted earlier, in this case, both a s. 31(1)(b) state deed and an ancillary agreement/ indigenous land use agreement had been signed by the native title party and Mr Cameron and Mr Reinalda. The question was whether both or either of them operated to prohibit the Tribunal from making a future act determination in this case. As both agreements provided for consent to the doing of the future act in question, the Tribunal found that *both* were potentially within the scope of s. 31(1)(b)—at [23].

However, the state deed had not been executed by the government party and so was not relevant. As to the ancillary agreement, it had been 'executed by the relevant negotiation parties' but 'abandoned by the native title party' before the application for the s. 35 application was made to the Tribunal—at [23].

It was determined that:

> If there is no section 31 agreement in force at the time the section 35 application is made, the Tribunal has jurisdiction to make a section 38 determination. However, if at any time after the section 35 application is made, agreement is reached, the jurisdiction of the Tribunal lapses. The fact that an agreement was reached but then terminated prior to the section 35 application being made, does not prevent the Tribunal reaching a determination. The focus of section 37 is on the existence of an extant agreement, not on a state of affairs which no longer exists—at [23].

**Good faith negotiations**

The Tribunal made the following observations on good faith negotiations:

- the NTA obliges the parties to good faith negotiations to consider a range of matters but, if they wish to reach a more comprehensive and enduring agreement, that is for them to determine;
- the type of matters that may be addressed are indicated by the criteria set out in s. 39 and issues identified in s. 33;
- the obligation is to negotiate in good faith – there is no obligation to reach an agreement;
- a party making a s. 35 application is not acting in bad faith, referring to *Strickland v Minister for Lands (WA)* (1998) 85 FCR 303 at 322;
- there is an obligation on the negotiation parties to enter into discussions with an open mind and an honest desire to reach a reasonable accord;
- a party alleging dishonesty or deceit (as the native title party did in this case) has an evidentiary burden, on the balance of probabilities, of substantiating the allegation, referring to *Strategic Minerals Corporation/Kynuna/Queensland* [2003] NNTTA 83, DP Sumner at [40];
- there is no obligation to negotiate after a s. 35 request has been made;
- while it may or may not be that a party's conduct after a s. 35 determination application has been made is relevant to whether a party negotiated in good faith before it was made (referring to *South Blackwater Coal Ltd v Queensland* (2001) 165 FLR 232 at 237 to 240), there is no mandate in the NTA for receiving evidence of that conduct—at [37] to [38].

The native title party contended the grantee party had failed to meet good faith negotiations criteria in that:

- he had shifted position;
- refused to sign a written agreement;
- undertaken unilateral conduct harming the negotiation process; and
- failed to do what a reasonable person would have done in the circumstances—at [29].

The grantee party refuted these contentions on the basis that he was not required to negotiate about events unrelated to the future act in question in these proceedings, he never

repudiated the agreements while the native title repudiated both, he did negotiate in good faith and he was free to severe or create business relationships as he saw fit. On the latter point, the Tribunal noted that:

> Mr Cameron could do as he saw fit in the running of his business affairs, but if his conduct in making or breaking commercial relations with others has or had an impact on agreements negotiated with other negotiation parties, then it is unsustainable to contend that the Tribunal must ignore such matters—at [50].

The government party contended that, in assessing whether the grantee party negotiated in good faith, the Tribunal should not and could not have regard to conduct of the grantee party prior to the date on which the obligation to negotiate in good faith arose.

**Past conduct may be considered**

The Tribunal noted that:

> There is no restriction on the Tribunal to receive into evidence past conduct of a negotiation party, if it is relevant to the issue of good faith. It would be wholly artificial to limit material to conduct arising after the commencement of good faith negotiations. Clearly parties engaged in such negotiations are influenced by a range of factors, and past negotiations and conduct may well be relevant not only to assessing the negotiations but also the overall tenor of the proceedings…The Tribunal and Federal Court have recognized that relationships do change once negotiations start, and if a party was so influenced by past negotiations that they did not approach the new negotiations with an open mind and a preparedness to reach a reasonable accord, they would be the party failing to negotiate in good faith—at [47].

