National Native Title Tribunal

NATIVE TITLE Hot Spots

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Determination of native title—Mandingalbay Yidinji

***Mundraby v Queensland* [2006] FCA 436**

Dowsett J, 24 April 2006

Issue

The issue here was whether the court should exercise the discretion available under s. 87 of the *Native Title Act 1993* (Cwlth) (NTA) to make a determination of native title that reflected an agreement reached by the parties to the proceedings in mediation.

Background

In April 1995, a claimant application was made under the NTA on behalf of Mandingalbay Yidinji People for a determination that native title exists over an area around Trinity Inlet and the Mulgrave River in Queensland. In 1999, the application was combined with another claimant application and, in October 2004, the combined application was amended to remove certain areas. As a result, the area covered by the application comprised six separate lots, divided into Parts A ('unassigned' Crown land) and Part B (areas appropriated for purposes not inconsistent with non-exclusive native title rights and interests)—at [3].

It was noted that the applicant claimed the Mandingalbay Yidinji people traditionally owned a much larger area but, because native title was extinguished over some parts and because others were subject to joint claims by the Mandingalbay Yidinji people and the Gunggandji people, the boundaries of the area covered by this application were drawn to exclude those parts.

The State of Queensland, the Cairns City Council, Cairns Port Authority, Ergon Energy Corporation Limited and Telstra Corporation Limited were the respondents to the application. (An additional 139 respondents, categorised as Indigenous people, professional fishers, irrigation and water supply recipients and tourist operators had been parties but all subsequently withdrew from the proceedings.)

The application was referred to the National Native Title Tribunal for mediation pursuant to s. 86B of the NTA in 1998 and the parties eventually reached agreement upon the terms of a draft determination. An application for a consent determination recognising the existence of native title was then filed with the court.

Pursuant to s. 87, the court must be satisfied the determination sought by the parties is within power and that it is otherwise appropriate to make it. His Honour Justice Dowsett looked to the materials provided by the parties in order to determine those matters.

Evidence of continuation of traditional law and custom

The court examined an anthropological and genealogical report prepared by Professor Bruce Rigsby, a consultant anthropologist, and a 'helpful summary' of Professor Rigsby's report contained in several affidavits sworn by Michael Hugh Southon, Director of Research-Anthropology with the North Queensland Land Council Native Title Representative Body, the claimant's legal representative—at [10].

It was noted that this material indicated (among other things) that:

- the Mandingalbay Yidinji claimant group represented the continuation of an older clan group, namely, the Yidinyji clan group sometimes called the Manggarra Yidinyji, who were and are the immediate western neighbours of Gungganyji people;
- their system of tenure and ownership is based on cognatic descent, where membership in the group is traced through both men and women from one or more apical ancestors;

- many of the Gungganyji and Mandingalbay Yidinji claimants reside on their homelands and others visit on a regular basis;
- although the claimants no longer meet all their sustenance and other needs from their own land, hunting, fishing and gathering remain important and meaningful pursuits;
- parents and grandparents pass on knowledge of traditional resources, and techniques of taking or manufacturing are passed on to children and grandchildren;
- the majority of members of the claimant group in each generation have lived continuously within the claim area since its inception in 1892 as an Aboriginal mission—at [14].

His Honour noted:

- that respondents had 'taken such expert advice as they deemed appropriate' in relation to this material;
- there were no conflicting native title claims over the subject areas;
- the history of all the applications in the area demonstrated that both the Gunggandji and the Mandingalbay Yidinji peoples have carefully identified the land with which they traditionally relate;
- both groups were in the area in 1892 when a mission was established and have maintained contact with the area ever since—at [17].

Therefore, the question of what was the position between the establishment of British sovereignty in 1788 and 1892 remained—at [17].

On this point, Dowsett J concluded that the evidence was sufficient to identify an apparently permanent occupation of the region by Aboriginal peoples as far back as 1770 continuing until about 1858:

> There is every reason to assume that occupation continued thereafter and until 1892 when the mission was founded. By that time there were clearly two distinct groups, the Gunggandji people and the Yidinji people, of which latter group the Mandingalbay Yidinji people are part. There is no reason to conclude that the division was recent….It seems more likely that it was an established fact of life as far as the Aboriginal people were concerned…This is their own traditional understanding of their history. There is no reason to doubt it—at [22].

