Native Title Hot Spots

No. 2, 14 October 2002

Contents

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Consent determination of native title

Martu and Ngurrara determinations

James on behalf of the Martu People v State of Western Australia [2002] FCA 1208

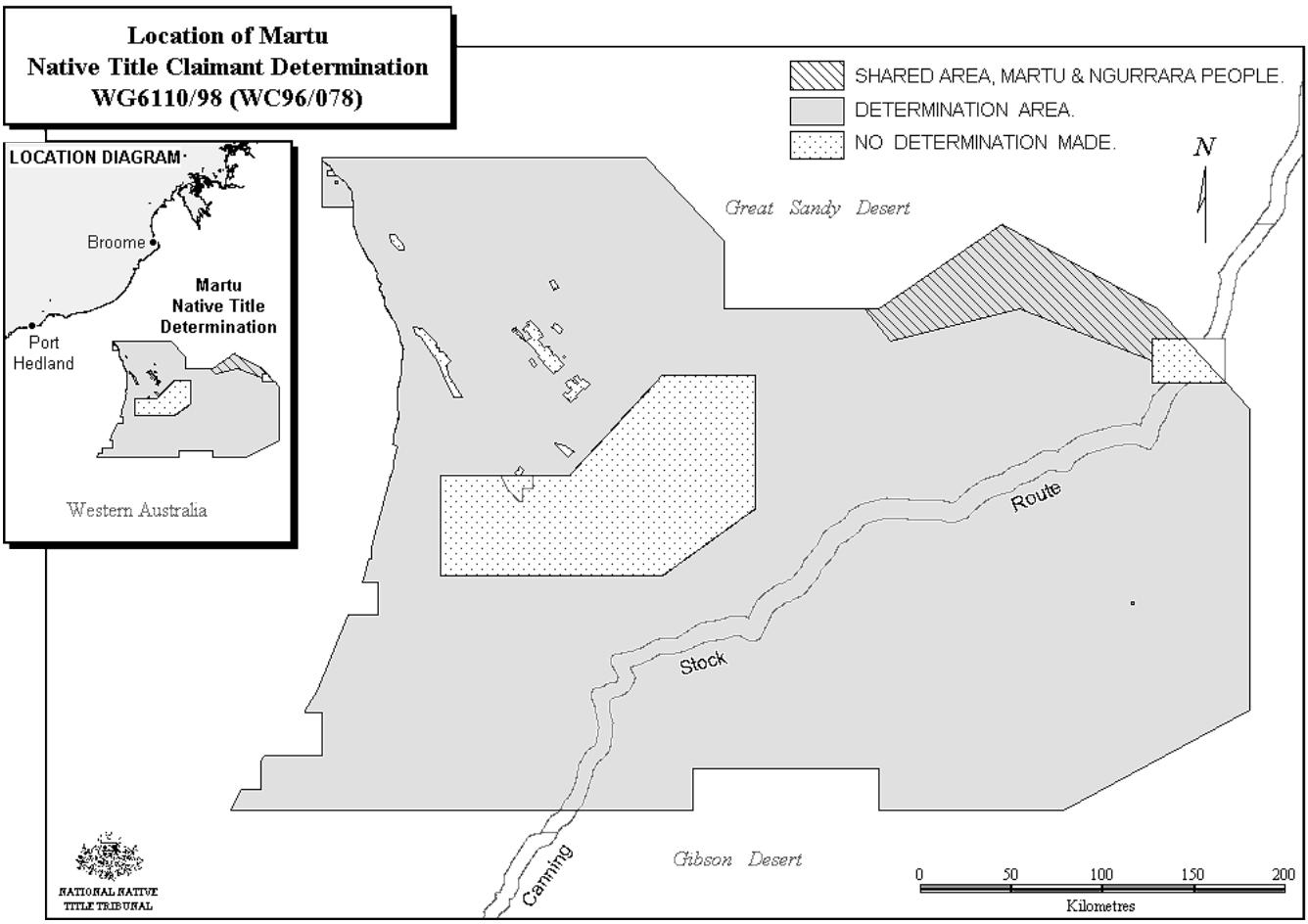
per French J, 26 September 2002

Orders were made by consent resulting in a determination of native title in relation to part of the area covered by each of the Martu and Ngurrara people's claimant applications. The determination area covers approximately 136,000 sq kms of unallocated State land in the Western Desert region of Western Australia. It involves the recognition of native title rights and interests, many of which are exclusive, over the largest area of land and waters to date. This is the first determination of native title to be made since the High Court handed down its decision in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*): see *Native Title Hot Spots* No. 1 for a summary of key aspects of that decision.

Section 87 factors

Section 87 of the *Native Title Act 1993* (Cwlth) (NTA) empowers the Federal Court to make orders giving effect to agreements about native title. His Honour Justice French noted that, before making a consent determination of native title, the court must be satisfied that it has the power to do what it is asked to do and that what it is asked to do is appropriate. French J gave examples of circumstances where these criteria may not be met:

- the parties had reached an agreement where it appeared to the court that there was nothing to support the claimed connection of the applicants to their country; or
- the determination appeared in some way to be obviously unfair or unjust — at [4].



In such circumstances, the court might conclude that making such a determination was not appropriate.

In the matter before French J, the criteria were met. It was noted that:

- the parties have had the benefit of legal advice;
- extensive anthropological research has been carried out to establish the connection of the native title holders to their country, the extent of that country and the existence and content of their traditional laws and customs. The anthropologists also reported upon the way in which they have kept their connection with their country since colonisation;
- evidence has been considered by the State to support their claim;
- the parties generally have been involved in the process of mediation — at [4].

His Honour noted that:

> The Court is entitled to and does give weight to the fact that agreement has been reached in the circumstances — at [4]. See also *Munn v Queensland* (2001) 115 FCR 109; *Kelly v NSW Aboriginal Land Council* [2001] FCA 1479 on the s. 87 factors.

Native title and boundaries

His Honour commented that:

> … it is a fact that in the extremely arid region of the Western Desert boundaries between Aboriginal groups are rarely clear cut…Desert people define their connection to the land much more in terms of groups of sites, thinking of them as points in space not as areas with borders…Various conventions and practices have arisen to guarantee freedom of movement by Aborigines into the territories of their neighbours in areas of extreme variability of rainfall. Despite this there is much evidence for the existence of ideas of territoriality. People suffer home sickness when away from their heartlands for long periods and a sense of unease when entering or camping in or travelling through someone else's country particularly for the first time — at [10].

Shared country

The determination recognises concurrent native title rights and interests of the Martu and the Ngurrara people over part of the determination area. His Honour noted that:

> It is particularly encouraging in this case that each of these groups, consistently with their traditional law and custom, is able to recognise the interests of the other in a common area of land — at [12].