In this matter, the previous negotiations involving Mr Cameron as representative of Ebony Ridge Marble and the Gugu Badhun People were taken into account but the weight placed on that evidence was tempered by the fact that (among other things):

- they occurred some years previously;
- the negotiations related to a different mining lease;
- while they involved Mr Cameron, they also involved other persons connected with Ebony Ridge Marble—at [48].

**Decision of question of good faith**

The Tribunal noted (among other things) that:

- both agreements stated that good faith negotiations had taken place;
- the parties, both of which had experienced and competent legal representatives, freely and with full knowledge executed agreements after what was clearly a series of fruitful negotiation meetings which met the criteria of good faith negotiations;
- it was the native title party that terminated the agreements without any discussions with Mr Cameron as to possible alternative arrangements;
- this course of action was not adequately explained even if previous conduct was considered—at [41] to [42] and [49].

Therefore, the Tribunal found that the government and grantee parties did negotiate in good faith and it could conduct a further inquiry and make a determination on the s. 35 application. It was noted that:

- the native title party did not discharge the evidentiary burden to justify its allegations of bad faith;
- the logically relevant evidence before the inquiry supported a conclusion of good faith as required by s. 31(1)(b)—at [52] to [53].

# Good faith negotiations – obligations regarding funding and compensation

## *Gulliver Productions Pty Ltd/Western Desert Lands Aboriginal Corporation/Western Australia* [2005] NNTTA 88

Deputy President Sumner, 30 November 2005

### Issues

Does the s. 31(1)(b) of the *Native Title Act 1993* (Cwlth) (NTA) require:

- the government party to negotiate about matters of compensation?;
- the government party and the grantee party to provide funding for negotiations to a native title party where that party is a prescribed body corporate?

The Tribunal's comments, in relation to the problems the lack of funding for prescribed bodies corporate causes in the native title process, are of particular note.

### Background

This matter concerned a future act notice issued under s. 29 of the NTA by the State of Western Australia in relation to the proposed grant of a petroleum exploration permit under the *Petroleum Act 1967* (WA) (Petroleum Act). Negotiations as required by s. 31(1)(a) of the NTA commenced on 27 June 2002.

During the course of those negotiations, on 27 September 2002, a determination recognising native title was made in relation to one of the native title party's claimant application (the third native title party). On 17 July 2003, the Western Desert Lands Aboriginal Corporation *(Jamukurnu-Yapalikunu)* was determined to be the prescribed body corporate (WDLAC) in relation to that determination of native title: see ss. 55 to 57.

Subsequently, WDLAC's details were entered in the National Native Title Register, making is a 'registered native title body corporate': see ss. 193(2)(d)(iii) and 253 of the NTA. Therefore, pursuant to s. 30(1)(c), WDLAC was now the native title party in these proceedings before the Tribunal. As the relevant claimant application was 'finalised', the details of that claim were then removed from the Register of Native Title Claims pursuant to s. 190(4)(d) so that the registered native title claimant in that claimant application ceased to be a native title party: see s. 30(2). The first annual general meeting of WDLAC was held in September 2004.

On 3 May 2005, the grantee party applied for a future act determination under s. 35 of the NTA. The third native title party (now WDLAC) alleged the government party had not negotiated in good faith prior to making the s. 35 application. Negotiations in good faith are one of the pre-conditions to the Tribunal making a determination in relation to such an application.

WDLAC did not allege any subjective lack of honesty or sincerity on the part of the government party but, rather, alleged failure to negotiate in a reasonable manner in the circumstances—at [26].

### Good faith obligations of the government party to negotiate on compensation

The Tribunal was satisfied that the government party had generally acted reasonably and in accordance with the good faith indicia set out in *Western Australia v Taylor* (1996) 134 FLR 211 at 224 to 225 *(Njamal)*, where the Tribunal anticipated the factual context would be important. In this matter, the Tribunal recognised that:

- the nature of the future act (i.e. the grant of a petroleum exploration licence) meant the government party had made only limited substantive offers towards settlement;
- the government party was not necessarily required by the good faith obligation to make reasonable substantive offers—at [35] to [37].