Therefore, it was found that:

> It is an available inference that the Mandingalbay Yidinji people have occupied the determination area continuously since prior to 1770….I am now satisfied in that regard and that it is appropriate to make the consent determination sought by the parties—at [27].

Determination

The determination recognised that native title exists in relation to the determination area, subject to the qualifications noted below.

The native title holders are those people known as the Mandingalbay Yidinji People being those Aboriginal people who are:

- the descendants of a named ancestor; or
- recruited by adoption, in accordance with the traditional laws and customs of the Mandingalbay Yidinji People.

Except in relation to 'water' as defined in the *Water Act (2000)* (Qld), and subject to the qualifications noted below, 'exclusive' native title was found in relation to part of the determination area, i.e. the nature and extent of native title rights and interests in relation to that part is possession, occupation, use and enjoyment of land and waters to the exclusion of all others.

In relation to the remainder, non-exclusive native title was recognised, including the non-exclusive right to use and enjoyment of the area. Many of the specific rights constituting this general right (e.g. the right to take, use and enjoy natural resources) are expressly limited to satisfying personal domestic, social, cultural, religious, spiritual, ceremonial and non-commercial communal needs. They are also all subject to the qualifications noted below.

Other non-exclusive native title rights and interests recognised (subject to the qualifications) included the right to:

- pass on native title in accordance with traditional laws and customs;
- make decisions in accordance with traditional laws and customs about access, use and enjoyment of the area by Aboriginal people

governed by the traditional laws acknowledged and traditional customs observed by the native title holders; and
- determine membership and filiation to the native title holders in accordance with traditional laws and customs.

Rights to water
In relation to all water in the determination area, the nature and extent of native title is the non-exclusive right to use, enjoy, hunt on, fish in and gather from the water and to take and use the water for non-commercial, personal domestic, social, cultural, religious, spiritual, ceremonial and communal purposes.

Qualifications
All of the native title rights and interests are subject to, and exercisable in accordance with:
- the laws of the Commonwealth of Australia and the State of Queensland;
- the traditional laws acknowledged and traditional customs observed by the native title holders; and
- 'other interests' in relation to the determination area, which are set out in the determination.

No native title to minerals or petroleum
There is no native title to minerals or petroleum as defined in the relevant Queensland legislation.

Prescribed body corporate
The native title is not to be held in trust. The Mandingalbay Yidinji Aboriginal Corporation is the prescribed body corporate for the purposes of s. 57(2) of the NTA.

Determination conditional in part
The determination will not take effect in relation to two of the six lots unless and until an indigenous land use agreement is registered on the Register of Indigenous Land Use Agreements. If it is not registered within six months of the making of the native title determination, the matter will be listed for further directions.

Determination of native title—Larrakia

***Risk v Northern Territory* NTD6033/2001**

Mansfield J, 17 May 2006

Issue
The court, in handing down its decision in *Risk v Northern Territory* **[2006] FCA 404 (**summarised in *Native Title Hot Spots* Issue 19), did not formally make a determination of native title. This is a summary of the subsequent determination and orders made on 17 May 2006 finalising the matter.

Order
His Honour Justice Mansfield determined that native title does not exist in relation to any part of the land or waters the subject of the applications comprising this consolidated proceeding (NTD6033/2001, Part A). His Honour ordered that the native title applications comprising the consolidated proceeding be dismissed either to the extent of the consolidation or entirely where, in the latter case, the applications covered areas solely within the area covered by the consolidated proceeding.

There was no order as to costs.

Area covered by claimant application—Bardi Jawi

***Sampi v Western Australia (No 4)* [2006] FCA 760**

French J, 19 June 2006

Issue
The question here was whether two areas were included in the area covered by a claimant application. If they were, then a further question would arise as to whether or not s. 47A of the *Native Title Act 1993* (Cwlth) (NTA) applied. By agreement, these areas were excluded from the determination of native title made in relation to that claim to allow the question to be separately determined: see *Sampi v Western Australia (No 3)* [2005] FCA 1716, summarised in *Native Title Hot Spots* Issue 17.