Excluded areas

Certain areas covered by the application are excluded from the determination. According to his Honour, in some cases this was because native title is thought to have been extinguished by operation of the Act or by operation of the common law. French J noted that it is on the latter basis that the Rudall River National Park is not included in the determination — on this point, see *Ward* at [249] to [258]. However, his Honour was careful to note that:

> This simply means that native title in such cases cannot be recognised by the Courts... The relationship of the people to their country in those areas is not changed by the limits that the Act or the common law place on recognition. If it is their country under their traditional law and custom it remains so under their law and custom whatever the Act or the common law say about recognition — at [12].

Common law holders

The common law holders of native title over the determination area are the Martu people, defined as those Aboriginal people who hold in common the body of traditional law and culture governing the determination area and who both:

- identify as Martu; and
- in accordance with their traditional laws and customs, identify themselves as being members of one, some or all of 11 named language groups.

Over the shared area, the Ngurrara people have concurrent native title. They are defined as those Aboriginal people who, in accordance with their traditional laws and customs:

- identify themselves and their forebears as: Jiwaliny; Mangala; Manyjilyjarra; Walmajarri; Wangkajungka; or any combination thereof; and
- acknowledge the beliefs, practices, and protocols associated with the jilakalpurtu rain making ritual complex.

Exclusive native title rights and interests recognised

The right to possess, occupy, use and enjoy the land and waters of the determination area to the exclusion of all others including the right to:

- live on the determination area;
- make decisions about the use and enjoyment of the determination area;
- hunt and gather, and to take the waters (other than flowing or subterranean waters) for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial, and communal needs;
- control access to, and activities conducted by others on, the land and waters of the determination area;
- maintain and protect sites and areas which are of significance to the common law holders under their traditional laws and customs; and
- be acknowledged as the traditional Aboriginal owners of the determination area, as against any other Aboriginal group or individual.

Non-exclusive native title rights and interests recognised

- For the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, the right to use the traditionally accessed resources listed i.e. ochre, soils, rocks and stones, and flora and fauna.
- The right to take, use and enjoy the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, including the right to hunt on and gather and fish from the flowing and subterranean waters.

Manner of exercise

The native title rights and interests are:

- exercisable in accordance with the traditional laws and customs of the common law holders;
- subject to and exercisable in accordance with the laws of the State and the Commonwealth including the common law.

Other interests in the determination area

The other interests recognised included:

- interests held under a State Agreement Act by Western Mining Corporation, various miscellaneous licences for mining purposes, 95 exploration licences, two prospecting licences and four petroleum exploration permits;
- mining leases granted on or after 1 January 1994. The non-extinguishment principle applies to such leases — see s. 24MB, s. 24MD(3) and s. 238;
- Telstra's rights and interests, including as the owner and operator of the telecommunications facilities installed within the determination area and its right of access to those facilities;
- public rights at common law;
- rights and interests granted by the Crown in right of both the State and the Commonwealth;
- access rights held by state and commonwealth instrumentalities and local government authorities as required in the performance of statutory or common law duties where such access would be permitted to private land;
- rights of public access, subject to state laws, to existing roads within the determination area, where members of the public have a right of access to such roads under the common law, and to the part of the Canning Stock Route included in the determination area.

The relationship between the native title rights and interests and the other rights and interests

This relationship is that:

- native title and non-native title rights and

interests co-exist. To the extent that the non-native title rights and interests are inconsistent with native title rights and interests, the latter continue to exist in their entirety but, to the extent of the inconsistency, have no effect in relation to the non-native title rights and interests. (The wording used in the determination is reminiscent of the wording of the non-extinguishment principle found in s. 238 of the NTA.); and

- 'for the avoidance of doubt', the existence and exercise of native title rights and interests does not prevent non-native title interest holders from doing any activity they are required or permitted to do because of the interest they hold. Both the non-native title rights or interests and any activity required or permitted to be done under that right or interest prevail over the native title rights and interests and any exercise of them but do not extinguish them. (This wording appears to draw on the language used in s. 24GB and s. 44H of the NTA.)

Areas not subject to determination

Several reserves that were vested under s. 33 of the *Land Act 1933* (WA) were excluded from the determination area because they are areas where previous exclusive possession acts have occurred and native title has been confirmed as being completely extinguished in relation to the whole of those areas: see *Ward* at [235] to [254] and [260]. In addition to excluding several repeater station sites on the basis that they constituted public works as defined in s. 253 and s. 251D of the NTA, any other public works were also excluded from the determination area without further definition. The other areas excluded from the determination include:

- mining leases and general purpose leases granted prior to 1 January 1994, presumably because the final effect of the grant of such leases on native title was not settled by the High Court in *Ward* — see [308] and [341]; and
- reserves that are not vested.

As noted above, Rudall River National Park was also excluded from the determination area. In a ministerial statement made on 24 September 2002, the Hon. the Acting Premier of Western Australia, Mr Eric Ripper, said,

> ... the Government remains committed to negotiating joint management arrangements [over the national park] with traditional owners — including the Martu people — as that is the only just and proper course of action under the circumstances.

Recent cases

Successful application under s. 66B to replace applicants

Daniel v State of Western Australia [2002] FCA 1147

per French J, 13 September 2002

Issues

This case concerned two applications under s. 66B of the NTA to replace the applicant in two native title claims: the consolidated Ngarluma and Yindjibarndi claim and the Yaburara and Mardudhunera claim. The Ngarluma and Yindjibarndi application was successful. This is the first time that an application made under s. 66B has succeeded.

Background

A future act agreement (see s. 31(1)(b) of the NTA) between the Premier of Western Australia, the Western Land Authority and the applicants dealing with the proposed

compulsory acquisition of native title over part of the Burrup Peninsula in the Pilbara region of Western Australia was near completion. However, David Walker refused to sign the agreement. Mr Walker was one of the people who, jointly, were named as the applicant in the claim and, as the claim was registered on the Register of Native Title claims, the Registered Native Title Claimant. In any right to negotiate proceedings, he was included as part of the native title or negotiation party — see s. 29, s. 30, s. 61(2), s. 75 and s. 253 of the NTA. The future act agreement could not be finalised without his signature.

A motion was brought under s. 66B of the NTA to replace the current applicant in the Ngarluma and Yindjibarndi proceedings (the s. 66B application). The effect of the orders sought was to remove the Mr Walker (and three others, now deceased) from the group named as the applicant. It was alleged that Mr Walker was no longer authorised by the native title claim group to make the claimant application and deal with matters arising in relation to it — see s. 66B(1)(a)(i). The s. 66B application was brought on as a matter of urgency because the State had commenced arbitral proceedings in the Tribunal under s. 35 of the NTA, seeking a determination that the proposed acquisition should proceed unconditionally.

Members of the Yaburara and Mardudhunera claim group brought a similar application to replace the applicant in order to remove a Ms Patricia Cooper from the applicant group. Like Mr Walker, Ms Cooper was refusing to sign an agreement with the State in relation to the acquisition of an area covered by the Yaburara and Mardudhunera application.

Authorisation and s. 66B

His Honour Justice French emphasised that:

> ... it is of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration, that those who purport to bring such applications and to exercise such rights on behalf of a group of asserted native title holders have the authority of that group to do so — at [11].