The government party's negotiating position in regard to compensation was that s. 24A of the

Petroleum Act imposes any liability to pay compensation on the grantee party. The Tribunal, referring to s. 24MD(3) of the NTA, was also of the view that, by operation of the NTA and the Petroleum Act, there was no obligation on the government party to negotiate about compensation in s. 31(1)(b) negotiations. The Tribunal noted that, on the material before it, at no stage did the third native title party propose the government pay compensation—at [40] to [47].

**Obligation to fund negotiations of a registered native title body corporate**

Among other things, WDLAC contended that:

- the area affected by the relevant s. 29 notice affected the lands of the Martu People and WDLAC had statutory obligations in relation to those lands under regulation 6 of the Native Title (Prescribed Body Corporate) Regulations 1999 (Cwlth) (PBC regulations);
- regulation 8 of the PBC regulations required WDLAC to consult with, and obtain consent of, affected common law title holders before making a 'native title decision';
- the government party was, or ought to have been, aware that WDLAC, 'like all Prescribed Bodies Corporate in the nation', had no financial resources to carry out its statutory responsibilities and that Ngaanyatjarra Land Corporation Aboriginal Council (the Ngaanyatjarra Council), the representative body for the area, was prohibited from funding WDLAC though Commonwealth grants;
- where one of the parties (here, WDLAC) is unable to participate in negotiations due to a lack of resources, and it is reasonably within the means of the other parties to facilitate that participation but they fail to do so, those parties have 'objectively failed to negotiate in good faith';
- as from 17 July 2003, when WDLAC was determined as the PBC, the government party should have recognised the consequences of issuing the s. 29 notice i.e. the third native title party (now WDLAC) was forced into negotiating without adequate resources;
- to continue negotiations without funding WDLAC was unreasonable and not consistent with the obligation to negotiate in good faith;
- what was in issue was the necessity of a contribution of the government and grantee parties, either severally or jointly, to facilitate the negotiations 'in order for negotiations to truly occur' with WDLAC—at [62] to [65].

In response, the government party's contentions (among other things):

- noted that s. 203BB(1)(b) (which deals with representative bodies' assistance and facilitation functions) and s. 203C (which deals with grants to representative bodies to enable performance of their functions) indicated an intention that assistance be in place for future act negotiations and placed no obligation on government parties or grantee parties to contribute;
- submitted that earlier Tribunal decisions, where it was found the obligation to negotiate in good faith did not extend to providing financial assistance to a native title party, should apply equally to prescribed bodies corporate as to registered native title claimants because s. 203BB(1)(b) made no such distinction, referring to *Western Australia v Daniel* [2002] NNTTA 230; (2002) 172 FLR 168; *Mt Gingee Munjie v Victoria* [1999] NNTTA 361; (1999) 163 FLR 87;
- pointed out that native title corporations are creatures of a Commonwealth statute and so the Commonwealth is responsible for funding them;
- asserted that the government party could not reasonably have known that a determination of native title would

necessarily be made during the course of the negotiations or that WDLAC would not be funded;

- noted that, since the native title party failed to advise the government party that it was no longer able to participate in the negotiations due to lack of resources, the issue of funding could not be relied upon as a ground for a decision that the government party had not negotiated in good faith—at [67] and [83].

**Commonwealth government policy on funding prescribed bodies corporate**

WDLAC's legal representative produced documentation of Commonwealth grant conditions for representative bodies in support of its contention that no Commonwealth funding was provided to prescribed bodies corporate for future act negotiations and statutory functions.

The Tribunal noted that the general terms and conditions relating to native title funding agreements administered by the Office of Indigenous Policy Coordination (OIPC) prohibited representative bodies using funds:

- to expressly support native title claimant group structures in areas where native title is determined to exist or otherwise support anyone else to perform the functions of a representative body in relation to those areas;

- to assist with either operating costs or regulatory compliance obligations of prescribed bodies corporate or registered native title bodies corporate without OIPC's prior approval, other than funding to assist with the establishment, incorporation and registration of prescribed bodies corporate, up to and including the first annual general meeting of such bodies—at [67].