Background

On 30 November 2005, his Honour Justice French made a native title determination in relation to a claimant application made on behalf of the Bardi and Jawi People. Two small freehold areas were expressly excluded from the determination. This was because, late in the proceedings, uncertainty had arisen as to whether or not they were included in the area covered by the application. The two areas, described broadly as the Lombadina/ Djarindjin area and the Kooljaman area, are referred to as the 'adjourned areas'.

Areas covered by the claimant application

The original claimant application in this matter was lodged with the National Native Title Tribunal on 1 September 1995 and accepted under the provisions of the old Act on 15 April 1996—at [10].

As originally drafted, the application excluded:

> [A]ny land contained within that area which is identified herein as being the subject of a grant of a freehold estate other than land granted to the Crown or a statutory authority of the Crown: the Australian Maritime Safety Authority— at [12].

The application was amended in 1998 to exclude:

> [A]ny land contained within that area which is, or has been, the subject of a grant of freehold estate other than land granted to the Crown or a statutory authority of the Crown but excluding that area of land…which is vested in Australian Maritime Safety Authority [AMSA]—at [15].

If was further amended in 1999 to use a different formulation for describing the excluded areas, which included (among other things) a statement that the exclusion clauses were 'subject to such of the provisions' of ss. 47 to 47B 'as apply to any part of the area contained within this application'.

Adjourned areas not part of application area

The court noted that:

> [T]he original application excluded all freehold grants other than freehold estates granted to the Crown or Crown authorities and including in that later category, AMSA. The 1998 amendment went no further than to except AMSA freehold land from the class of Crown to Crown grants so that it fell within the general exclusion of freehold titles and thus outside the claim area—at [25].

Therefore, French J held there was:

> [N]o room for debate that the application as originally filed and as it stood after the 1998 amendments did not extend to freehold lands save for that subject to grants to the Crown or Crown authorities. The adjourned areas were the subject of freehold titles vested in the Roman Catholic Bishop of Broome and the Kooljaman Land Aboriginal Corporation respectively—at [26].

In other words, the adjourned areas were subject to freehold grants that were **not** grants to the Crown or Crown authorities and so the adjourned areas were excluded from the area covered by both the original application and the application as amended in 1998.

As to the 1999 amendments (made after the new Act commenced), his Honour noted that, at the time those amendments were made, s. 64(1) had been inserted into the NTA. It prohibited an amendment to an application that would result in any area not covered by the original application from being included in the amended application. Therefore, as his Honour noted, there could be no implication or argument that the amendment made in 1999 brought into the area covered by the amended application any area that had been excluded previously—at [29].

As a result, it was found that, since the adjourned areas were not included in the area covered by the application, they could not be included in the determination.

Fresh application could be made

The court noted:

- this finding did not prevent a separate application for a native title determination being brought in respect of the adjourned areas;
- having regard to the evidence taken and facts found in the primary proceedings, it was likely that the only issue in a new application would be the application of ss. 47A and 47B to those areas—at [31] and [33].

Decision

His Honour found the adjourned areas were not included in the area covered by the claimant application the subject of these proceedings and so they could not therefore be included in the native title determination—at [33].

Compensation application in Jango— no determination of native title

Jango v Northern Territory (No 6)
[2006] FCA 465

Sackville J, 3 May 2006

Issues

The issues raised in this case were:

- whether there should be an order as to costs in relation to *Jango v Northern Territory* [2006] FCA 318 (the principal judgment), summarised in *Native Title Hot Spots* Issue 19; and
- whether the Federal Court was required to make a 'current determination of native title' pursuant to s. 13(2) of the *Native Title Act 1993* (Cwlth) (NTA) in relation to the application area dealt with in the principal judgment.