French J commented that, although the definition of 'authorise' in s. 251B NTA does not specifically cover withdrawal of authorisation, that section defines by analogy the process by which authorisation may be withdrawn for the purposes of s. 66B NTA. His Honour also noted that authorisation in these terms:

> … is hardly a matter likely to have been contemplated explicitly by traditional law and custom…[I]t should not be surprising if there is some difficulty in applying traditional decision-making processes, albeit by closest analogy, to the conferring of the kind of authority contemplated by s 251B — at [14].

Conditions to be satisfied under s. 66B

French J noted the following conditions must be satisfied under s. 66B of the NTA:

- there must be a claimant application, as there was in this case;
- each applicant in the proceedings must be a member of the native title group, as was the case here;
- the person to be replaced must be no longer authorised by the claim group to make the application and to deal with matters arising in relation to it or that person must have exceeded the authority given to him or her by the claim group;
- the persons making the application must be authorised by the claim group to make the application and to deal with matters arising under it — at [17].

Power to remove

His Honour noted that:

- the court's powers under s. 66B are discretionary;
- the claim group's power to remove an applicant under s. 66B(1) depended upon either a cessation of the authority conferred upon the person to be removed or action by that person in excess of the authority conferred;

- where it is alleged that the person sought to be replaced acted in excess of authority under s. 66B(1)(a)(ii), this does not require a separate decision-making process in order to establish it. This is consistent with a beneficial construction of s. 66B as 'a facultative provision directed to maintaining the ultimate authority of the native title claim group';
- the criterion of cessation of authority under s. 66B(1)(a)(i), which was relied upon in this case, may be more onerous. Unless it could be said that, when the authority was originally conferred, it was limited so as to cease when certain events happened, a separate decision-making process was needed to bring about the cessation of authority;
- if the original authority was conferred subject to the continuing supervision and direction of the native title claim group, then it may be that the applicant is not authorised to act inconsistently with a resolution or direction of the claim group. In such a case, it could reasonably be said that the applicant has exceeded their authority in contravention of the claim group's decision;
- there must be evidence that identifies the nature of the decision-making process followed by the claim group that results in the authorisation of members to act on behalf of that group — at [15] to [17].

Decision-making process

His Honour noted that, if a decision relating to authorisation is made by a collective or representative body, then the members applying for the order to replace the applicant must be able to prove:

- that such a body exists under customary law recognised by the members of the group;
- the nature and extent of the body's authority to make decisions binding the members of the group; and
- that the body has authorised those seeking to replace the current applicant to make the claimant application and deal with matters arising in relation to it — referring to *Moran v Minister for Land and Water Conservation* [1999] FCA 1637 at [34].

Evidence in Ngarluma and Yindjibarndi proceedings

The evidence included:

- affidavits in relation to the claim group's decision-making process from 13 of the 15 people bringing the s. 66B application;
- a video recording of the meeting where the resolution to bring the s. 66B application was passed;
- copies of the notices sent out to call the meeting where the s. 66B resolution was put and details of how those meeting notices were distributed. The notice included the background to the matter and the agenda for the meeting;
- affidavits from a solicitor and Aboriginal liaison officer working for the claimant's legal representative, the Yamatji Barna Baba Maaja Aboriginal Corporation (YBBMAC), about the meeting process;
- an affidavit from an anthropologist, whose involvement with the Ngarluma and Yindjibarndi people dated back to 1982 and included work on their native title claim. It set out his understanding of the decision-making process they employed. This included his observations about that process in the lengthy period that preceded the making of the native title claim — see [25] to [45].

See also *Ward v Northern Territory* [2002] FCA 171 on evidentiary requirements in s. 66B proceedings.

Mr Walker's evidence was that, amongst other things, he is as an elder, law man and custodian of traditional and customary sites of the Ngarluma people and that:

- the Burrup contains the most important sites in Ngarluma culture, tradition and custom;
- claim meetings were controlled by the YBBMAC's lawyers, who would not listen to the claimants or talk to them in a proper way about native title in the Burrup and so he and other claimants did not want to attend;

- he refused to sign this agreement because 'the Ngarluma elders must continue to manage and control our sites and our culture because it ties us to our land and it identifies us through our song, stories and dreamings and I did not understand the agreement and how it would affect this' and because he was not involved in the negotiations, was not given the opportunity to look at the documents and was not given any advice about it until he obtained it from his own lawyer — at [46] to [50].

Having noted that the question of whether Mr Walker was no longer authorised by the group depended upon whether or not there had been a withdrawal of his authority in accordance with s. 251B of the NTA, French J held that:

- on the balance of probability, no process of the kind contemplated in s 251B(a) (under traditional law and custom) existed for doing things of this kind i.e. deciding to replace the applicant in native title proceedings;
- the evidence supported inferences that:
  - decisions of that kind are taken in accordance with a process of decision-making which has been adopted by the persons in the native title claim group; and
  - that process was agreed to by them over a period of time. It involved conducting community meetings on matters of major concern in connection with the native title determination application — at [51].

His Honour went on the say that:

> The process of decision-making undertaken [on 12 August 2002 to authorise the making of the s. 66B application] may be criticised as pressured [for various reasons]…However, it is not to be supposed that members of the claim group which had been for so long engaged in processes associated with their native title determination application and with the negotiation of the State agreement were not capable of making an informed decision reflected in the resolutions which were eventually passed — at [52].

Decision

French J held that:

- as a result of the decisions taken at the meeting of 12 August 2002, Mr Walker was no longer authorised by the claim group to make the application or to deal with matters arising in relation to it;
- the applicants put forward in the s. 66B application were authorised at that same meeting to make the application and deal with matters arising from it;
- it was appropriate to make the order under s. 66B NTA because this was a case in which one of a large number of registered native title claimants was holding up the execution of an agreement which was authorised by the native title claim group, and which was of substantial importance to its members — at [54].

Yaburara and Mardudhunera proceedings

Ms Patricia Cooper, one of three people who jointly made up the applicant and, as the claim was registered, the registered native title claimant, declined to sign an agreement with the State of Western Australia regarding the compulsory acquisition of native title rights and interests in an area covered by that application. The Yaburara and Coastal Mardudhunera Aboriginal Corporation (the Corporation) held a special general meeting on 3 September 2002 where it was resolved that, if Ms Cooper did not either sign the agreement or resign as a named applicant immediately, an application to remove Ms Cooper as a named applicant pursuant to s. 66B NTA should be made. It is to this application that these proceedings relate.

Decision

His Honour found that there was a relevant claimant application and that those bringing the s. 66B application were members of the relevant claim group. However, difficulties arose because:

- a number of affidavits were filed by persons named as members of the claim group who swore that they had never given authority for this motion to be brought on their behalf;

- the hearing was conducted in unsatisfactory circumstances:
  - it was brought on at short notice;
  - documents were served at short notice;
  - Ms Cooper was not legally represented and had participated in the hearing via a telephone link up from Geraldton;
- the material before the court did not disclose whether the relevant decision-making process was made according to traditional law and custom, and there was no equivalent of the anthropological evidence given by Mr Robinson in the Ngarluma and Yindjibarndi motion.