WDLAC also:

- referred to statements made by the current Commonwealth Attorney General expressing the Australian Government's view that states and territories should contribute to the costs associated with establishing prescribed bodies corporate;

- expressed the view that the use to which funds paid to WDLAC from mining companies under agreements about the doing of other unrelated future acts was limited because WDLAC is a tax exempt charity and had advice that, to retain its exempt status, such funds could only be used for charitable purposes within the Rules of Incorporation— at [68] and [70] to [71].

The government party contended that:

- WDLAC's rules of incorporation arguably included both charitable and non-charitable purposes and, to obtain tax exempt status as a charity, it must be assumed that the Australian Taxation Office was of the opinion that the strictly non-charitable purposes must further or aid the dominant charitable purpose or be incidental to it;

- if money received from other future act negotiations were used to support the dominant charitable purpose (e.g. further negotiations to obtain monies that could be applied to the charitable purpose), then there would be no impediment to the use of the funds for the negotiation of agreements relating to unrelated future acts;

- there was no direct evidence that the money obtained from other future act agreements could only be used to further the charitable objects of WDLAC.

It was noted that:

> It is impossible for the Tribunal to resolve this situation on the basis of the evidence provided, nor is it necessary to do so in order to deal with the principal issue of whether the Government party has negotiated in good faith. Had the issue been of critical importance I would have sought more evidence and submissions in relation to it. What can be said is that WDLAC…genuinely held the view that the

mining company funds could not be used for the purposes of these negotiations. I suggest for the future that this issue be clarified in relation to WDLAC and other PBCs so that the policy debate about the funding of PBCs which has been evident in these proceedings can proceed on a firmer footing…

Even if the mining funds could legally have been used to fund the present negotiations as the Government party argues, it is difficult to criticise WDLAC for wanting to see as much of the mining funds as possible distributed to holders of native title in one form or another.

The WDLAC Governing Committee…[is] faced with making a policy decision about the distribution of its income from earlier…negotiations to support negotiations about…unrelated mining or exploration proposals. If the new proposal is a large mining venture…then funding negotiations to achieve maximum benefits may be justified. On the other hand the future act proposed may be, as in this case, an exploration tenement with no certainty that economic production will follow. There will also be cases where...[prescribed bodies corporate] have no income from other than Government sources to finance negotiations about future acts. This case highlights the unresolved policy differences about the funding of...[prescribed bodies corporate], which will need to be given consideration by Commonwealth and State/Territory Governments—at [73] to [75].

The Tribunal was satisfied that:

- the NTA empowered the Australian government to fund representative bodies to assist prescribed bodies corporate to perform their statutory functions and that this power is not restricted in time;
- although funding could be applied for after the first annual general meeting of a prescribed body corporate, as a matter of policy and practice no specific funding is provided for this purpose;
- the government party would have known that the Australian government did not provide funding to representative bodies or prescribed bodies corporate to assist the latter in future act negotiations, at least by the time the s. 29 notice relevant to this inquiry was given—at [79].

**Cost of compliance with PBC regulations**

The Tribunal agreed with WDLAC that:

- the obligations of a registered native title body corporate under regulation 8 of the PBC Regulations are to consult with and obtain the consent of the affected common law holders of native title before making a native title decision;
- obtaining proper decisions from native title claimants and holders can be a time-consuming and expensive process, involving travel to remote communities, and can involve substantial costs—at [86] to [87].

**Five person rule**

Regulation 9 of the PBC Regulations sets out the 'five person rule', which (in paraphrase) says that evidence of consultation and consent can be provided if at least five members of the prescribed body corporate who are common law holders whose native title rights and interests would be affected by the proposed native title decision sign to certify that consultation had taken place and consent been given. If there are fewer than five members so affected, at least five members, including each affected common law holder who is also a member, must sign.