On 31 March 2006, in the principal judgment, his Honour Justice Sackville dismissed a compensation application and set a timetable for written submissions on costs and any other further orders (if any) that should be made.

No order as to costs

Neither the Northern Territory nor the Commonwealth sought an order for costs. Since s. 85A(1) of the NTA provides that, unless the court orders otherwise, each party to a proceeding must bear their own costs, the court determined it was appropriate that there be no order as to costs—at [2] to [3].

Was a 'current determination of native title' required?

The question raised here related to s. 13(2) of the NTA, which provides (in paraphrase) that, if the court is making a determination of compensation in accordance with Division 5 of the NTA, and there has been no previous 'approved determination of native title' (as defined in ss. 13(1), (3) to (7) and 253) in relation to the area concerned, then it must also make a 'current determination of native title', i.e. a determination of native title 'as at the time the determination of compensation is being made'.

The Commonwealth, with the support of the territory, submitted that:

- having finally determined the compensation application in principal judgment, the court was now required to make a 'current determination of native title' in relation to the application area pursuant to s. 13(2);
- no 'approved determination' of native title had previously been made in relation to any part of the application area;
- the court was 'making a determination of compensation' when it made a final determination in the principal judgment and so s. 13(2) applied;
- this was so even where, as in the principal judgment, the court dismissed the application for a determination of compensation—at [4] to [5].

The applicant's response was that:

- the court had not made 'a determination of compensation in accordance with Division 5' within the meaning of s. 13(2);
- the Commonwealth's interpretation of s. 13(2) strained the statutory language and sought to rewrite that provision by suggesting the words 'is making a determination of compensation' should be taken to mean 'is making a determination of liability or quantum with respect to compensation';
- such a construction was untenable—at [8].

After summarising the statutory scheme in relation to compensation, Sackville J noted (among other things) that:

- the 'key' expression found in s. 13(2) relevant to this case was 'making a determination of compensation in accordance with Division 5';
- unlike s. 225, which defined 'determination of native title' as a determination of whether or not native title exists in relation to a particular area, the NTA did not define the expression 'making a determination of compensation in accordance with Division 5';
- the expression 'determination of native title' appears in s. 13(1), which provides for an

application to be made for a determination of native title in relation to an area for which there is no approved determination;

- this potentially raised the issue of whether the statutory definition of 'determination of native title' should be applied *mutatis mutandis* (i.e. with any necessary changes made) to the expression 'determination of compensation';
- subsection 13(2) refers not merely to 'a determination of compensation' but to 'a determination of compensation in accordance with Division 5';
- the entitlement to compensation was not created by Div 5 but by other provisions in Part 2 of the NTA;
- Division 5 was concerned with determining the quantum of compensation payable to persons entitled to compensation under those other provisions—at [18] to [20].

It seemed to his Honour that:

> [T]he intent of the statutory language is clear enough. The Court is 'making a determination of compensation in accordance with Division 5' when it is determining the quantum of compensation payable to particular applicants. It is **not** making such a determination when it decides that the applicants are not entitled to any compensation— at [22], emphasis in original.

In the court's view, had Parliament wished to adopt the meaning urged by the Commonwealth and the territory:

> [I]t might have been expected to define the expression 'making a determination of compensation' so as to include a determination that no compensation is payable. After all, Parliament took that course when it defined a 'determination of native title' to include a determination that native title does not exist in relation to a particular area: see s 225. However, it has not done so—at [23].

According to Sackville J, this construction of s 13(2):

> [N]ot only accords with the ordinary meaning of the statutory language but is…readily understandable as a matter of policy. The Court can make an award of compensation under the *NT Act* only where native title over land has been extinguished. If a compensation award is made, the Court will have before it the evidence necessary to conclude that native title does not exist over the land. [Note that there may also be a determination of compensation where native title is only partially extinguished.] Accordingly, there will be no difficulty in the Court making a determination to that effect.