As a result of the above considerations, French J declined to make the orders sought in the motion and adjourned the proceedings to 18 September 2002, when the court was advised that Ms Cooper had not yet engaged a lawyer. At a further directions hearing on 3 October 2002, it was agreed that a claim group meeting would be held in Karratha on 14 November 2002 and, if the matter was not resolve at that meeting, a further hearing of the s. 66B application would commence the following day in Karratha.

Future act injunction proceedings

Turrbal People v Queensland [2002] FCA 1082

per Spender J, 30 August 2002

Issue

Was a registered native title claim sufficient to support injunctions to stop possible future acts from being done in relation to the claim area?

Background

The whole of the land in question was granted to the Brisbane City Council (BCC) in 1965 pursuant to a Deed of Grant in trust (DOGIT) to be held in trust as a reserve for recreational purposes only. (There were some previous grants over the same area but these were not noted as being of particular significance by the court.) The land was subdivided in 1967 into three lots.

In August 1999, pursuant to a DOGIT, the Crown granted freehold over the lot that was relevant to these proceedings. Under this grant, BCC held the land on trust for 'Aboriginal and no other purpose'. BCC leased part of the land to the State of Queensland for 30 years for the purpose of building and operating an Aboriginal cultural centre. Prior to the grant of that lease, notification was provided to the registered native title claimant pursuant to s. 24JA of the NTA. On 28 March 2002, the Musgrave Park Cultural Centre Inc (allegedly a non-Turrbal organisation) subleased the land from the State.

The first motion filed was against the State, BCC and an architect seeking an injunction on the construction of an Aboriginal cultural centre at Musgrave Park. The second motion was against the State, the BCC and three other city councils and sought 'an injunction on [sic] all current and future acts occurring on' the area covered by the registered claim, except with consent of the Turrbal people.

Submissions

In relation to the first notice of motion, it was alleged that:

- the DOGIT to the BCC in 1999 was racially discriminatory 'because the Turrbal Traditional Land Owners, whose native title claim had already been lodged in May 1998 [over the area in question] were neither consulted nor negotiated with by the State…prior to the granting of the Deed. Musgrave Park was specifically identified in the Turrbal native title claim';
- the granting of the DOGIT by the State to the BCC was inconsistent with the NTA and Aboriginal customary practices;
- the lease of the land to the Musgrave Park Cultural Centre was contrary to s. 61 of the *Aboriginal Land Act 1991* (Qld) as it favoured Aboriginal groups with historical association over those with traditional association to the land — at [6].

The allegation in relation to the second motion was that 'the Turrbal people have experienced, and continue to experience contemptuous acts by the State of Queensland and the Brisbane City Council, which attempt to deny the Turrbal people of their rights and interests as claimed in the registered native title application'. An example of a failure to notify them over dealings in the claim area was given in support of this allegation — at [7].

Findings re traditional law submission

His Honour Justice Spender held that the claim of a breach of Turrbal customary law was not a relevant factor in the proceedings. The application of state law to Aboriginal people is not in any way subject to their acceptance, adoption, request or consent, and he cited *Walker v NSW* (1994) 182 CLR 45 as authority for this — at [8].

No evidence of native title before the court on final injunction

His Honour noted that:

- there was 'a dearth of material by the applicant indicating the basis upon which…the Turrbal [have] an interest in the land upon which the proposed development is to occur', apart from the fact that there is a registered native title claim over that area;
- 'Registration [of a claimant application] does not put the question of title beyond debate on an application by a registered claimant for an injunction': *Lardil Peoples v Queensland* (2001) 108 FCR 453 and *Fejo v Northern Territory* (1998) 195 CLR 96 at 125–126;
- the applicant's motions did not identify whether the injunctions sought were final or interlocutory. In *Lardil* at [107], it was held that an applicant must demonstrate that they have native title if a final injunction is sought. If final injunctions were sought in this case, then the failure to demonstrate the existence of native title would be fatal — at [28] to [30].

Observations on interlocutory injunctions, future acts and native title

His Honour noted that:

- in *ABC v Lenah Meats Proprietary Limited* (2001) 76 ALJR 1, the majority of the High Court held that there was no basis for the injunction where there is no underlying cause of action to be tried;
- an interlocutory injunction should only be granted to preserve the subject matter of a dispute or to maintain the status quo pending the determination of the rights of the parties.

  There has been no identification of a right that an injunction against the construction of the cultural centre would preserve, or which access to the site for the purpose of constructing a cultural centre would infringe;

- the applicant for an interlocutory injunction must show that there is a serious question to be tried and that the balance of convenience favours the granting of an injunction;
- in this case, the procedural rights given in Part 2 Division 3 of the NTA only arise when an act or proposal would constitute a future act as defined by s. 233 NTA. If the applicant wished to successfully argue that act of granting the DOGIT was racially discriminatory, then the DOGIT must be shown to be a future act i.e. an act that affected native title. No assessment could properly be made upon the material presently before the Court about the merits of the applicant's claim for native title — at [31] to [34].

Decision

Each application was dismissed and costs were awarded to the State and the architect because:

- it had not been shown that any lack of consultation or negotiation with Turrbal People in relation to the grant of the DOGIT to the BCC was racially discriminatory. The provisions of the *Racial Discrimination Act 1975* (Cwlth) (RDA), 'in so far as they may be relied upon by the applicant, yield to specific provisions of the NTA', relying upon

the High Court's findings in *Western Australia v Commonwealth* (1995) 183 CLR 373;

- the claim that the grant of the DOGIT is inconsistent with the objects of the NTA was no basis for an injunction. No breach of a specific provision of the NTA was shown;
- no serious question to be tried was shown in the first motion. In any event, the balance of convenience was overwhelmingly in favour of the rejection of any relief. The three year delay in bringing the injunction proceedings was also of relevance to the question of convenience, as was the provision for compensation under ss. 24JB(4) and (5) of the NTA;
- the reasons applicable to the first motion applied to the second. Further, the relief sought was unspecific and uncertain and ought not be granted — all at [36] to [42].

Effect of *Ward*

Spender J commented that there were 'possible grave difficulties' confronting the native title claim relevant to these proceedings. Following the decision in *Western Australia v Ward* (2002) 191 ALR 1 at [224] to [229], which deals with the effect of the vesting of a reserve under s. 33 of the *Land Act 1933* (WA), there is 'a very real question' as to whether the Deed of Grant to BCC made in 1965, a date prior to the commencement of the RDA, wholly extinguished native title — at [34] to [35].

Joint evidence

Nudding & Strickland on behalf of the Maduwongga People v Western Australia [2002] FCA 934

per Lindgren J, 23 July 2002

Issue

Could evidence be given by claimants either jointly or in consultation?