The government party contended that that practical difficulties and cost of obtaining consent of native title holders could be overcome by the 'five person rule'.

The Tribunal rejected this contention:

> The 'five person rule' is only an evidentiary aid. The five persons must still be satisfied that the appropriate consultation and consent process has been properly carried out. They cannot assert under the 'five person rule' that the consultation and consent has been properly followed if, in fact, it has not—at [87].

**Summary of findings with respect to funding**

In summary, the Tribunal findings in relation to funding of registered native title corporations to carry out their statutory functions in relation to future act mediation and arbitration were:

- the NTA permits representative bodies to provide assistance to both claimants and holders of native title (including in negotiations in relation to future acts) and they may apply for, and be funded by, the Australian government for this activity, referring to ss. 203BB(1)(b) and 203C;
- no distinction is drawn between registered native title claimants and those holding native title, as both are 'native title parties' under ss. 29(2)(a) and (b) but the different approaches to funding each for the conduct negotiations under s. 31(1) are a matter of Australian government policy;
- once a PBC has been determined it has statutory functions it is obliged to perform by the PBC Regulations, including obligations under r. 8 to consult with, and obtain the consent of, affected common law holders of native title before making a native title decision;
- a decision to agree to the grant of a petroleum exploration permit is likely to lead to native title rights and interests being affected (i.e. it is a native title decision) and this requires the consultation provided for in r. 8(2);
- the cost of performing the statutory functions in relation to consultation and obtaining consent could be substantial in some cases;
- the Australian government does not make funds available to representative bodies specifically to enable them to be dispersed to prescribed bodies corporate for the purpose of conducting s. 31 negotiations;
- while the Australian government's funding conditions do not prohibit a representative body from dispersing funds to prescribed bodies corporate for s. 31 negotiations, this will be of no practical utility if the only funds available from the Australian government have been provided for other purposes, which appears to be the case;
- a representative body could provide assistance on a fee for service basis and, in this case, the Ngaanyatjarra Council and lawyers employed by it agreed to act for WDLAC in future act negotiations on a limited basis;
- the Australian and state/territory governments do not agree about responsibility for the funding of prescribed bodies corporate and no general funding provision is made by either of them to enable these bodies to carry out their statutory functions, apart from the limited Commonwealth funding referred to above for assistance until the first annual general meeting;
- at least since the beginning of 2002, the government party would have been aware of the Australian government's funding conditions and of the limitations placed on the use of funds for the activities of prescribed bodies corporate—at [89].

**Does the obligation to negotiate in good faith extend to funding the native title party?**

After referring to its previous consideration of this issue, the Tribunal found that:

- if there is no obligation on another party to fund negotiations in good faith, when dealing with a native title party who is a registered native title claimant, there was no reason for this to change simply by virtue of the native title party being a prescribed body corporate;
- subsection 31(2) makes it clear that a refusal to negotiate on the matters other than the effect of the future act on registered native title rights and interests does not mean failure to negotiate in good faith;

- the scope of good faith negotiations is confined to the effect of the future act on the native title party's registered native title rights and interests and other matters related to them in s.39(1)(a);

- there is no authority to support the proposition that it is a necessary adjunct to the obligation to negotiate in good faith for funding to be provided by the other parties to enable the negotiations to be carried out by the native title party;

- even if this is wrong, the conduct of the negotiations in relation to funding in this matter did not indicate a lack of good faith by the government party;

- concerns about funding were only raised by the native title party late in the negotiations (i.e. September/October 2004) and at no time was a specific proposal made by the native title party to the government party to fund the negotiations;

- if a native title party wants the question of the funding of negotiations to be an issue within the scope of good faith negotiations, a specific proposal backed by information (including the cost of complying with the PBC Regulations) to show that, without funding, it will not be able to properly negotiate about the future act, should be put on the table—at [88], [90] to [93].