However, an application for compensation under the *NT Act* may fail for many reasons. The evidence adduced on an unsuccessful compensation application may be insufficient to enable a current determination to be made as to whether or not native title exists over the land. In these circumstances, it may simply be impossible for the Court to comply with a statutory requirement that it make a determination as to whether or not native title exists in relation to the land. This is presumably one reason why Parliament did not define 'determination of compensation' to include a decision to dismiss an application for compensation. It follows that I disagree with the Commonwealth's submission that there can be no rational reason for distinguishing between a case where compensation is payable and a case where the Court decides that there is no entitlement to compensation.

The Commonwealth contended that a 'broader' interpretation of s 13(2) of the *NT Act* would promote the statutory objects of providing certainty as to the status of land and reducing the potential for multiple litigation concerning the same area. It is by no means clear that this is necessarily the case. For example, a declaration that native title does not exist over particular land, made in the context of an unsuccessful application for compensation under the *NT Act,* may not prevent a subsequent application by other claimants seeking compensation. In any event, for the reasons I have given, the 'broader' interpretation may prove to be unworkable in a given case. Moreover, as I have explained, had Parliament intended to promote the objects of certainty and finality in the way suggested by the Commonwealth, it would have been easy for it to incorporate in the legislation a definition that achieved the desired result—at [24] to [26].

Decision

It was found that:

- s. 13(2) of the NTA did not require the court, in the circumstances of this case, to make a current determination of native title; and
- the respondents did not point to any other source of power which would support the making of a determination of native title—at [27].

ILUA—application to set aside decision to register

Kemp v Registrar, Native Title Tribunal [2006] FCA 568

Emmett J, 5 May 2006

Issue

The applicant in this case, Keith Kemp, sought:

- an order setting aside the decision to register an indigenous land use agreement (the ILUA) in the Khappinghat Nature Reserve and Saltwater National Park in New South Wales (the main application); and
- interlocutory relief prohibiting the doing of certain works that were covered by the ILUA.

This decision deals with the interlocutory proceedings.

Background

Mr Kemp claimed to have a native title interest in the ILUA area and that the Saltwater People, one of the parties to the ILUA, were not authorised to enter into the agreement. Mr Kemp also alleged that the decision to register the ILUA involved both an error of law and a breach of the rules of natural justice and should be set aside. The Native Title Registrar's decision under s. 24CL of the *Native Title Act 1993* (Cwlth) (NTA) to register the ILUA was made on 12 December 2005.

The ILUA stated that various Ministers of the Crown in right of New South Wales, and Patricia Hurst, the Saltwater Tribal Council and Greater Taree City Council entered into the agreement for the purpose of:

- recognising that the Saltwater People held native title in the area;
- regulating the exercise of those rights;
- providing a role for the Saltwater Tribal Council (an Aboriginal Corporation incorporated under the *Aboriginal Councils and Associations Act 1976* (Cwlth) for the purpose of holding native title in trust for the Saltwater People) in the management of the area;
- providing for the withdrawal of the native title determination applications made by Ms Hurst on behalf of the Saltwater People; and
- settling other matters—at [5].

Among other things, the parties to the ILUA consented to the doing of certain future acts (what Mr Kemp called capital works), including:

- the amendment, repeal or the re-making of the *National Parks and Wildlife Act*;
- the making of a plan of management and any subsequent amendments;
- construction of a camping ground area and associated amenities, facilities and signage;
- erection of a plaque recording the use of the land by the 'Indigenous People of the Manning River Valley'— at [7].

Mr Kemp sought an interlocutory order prohibiting the doing of any further of the works. As the court noted, Mr Kemp became aware at the time of the hearing that the majority of the works contemplated by the agreement had been completed and accepted that completion of works necessary for health and safety purposes should not be hindered—at [14] and [16].

Mr Kemp was, however, concerned that other works might be done that would be inconsistent with the native title rights that he sought to establish in relation to the area but was 'unable to be specific about that matter and acknowledged the difficulty that a citizen has in knowing what the executive government has in mind'—at [17].

His Honour was of the view that:

> Be that as it may, in the absence of evidence of some threat, I am not persuaded that there is any appreciable or relevant risk that work might be done that is inconsistent with the native title claims that Mr Kemp seeks to assert prior to the time when the matter is fixed for final hearing. Even if there were, I have considerable difficulty in seeing what equity

there is vested in Mr Kemp to restrain the work—at [18].