Background

The applicants in the Maduwongga People's proceeding are two sisters: Anne Joyce Nudding and Marjorie May Strickland. Their application overlapped a claim that was being heard by the court and evidence in support of the Maduwongga claim in the overlapping area was about to be heard. Ms Strickland and Mrs Nudding sought leave to testify in a special way: by giving evidence either jointly or in consultation with one another. They relied upon Order 78 subrule 34(1) of the *Federal Court Rules*:

- The Court may, if it considers that in all the circumstances it is *in the interests of justice* to do so, receive into evidence statements from a group of witnesses, or a statement from a witness after that witness has consulted with other persons — subrule 34(1), emphasis added;
- If a statement is made by a witness after consultation with other persons, the identity of the persons may, at the direction of the Court, be recorded in the transcript — subrule 34(2).

Part of the evidence given in support of the motion was that Mrs Nudding expected to have difficulty and possibly would be 'unable to give the best oral testimony' unless she could sit with her sister and 'ask for her assistance and reassurance from time to time' — at [15]. His Honour Justice Lindgren observed that this circumstance may also arise where two or more witnesses, such as the occupants of a motor vehicle involved in a collision or co-workers who witness the same event. Like Ms Strickland and Mrs Nudding, they too would have knowledge 'touching the same subject matter' — at [16] to [17].

Lindgren J was of the view that the first order sought could not be made as witnesses cannot testify jointly; a witness can testify only as an individual. In any case, his Honour found that it was not in the interests of justice to make either order sought:

> I think it is in the interests of justice that the Court be able to understand the extent of each witness's own knowledge and recollection in the usual way, without the contamination of consultation. For this reason, the motion should be dismissed — at [23].

Observations on Order 78 subrule 34(1)

At [26] to [28], his honour expressed the following views as to the proper application of this rule:

- In the case of the reception into evidence of statements from a group of witnesses, the statements will be identifiable as those of respective individual members of the group who testify on their oath or affirmation;
- Where the court allows consultation, the person consulted is not, by reason of having been consulted, a witness and is therefore not required to be sworn;
- In an appropriate case, the court might permit:
  - witnesses to stand or sit as a group while testifying;
  - those members of a group who are to testify all to be sworn at the outset and counsel for the party who calls them to question them, switching from one to another, rather than questioning one witness to conclusion before questioning the next one;
- In these circumstances, the cross-examiner should then have the option of either questioning each witness in the usual way or to do as the examiner-in-chief has done.

Lindgren J considered that these comments were consistent with the observations of Chief Justice Black in relation to O 78 r 34 in his recent article: 'Developments in Practice and Procedure in Native Title Cases' (2002) 13 *Public Law Review* 1 at 7.

Decision

The motion was dismissed. Ms Strickland and Mrs Nudding would be permitted to sit near each other when giving evidence for 'moral support'. If counsel for the one giving evidence sought leave to have her consult with her sister, then that application would be dealt with on its merits at that time.

Party status and strike out application

Simms v Minister for Land & Water Conservation [2002] FCA 15

per Lindgren J, 21 August 2002

Issues

This case concerned an application by the New South Wales Native Title Services (NTS) to be joined as a party to the proceedings and an application by the NTS to strike out the proceedings because of lack of authorisation.

Application for joinder

NTS relied upon s. 84(5) of the NTA, which authorises the Federal Court to join any person at any time as a party to the proceedings 'if the Court is satisfied that the person's interests may be affected by a determination in the proceedings'.

Although NTS is not a representative Aboriginal/Torres Strait Islander body, it has been funded by ATSIC under 203FE of the NTA to perform the functions of such a body.

Decision

His Honour Justice Lindgren decided that NTS had interests which may be affected by a determination in the proceedings and should be joined to the proceedings pursuant to s. 84(5) of the NTA: *Bissett v Minister for Land and Water Conservation* [2002] FCA 365, *Gale v Minister for Land and Water Conservation* [2002] FCA 972, and *Woodridge v Minister for Land and Water Conservation* [2002] FCA 1109.

Application for strike out

If an application does not comply with s. 61 of the NTA, then a party to the proceeding may apply to the Court to have that proceeding struck out: s. 84C. NTS sought strike out on the basis that the applicant in the claimant application was not duly authorised by as required under s. 251B of the NTA.

Evidence

The affidavit evidence provided in support of the applicant's authorisation related to a previous native title proceeding, brought by ostensibly the same native title group (the Eloura people), which had been dismissed for non-compliance with conditional orders made in May 2002. The current proceedings were commenced on 21 May 2002 in substantially similar terms as in the previous proceedings. There was evidence that, at a meeting convened by or with NTS, the Elouera people had decided that the conditional order for dismissal of the previous proceedings should be allowed to take effect and that the matter should be considered further in September 2002.

Decision

His Honour found that, on the evidence before him, the three people named as the applicant were not authorised to commence these proceedings and the application was struck out.

Party status for body funded to perform functions of a representative body

***Brierley on behalf of the Walbunja People v Minister for Land & Water Conservation* [2002] FCA 1209**

per Emmett J, 13 September 2002

Issue

The New South Wales Aboriginal Land Council (NSWALC) made application for leave to withdraw as a party and New South Wales Native Title Services Limited (NTS) made application to be joined as a party to each the proceedings in relation to two claimant applications. (As noted above, NTS is not a representative body; it has been funded by ATSIC under 203FE of the NTA to perform the functions of such a body.) One party opposed the proposed orders on the basis the NTS was not properly performing the functions for which it was funded under s. 203FE(2) of the NTA.

Background

In *Munn v The State of Queensland* [2002] FCA 78 at [16], his Honour Justice Emmett expressed some reservations concerning the court's power to join a body in these circumstances:

> The Act clearly contemplates that a representative body may be a party to a proceeding, but only if it notifies the Federal Court in writing within the time specified in s 84(3)(b). The Act evinces a policy that, if the persons named within s 84(3) does not notify the Court, then it is only a more limited class of persons who may be joined as parties pursuant to s 84(5), namely only persons whose interests may be affected.

His Honour noted that the court had expressed some concern as to the ambiguity of the legislation concerning joinder in other matters, referring to *Walker v Western Australia* [2002] FCA 869; *Woodridge v Minister for Land and Water Conservation* [2002] FCA 1109; *Simms v Minister for Land and Water Conservation* [2002] FCA 15; and *Gale v NSW Minister for Land and Water Conservation* [2002] FCA 972.

While noting that s. 84(3)(a)(i) and s. 66(3)(a)(ii), made it 'tolerably clear' that a representative body would be a party to proceedings, his Honour commented that there may be 'a hiatus in the legislative scheme insofar as the Act does not expressly provide for joinder of a new representative party'.

After expressing further misgivings about whether or not the 'interests' NTS had identified (namely discharging its responsibilities to identify persons who may hold native title and consulting with indigenous communities that might be affected by matters with which it was dealing — see s. 203BJ) fell within the scope of s. 84(5), his Honour decided it would not be 'clearly erroneous' to conclude that they did and followed the decisions in the matters noted above.