A contention that negotiations should have included consideration of funding WDLAC after the grant of the tenement was also rejected for similar reasons:

> Even if it could be argued that good faith negotiations can encompass the funding of a PBC post-grant because s 39(1)(a)(iii) talks of the effect of the future act on the development of the social, cultural and economic structures of the native title party…no such proposal was developed or put to either the Government party or grantee party—at [95].

**Funding of negotiations – grantee party**

After noting that WDLAC's contentions that obligation of a grantee party to negotiate in good faith included funding a native title party were, in all but one respect, of the same nature as those relating to the government party, it was held that the findings in relation to the effect of s. 31(2) and the failure of the native title party to make proposals on the issue, until very late in negotiations, were equally applicable to these contentions.

**Notice is not part of negotiation in good faith process**

The Tribunal found that:

- the giving of a s. 29 notice is not part of the negotiation process;

- negotiations commence with the letter sent by the government party pursuant to s. 31(1)(a) requesting submissions;

- the discussion noted above about the scope of good faith negotiations was applicable here i.e. giving of s. 29 notice is not related to the effect of the proposed future act on the relevant registered native title rights and interests;

- even if the giving of the notice could be related to good faith negotiations, there was no unreasonable conduct on the government party's part in this case, since at the time notice was given, the native title party was a registered native title claimant and it was not reasonable to expect the government party to anticipate that an unfunded prescribed body corporate might come into existence at some time in the future;

- even if this could be anticipated, that was no reason to refrain from giving the notice since to do so would be 'severely disruptive to the processing of future acts in a timely manner'—at [100] to [101].

### Decision

The Tribunal found that the government and grantee parties did negotiate in good faith and the Tribunal could conduct a further inquiry and make a determination on the s. 35 application.

### Comments on funding issue

The Tribunal made the following concluding comments on the funding of prescribed bodies corporate:

> The evidence tendered in this matter has drawn attention to what is now a longstanding policy dispute between the Commonwealth and state and territory Governments about how PBCs should be funded. I am aware that the Tribunal…has…pointed out its concerns for the operation of native title processes if PBCs cannot properly carry out their statutory functions. It does seem anomalous that government funding is available…to support native title parties at the claimant stage but once native title is determined government funding in practice is no longer available…It is not the Tribunal's role to enter into the policy dispute but I am obliged to point out that how PBCs are to be funded needs to be given urgent attention by governments…
>
> One of the six practical reforms to deliver better outcomes in native title announced by Attorney-General Ruddock…was an examination of current structures and processes of PBCs which was to include consultation with relevant stakeholders….It is not clear whether [the source of funding for prescribed bodies corporate]…is an issue being considered…but matters raised in this inquiry suggest that some resolution of the funding issue will be necessary to ensure the on-going effectiveness of PBCs and workability of the native title system—at [102] to [103].

## Good faith negotiations – obligations regarding compensation

### *Griffin Coal Mining Co Pty Ltd/Nyungar People/Western Australia* [2005] NNTTA 100

Deputy President Sumner, 23 December 2005

### Issues

The issues summarised here are:

- does the obligation to negotiate in good faith found in s. 31(1)(b) of the *Native Title Act 1993* (Cwlth) (NTA) require the government party to facilitate and actively participate in the negotiation process, in particular to facilitate discussions on matters of compensation with respect to grants of tenements under the *Mining Act 1978* (WA)?

- is the native title party obliged to make submissions about the effect of the future act on registered native title rights and interests?

### Background

This determination relates to the proposed grant of four coal mining licences under the *Mining Act 1978* (WA). The main question the Tribunal dealt with in this decision here was whether the grantee party had negotiated in good faith prior to lodging an application under s. 35 for a future act determination under s. 38 of the NTA in relation to the grant of those licences. Negotiations in good faith are one of the pre-conditions to the Tribunal making a determination in relation to such an application. The native party alleged the government party and the grantee did not negotiate in good faith. The Tribunal observed that the role the government played in the negotiations was essentially facilitative, consistent with current practice in Western Australia.