Consulting with the objector

In response to the objector's submission that NTS was not properly discharging its responsibilities and should not be joined at this stage, Emmett J said that, if this was the case, then it was a matter that should be addressed only after NTS was joined as a party, when NTS were subject to regulation by the court. A failure by NTS to discharge its responsibilities adequately may be a ground for 'concluding that it no longer had an interest in the proceeding'. His Honour expressed the 'earnest hope' that the objector would be consulted in an appropriate fashion by NTS in connection with the continuing mediation of this matter. The Tribunal must report no later than 31 January 2003 as to the progress of the mediation of these two claims.

Decision

Pursuant to s. 84(5) of the NTA, NTS was joined as a party to proceeding and NSWALS granted leave to withdraw as a party pursuant to s. 84(7) of the NTA.

Referral for mediation in relation to authorisation

Wharton on behalf of the Kooma People v State of Queensland [2002] FCA 1112

per Emmett J, 28 August

Issue

What was the appropriate course to take when two applications over the same land are brought by different applicants on behalf of the same claim group?

Background

His Honour Justice Emmett noted that:

> It is clearly undesirable that two proceedings remain on foot in relation to the same land purportedly brought on behalf of the same Native Title Claim Group — at [1].

His Honour then found that, if the matter could not be resolved by mediation, the appropriate course was to endeavour to bring the conflict to a head for resolution. To achieve this, Emmett J joined each applicant as a party to the proceedings in relation to the other's application. According to his Honour, an application for an order to either replace the applicant under s. 66B(1) or strike out one or other of the claims pursuant to s. 84C(1) of the NTA could then be brought in order to establish which of the applicants has authority to bring a claim on behalf of the Kooma People — at [2] to [3].

Counsel appearing indicated that mediation was unlikely to resolve the issue of authorisation. While Emmett J was reluctant to impose any additional burden on the parties that was unlikely to achieve resolution:

> ... a direction for mediation, even if it does not resolve the question of authority, would at least serve to isolate the issues that are likely to be raised for determination by the Court as to the question of authority — at [5].

Decision

The applicants were referred to the Tribunal for mediation on the question of who has authority to bring a claim on behalf of the Kooma People in relation to the area covered by these two claims.

Amendment application opposed by overlapping claim group

Munn for and on behalf of the Gunggari People v Queensland [2002] FCA 1111

per Emmett J, 28 August 2002

Issue

An overlapping claimant group opposed an application to amend that was brought to facilitate negotiation of a consent determination, because they had not had sufficient time to consider the effect of the orders and any consent determination on their claims.

Background

The applicant sought leave to amend one of the Gunggari People's claimant application to reduce the area covered to four identified town lots and to reduce the respondent parties to the State of Queensland and Telstra. This was in order to facilitate an agreement as to the making of a consent determination over those lots. The Kooma People, who had applications on foot that overlapped some of those brought by the Gunggari People, opposed the making of the orders on the basis that, due to late notice of the application to amend, they were not in a position to consent. His Honour Justice Emmett identified two reasons for the possible opposition:

- a concern as to the authority of Mr Munn to make the application on behalf of the Gunggari People;
- while the application, as amended, would relate only to four parcels of land in the town of Dunkeld, the material relied on by Mr Munn in support of that application, is material that would also be relied on in relation to a far more extensive Gunggari application.

While noting that the Kooma People may not have an interest in the first matter, his Honour commented they may, from a pragmatic point of view, want to ensure that any negotiations with the Gunggari People are conducted with a duly authorised person. On the second, his Honour referred to some earlier decisions in which he expressed the view that the making of a consent determination over one area 'would not give rise to any presumption' as to the existence or not of native title over another area not subject to the consent determination: see *Munn v State of Queensland* (2002) 115 FCR 109. However, as the Kooma People were party to those proceedings, they were given the opportunity to get advice and to consider whether or not there were any adverse consequences for them if a consent determination was made in this matter — at [4] and [6].

Decision

Orders substantially as sought by Mr Munn were made but stayed until 13 November to allow the Kooma People to take advice and inform the court whether they wish to oppose the orders.

Trial dates vacated

Bullen v Western Australia [2002] FCA 992

per Gyles J, 8 August 2002

Issue

Should an application to vacate the trial dates and otherwise significantly alter the timetable for preparation for trial, brought on behalf of two applicants and the State of Western Australia and opposed by several of the respondents, be allowed? The substance of the application was based upon the interplay between a lack of resources available to the applicants and the opportunity for meaningful mediation by the National Native Title Tribunal — at [3].

Mediation and preparation for trial

His Honour commented that there is particular force in the submission that there is no necessary inconsistency between preparation for trial, on the one hand, and mediation on the other. It is,

> ... naïve to think that there can be effective mediation without a proper understanding of the basis of the claims and some real understanding as to the evidence which is available to support it — at [9].

Decision

His Honour expressed some misgivings but held that the combined effect of the following factors warranted the vacation of the hearing dates:

- that both the financial and human resources of the Goldfields Land and Sea Council, being representative for the first and third applicants, were consumed in the litigation of another matter;

- the acceptance by all parties that mediation was to be encouraged and that pursuit of the litigation in accordance with the timetable would be contrary to that objective; and
- unresolved issues concerning the representation of one applicant would be an impediment to the preparation of that claim for trial — at [9].

Preservation of evidence

Bullen v Western Australia [2002] FCA 1107

per Gyles J, 6 September 2002

Issue

There were competing submissions before the court as to nature of the orders to be made in connection with a proposed hearing next year to take evidence to be preserved in advance of the substantive hearing of the matter.

Decision

Without reciting the arguments or specifically dealing with the competing submissions, orders for the preservation of evidence were made, with his Honour Justice Gyles noting that:

- the substantial objective of the proposed hearing is to take evidence that may otherwise be lost or rendered less valuable by the passing of time. Delay in the resolution of such cases makes that objective a high priority if justice to all parties is to be done. Time already set aside by the court and the parties should be utilised;
- hearings in localities remote from the court require considerable organisation. Once dates are fixed, they should not be departed from lightly;
- the hearing was more likely to be satisfactory if the procedure is kept as simple as possible;
- the proposed hearing, preparation for the case generally and any mediation should all proceed with as little unnecessary duplication as possible — at [2] to [3].

No order was made for statements of evidence to be provided:

> It should be assumed that, absent any contrary ruling in due course, evidence should be lead orally with no cross-examination to be permitted on any statement as to the substance of evidence which is provided pursuant to these Orders. This, and any other relevant issue, can be taken up at the next directions hearing — at [4].

Bolton on behalf of the Southern Noongar Families v Western Australia [2002] FCA 1087

Conti J, 2 September 2002

Issue

Directions were sought for the preservation of evidence in advance of the substantive hearing of these applications. One of the issues was whether the directions should require the applicants to file a points of claim prior to the taking of preservation evidence.

Submissions of the parties

The applicant's representative submitted that there was little utility in an order for points of claim at this stage as these may change 'dramatically' once further tenure information became available. Alternatively, a summary was all that should be required prior to the preservation testimonies. Other respondents submitted that preservation evidence had to be given in the context of the identified issues in dispute between the parties if it was to be of any use.

Decision

His Honour Justice Conti postponed the further hearing of these interlocutory proceedings until:

> ... the applicants are in a position to be more precise as to the ambit of the taking of the proposed preservation evidence, and as to the whereabouts of so doing, so that the final terms of the orders as to the giving of preservation evidence in chief can be settled. Those orders should be in principle substantially along the lines of the orders for the taking of evidence in

the Wongatha proceedings [see *Harrington-Smith on behalf of the Wongatha People v Western Australia* [2002] FCA 632]… In the meantime the State of Western Australia should expedite preparation of some form of catalogue of the freehold and leasehold interests located within the claim areas — at [13].

Recommendation for land rights grant over intertidal zone and river bed and banks

Northern Territory of Australia v Honourable Justice Olney **[2002] FCAFC 280**

per Black CJ, French and RD Nicholson JJ, 3 September 2002

Issue

This case concerned an application for judicial review of a recommendation by the Aboriginal Land Commissioner to the relevant Minister for grants of land in three coastal regions on the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (the ALRA). A grant under the ALRA is a grant in fee simple i.e. freehold.

Background

This was the first inquiry into a claim made under the ALRA to parts of the intertidal zone and to the bed and banks of a river in circumstances where no other adjacent land was either claimed or was already Aboriginal Land held under ALRA. It was not suggested that any part of the land claimed was either required for, or suitable as, a place to live.

The Full Bench of the Federal Court noted that the long title of the ALRA provides for the granting of traditional Aboriginal land in the Northern Territory 'for the benefit of Aboriginals, and for other purposes'. The substance of the Northern Territory's complaint was that:

- the recommendations related to land that was not intended for occupancy by its traditional owners and was not contiguous to any land under which such occupancy had been or could be granted under the ALRA;
- the recommendations failed to have regard to principles contained in s. 50(4) of the ALRA about the desirability of providing secure occupancy for traditional owners.

In the reports containing his recommendations, the Commissioner found (amongst other things) that:

- the evidence on behalf of the claimants of their traditional spiritual affiliation to, and responsibility for, sites and the land was both cogent and credible;
- the Aboriginal tradition to forage as of right over the land included obtaining of fish and other aquatic creatures for food;
- the traditional attachment of many of the claimants to the claim area was 'demonstrably strong';
- although the area claimed was relatively small, it was part of a much larger area made up of numerous traditional countries from which the indigenous inhabitants and their forebears had, for the most part, been excluded since the commencement of European settlement;
- the claimants had maintained a traditional attachment to all parts of their traditional country, despite the fact that some parts may not have been visited as much as others or were lacking in an abundance of sacred or significant sites. It could not be said that the claimants had in any way abandoned any part of the claim area;
- their attachment to different parts of it varied according to the nature of the land and its location. The claimed entitlement to forage as of right over the land the subject of the claim was not in dispute. A number of witnesses gave evidence of the exercise of the claimed right by hunting, fishing and gathering the resources of the land and waters within and in close proximity to the claim area;
- the sole purpose of the ALRA land claim process is not to provide Aboriginals with secure occupancy of a place to live — at [8] to [25].

Decision

The Federal Court found that the Northern Territory Government's suggested interpretation of the ALRA proposed 'an inhibiting operation' of the ALRA which tended against grants of land under that Act where no actual occupancy is sought:

> That construction is inconsistent with the recognition by the Act, in its definitions of "traditional Aboriginal owners" and "Aboriginal tradition" of the spiritual dimensions of traditional ownership. It is a concept which runs much wider than physical occupancy of a particular location — at [35].

Decision

The applications for review were dismissed with costs.

State of Western Australia releases new guidelines

The State of Western Australia's new 'Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title' were released on 8 October 2002. According to the preamble to the guidelines, they will 'assist those involved in the native title process to clearly understand the information the government requires in order to make a decision as to the possibility of settling a native title application by agreement'. The guidelines are available on the home page of the Hon. the Deputy Premier, Mr Eric Ripper:
http://www.ministers.wa.gov.au

Right to negotiate determinations

The determinations 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. For further information about right to negotiate proceedings, see the *Guide to future act decisions made under the Commonwealth right to negotiate scheme* on the Tribunal's home page.

Please note that, as from volume 163, the Federal Law Reports will recommence reporting significant determinations made by the Tribunal.

Objection to the application of the expedited procedure

Effect of grant of pastoral lease over objection area — *Ward*

Judy Hughes & Ors on behalf of the Thalanyji People/Western Australia/Blackjack Resources Pty Ltd

NNTT WO01/442, Hon E.M. Franklyn QC, 23 August 2001

Issue

The area to which these objection proceedings relate was in Western Australia and was subject to the grant of a pastoral lease. The objectors contended (amongst other things) that traditional law and custom required others to make agreements with the native title holders for access to the land to pursue activities.

Tribunal's findings

On this point, the Tribunal was of the view that the objectors' contention that traditional law and custom required others to make agreements with the native title holders for access to the land concerned was not supported by the decision in *Western Australia v Ward* (2002) 191 ALR 1 at [192], where it was found that the grant of a pastoral lease in Western Australia extinguished the right to control access to the land.

Evidence of right to speak for claim group

Allan Griffiths/BHP Billiton Minerals Pty Ltd/Northern Territory

NNTT DOO1/100, Mr J. Sosso, 5 July 2002

Issue

The government party challenged the reliability and weight that could be given to affidavit evidence when:

- the deponent did not depose to his authority to speak for the claim group and the affidavit did not identify the deponent as either a claimant or an elder for the claim group;
- there was no independent evidence of the deponent's authority to speak.

Tribunal's findings

The Tribunal set out a number of factors that are relevant in determining whether a native title holder has the requisite authority to speak on behalf of areas or sites said to be of particular significance, including:

- Is the deponent an applicant or objector or identified in the claimant application as a member of the native title claim group?
- Has the native title party lodged other affidavits, witness statements or primary evidence that substantiate the assertions made by the deponent or is there any secondary evidence that substantiates the qualifications of the deponent to speak on about areas or sites of significance e.g. independent research material?
- Is there any corroborating primary material in other court or tribunal proceedings which would assist in determining the status of the deponent?
- Is there evidence that the deponent, by their actions, has demonstrated a right to speak for sites e.g. instituted court proceedings to protect sites?
- Is anyone contesting the deponent's authority to speak or is the evidence of the deponent cast into doubt by any other material submitted to the Tribunal? — at [15].

The Tribunal noted that expedited procedure inquiries were, by their nature, designed to be conducted in an informal, quick and less costly manner for the parties and the commonsense approach applied to these proceedings

required that some leeway be given to parties in relation to their capacity to prepare material for the consideration of the Tribunal.

Decision

The Tribunal drew an inference that, on the material before it, the deponent had the requisite authority to speak only in regard to certain sites. There was insufficient material to find the deponent had the requisite authority for the other sites mentioned — at [21].