**Good faith obligations of the government party to negotiate on compensation**

This contention was withdrawn by the native title party but the Tribunal considered it in the determination both for completeness and because it may be relevant to other good faith negotiation inquiries relating to the government party's obligations—at [16].

The Tribunal was of the view that:

- in the case of a grant of mining tenements, the obligation to negotiate in good faith places an obligation on the grantee party only to negotiate about compensation for the effect of the future act on native title rights and interests;
- its findings in G*ulliver Productions Pty Ltd/Western Desert Lands Aboriginal Corporation/Western Australia* [2005] NNTTA 88, summarised in this issue of *Native Title Hot Spots*, applied to the obligations of the government party in negotiations in good faith about mining tenements under the *Mining Act*;
- overall, the grantee and the government party had negotiated in good faith—at [28], [36] [56] to [82].

**Is grantee party obliged to negotiate about s. 33 payments?**

The native title party originally contended that the negotiations were frustrated because it was not given an opportunity to negotiate payments of the kind contemplated by s. 33(1) of the NTA because of the failure of the grantee party to respond to its requests.

The Tribunal:

- referred to the remarks made by the Federal Court on the scope of the obligation to negotiate about s. 33(1) payments in *Brownley v Western Australia* (1999) 95 FCR 152 (*Brownley*) at [48] to [56];
- noted this decision was made before the 1998 amendments to the NTA, when only the government party had an obligation to negotiate in good faith, and before s. 125A was inserted into the *Mining Act*, which expressly provides that parties other than the government are liable to pay any compensation to native title holders;
- referred to *Western Australia v Dimer* 2000) 163 FLR 426 at [126], where it was said, in relation to s. 33, that the grantee party may not be obliged to reach an agreement, but it is required to receive and consider a proposal from the native title party;
- pointed to earlier determinations in which, on the facts, it had accepted that the obligation to negotiate in good faith about s. 33(1) payments also extended to the government party—at [40] to [43].

After noting these earlier decisions had not considered whether s. 33(2) affected the authority of Brownley, the Tribunal was satisfied that it did not:

> However, if a native title party wishes to request the grantee party to satisfy any obligation to pay compensation by s 33(1) payments then it can make a proposal to this effect and the grantee party would be obliged to consider it in the manner explained in *Brownley*. To satisfy the jurisdictional precondition of negotiation in good faith there is no obligation at large on the grantee party to negotiate in good faith about s 33(1) payments but only insofar as they are seen as a means of satisfying the obligation to pay compensation for the effect of the future act on native title. Such negotiations are not excluded by s 31(2)—at [44].

The Tribunal held that the insertion of s. 125A into the *Mining Act* relieved the government party of the obligation to pay compensation to native title parties or to negotiate about s. 33(1) payments for the grant of mining tenements. However, the government party may still need to consider, if a proposal is made, whether to impose a s. 33(1) payment as a condition to a mining tenement, where it has been agreed between the native title party and the grantee—at [45].

**Is the native title party obliged to make submissions?**

The government party invited all the negotiation parties to make submissions and the native title party declined. It was common ground that it was not obliged to do so.

The Tribunal:

- referred to its interpretation of ss. 31(1)(a) and (b) as together laying down a procedural framework which involved the native title party submissions providing a basis upon which the negotiations could proceed;
- noted that the fact that a native title party does not make submissions is a factor that can be taken into account in determining whether the other parties have negotiated in good faith—at [50].

The Tribunal considered it desirable for the native title party to make submissions or at least articulate its concerns about the future act during negotiations. The argument that it was too costly to make submissions in all future act matters was rejected by the Tribunal, with it being said that where there is a proposal for productive mining, it should not be beyond the capacity of the native title party to consider the impact of the proposal on its native title rights and interests and other matters in s. 39(1)(a) of the NTA—at [52] to [54].

**Decision**

The Tribunal found that the government and grantee parties did negotiate in good faith and it could conduct a further inquiry and make a determination on the s. 35 application.

**For more information about native title and Tribunal services, contact the National Native Title Tribunal, GPO Box 9973 in your capital city or on freecall 1800 640 501.**
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