Victor Groves & Ors /Exploration & Resource Development Pty Ltd/ Northern Territory

NNTT DO01/127–129, Mr J. Sosso, 13 September 2002

Issue

The government party challenged the authority of one of the deponent's to speak on behalf of the native title claim group, referring to the judgement of Nicholson J in *Little v Western Australia* [2001] FCA 1706.

Tribunal's findings

The Tribunal confirmed the distinction between a challenge to the authority of a native title holder's evidence relating to community and social activities and major disturbance and a challenge to that person's authority to speak about sacred sites. In relation to the former, no special authority or status within the claim group is required to be demonstrated. The core issue for such evidence is that the person is a member of the claim group or a relevant native title holder. Once that is established, unless the evidence is challenged as to its veracity, the Tribunal can weight the evidence in making the predictive assessment required by s. 237 — at [12].

The Tribunal commented that if the native title party wished to rely upon affidavit evidence given in another objection proceeding, they should inform the Tribunal of the following matters:

- the basis upon which reliance was placed on this affidavit evidence;
- the relevance of this to their objection;
- the relationship of the deponent to the relevant native title claim group.

Principles applying to a jurisdictional challenge

Andy Andrews & Ors/Exploration & Resource Development Pty Ltd/Northern Territory

NNTT DO01/123–125, Mr J. Sosso, 19 August 2002

Issue

Amongst other things, the Tribunal considered the principles that should apply to any challenge to its jurisdiction.

Principles applying to a jurisdictional challenge

At [42] to [74], the Tribunal set out a number of important principles in deciding that the issues raised did not go to the jurisdiction of the Tribunal to conduct an inquiry, including:

- jurisdictional challenges should only be made where there are clear and fundamental threshold principles at stake. The party raising the challenge must support and substantiate it;
- the challenge must clearly raise an issue that goes to the capacity of the Tribunal to make a determination. It must not go to the merits of the objection or to fundamental issues relating to the factual determination of native title, the latter being within the jurisdiction of the Federal Court;
- registration of a claimant application does not prevent either a party raising a jurisdictional challenge or the Tribunal from looking behind the Register of Native Title Claims. However, the Tribunal would not substitute its views for those of the Registrar unless there were clear and compelling reasons for doing so;
- once the issue of jurisdiction is raised, the Tribunal must determine whether or not it

has jurisdiction, even though this may involve deciding 'very complicated questions of mixed fact and law': *Mineralogy Pty Ltd v NNTT* (1997) 150 ALR 467;

- if a native title party presented evidence that the other parties considered inadequate, then the proper means to address that issue was through evaluation of the s. 237 criteria. 'It is a fundamental misconception to characterise matters of merit with matters of jurisdiction.'

Multiple objectors on single Form 4

Andy Andrews & Ors/Exploration & Resource Development Pty Ltd/Northern Territory

NNTT DO01/123–125, Mr J. Sosso, 19 August 2002

Issue

The government party, amongst other things, challenged the validity of the Form 4 which was lodged by multiple objectors.

Background

The native title parties lodged a single Form 4 rather than three separate objections. The parties determined not to proceed on the issues raised by the government party. However, the Tribunal took the opportunity to make some comments.

Tribunal's comments

- There is no bar to the Tribunal accepting a Form 4 which contains more than one party objecting to the same future act but there would be only one inquiry and one determination in those circumstances, notwithstanding the multiple objectors.
- Section 140 of the NTA enables the Tribunal to hold a single inquiry into multiple objection applications, potentially involving many proposed tenements. It does not result in a merger of objection applications.
- It is open to the Tribunal to uphold an objection on the basis of evidence provided by one native title party even though the evidence of another native title party may not sustain such a finding. However, s. 32 of the NTA does not relieve a native title party from articulating its case. Nor can that party rely on contentions of another native title party without providing any evidence or contentions of its own — at [33] to [39].

Registered sites

Ted Camfoo and Ors/Exploration& Resource Development Pty Ltd/Northern Territory

NNTT DO 01/126, Mr J. Sosso, 30 August 2002

Issue

The relevance of registered sites to the proceedings was one of the matters considered.

Subsection 237(b) and registered sites

The Tribunal found that:

- no adverse inference should be drawn when a site has not been registered or recorded;
- registration or recording of sites is not determinative of whether a site is of particular significance to native title holders. It is for the native title party to provide primary evidence, from a person with authority to speak for the area, of the significance of the site;
- in this matter, there were scant details of 10 unnamed sites before the Tribunal, such that the conditions precedent to a s. 237(b) assessment i.e. the identification, description of and information about the sacredness of the site to the native title holders, were not met;
- of three named and recorded sites, only one was within the boundary of the proposed grant and there was no primary evidence of its particular significance. Of the other named sites, the extracts from ALRA land claim reports submitted provided little material on the sites mentioned by the native title party;

- there was no direct evidence to make a finding of particular significance or that a site outside the boundaries of the claim would be directly affected by the exploration activities if the tenement was granted — at [19] to [20], [31] and [54] to [55].

Valerie Tambling & Ors/NT Gold Pty Ltd & Anor/Northern Territory

NNTT DO01/136, Mr J. Sosso, 23 September 2002

Issue

There were two registered sites in the vicinity of the area of the proposed grant. The native title party presented no evidence and made no assertions to the Tribunal about these sites.

Section 237(b)

The Tribunal was of the view that:

- the fact that a site has been registered in accordance with the *Aboriginal Sacred Sites Act 1989* (NT) was 'a useful starting point' in this context but was not determinative;
- the finding that a site is a 'sacred site' and can be registered is to be distinguished from a finding that a site is of particular significance in a s. 237(b) inquiry;
- the native title party must inform the Tribunal whether there are any sites of particular significance in the area or vicinity and explain the sacredness by means of evidence adduced from persons with the authority to speak on the sites — at [14].

The native title party presented no evidence about the two registered sites and made no assertions to the Tribunal about these sites, with the result that they were not considered in the s. 237(b) assessment. The existence of a women's business site within the area was not supported by any evidence of its significance from any person who had authority to speak for the site. A male deponent, who acknowledged he had no authority for the site, gave some evidence. The Tribunal concluded there was insufficient evidence to make a predictive assessment pursuant to s. 237(b) — at [40] to [42].

Tribunal practice and procedure

Following the High Court decision in *Western Australia v Ward* (2002) 191 ALR 1, interim registration test guidelines addressing the majority judgment were posted on the Tribunal's website and sent to major stakeholders. Submissions were invited. A number of submissions were received from both government and indigenous interests. The guidelines were revised in the light of those submissions and the revised version posted on the web on 1 October 2002: see 'Registration testing post-*Western Australia v Ward*: revised interim guidelines' for delegates and case managers.

Please note that, as the procedures on the Tribunal's website are continuously updated, reference should always be made to versions posted on the website. Changes appear as red text within the document, along with the date on which the changes were made. They are consolidated on a three-monthly basis and the consolidated version reflects all changes made to that date.

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

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