It was found that there was no evidence before the court of the basis upon which Mr Kemp asserted such rights and:

> More fundamentally, the only relief…sought… is the setting aside under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) of the decision to register the agreement. Mr Kemp has not demonstrated any basis for the proposition that the registration of the agreement has any relevant effect on Mr Kemp's entitlement to restrain works of the nature in question—at [19].

Decision

For the reasons summarised above, Emmet J was not persuaded that Mr Kemp was entitled to any interlocutory relief of the nature sought—at [21].

Replacing the applicant under s. 66B

'Pooncarie' Barkandji (Paakantyi) People v NSW Minister for Land & Water Conservation [2006] FCA 25

Stone J, 2 February 2006

Issue

The issue in this case was whether the Federal Court should exercise its discretion under s. 66B(2) of the *Native Title Act 1993* (Cwlth) (the NTA) to replace the applicant in a claimant application.

Background

There had been a number of disputes within the native title claim group, including disputes about which members of that group should be 'the applicant' and what area the application should cover—at [1] and see *Dimer/Askins/Western Australia* [2006] NNTTA 70, summarised in this issue of *Native Title Hot Spots*, on the meaning of 'the applicant'.

An earlier application made under s. 66B(1) to replace the applicant was unsuccessful: see *Johnson* v *Lawson* [2001] FCA 894. A subsequent application was successful: see *Lawson v Minister for Land and Water Conservation for New South Wales* [2002] FCA 1517 (*Lawson*), summarised in *Native Title Hot Spots* Issue 3.

The present application under s. 66B(1) arose as a result of a dispute between two of the people comprising the applicant (Ray Lawson and Noel Johnson) and the remainder of the claim group. Mr Lawson and Mr Johnson believed that:

- the term 'Barkandji' referred to a narrower group than the native title claim group described in the application; and
- this narrower group should make a separate native title claim over a smaller area than that covered by the current application—at [4] and [25].

Representation by a non-lawyer— s. 85 does not apply

Mr Lawson and Mr Johnson sought leave of the court to be represented by a non-lawyer, Mark Dengate, who had represented them in other proceedings before Stone J. It was noted that s. 85 did not apply because that section is only available to 'a party' to the proceeding:

> Although Messrs Lawson and Johnson are members of the applicant group they are not, as individuals, parties to this proceeding: see s 61(2) of the NTA—at [8].

However, her Honour was satisfied that, as they were effectively contradictors in relation to the s. 66B(1) application, the court had power to do what was 'incidental or necessary to' the exercise of the powers conferred on it, including entertaining the application for leave for Mr Dengate to appear—at [8].

Having satisfied herself that she had jurisdiction, Stone J refused to grant leave because:

> [D]espite his [Mr Dengate's] genuine commitment to his clients, I am convinced that he has neither the discipline nor the understanding to assist them or the Court—at [11].

Authorisation of new applicant

A meeting of the claim group was held in October 2005 for the purpose of resolving the dispute between Mr Lawson and Mr Johnson, on the one hand, and the remaining members of the applicant group on the other.

If that could not be achieved, then the meeting would consider whether the current applicant

was still authorised by the claim group to conduct proceedings on its behalf. This was because, as Stone J observed:

> If an application under s 66B[(1)] is to succeed it is necessary that the evidence clearly demonstrate that the relevant persons no longer have that authority and, for this reason, it was necessary to make careful preparation for the…meeting —at [17].

Mr Lawson and Mr Johnson did not attend the meeting.

The court then applied the principles outlined by French J in *Daniel v Western Australia* (2002) 194 ALR 278 to determine whether the conditions set out in s. 66B(1) had been met—at [28].

On the basis of the evidence, Stone J was satisfied that:

- all reasonable steps were taken to advise members of the claim group of the meeting;
- adequate assistance was provided to permit members of the claim group to attend where they did not reside in the town where the meeting was held;
- Mr Lawson and Mr Johnson were aware the meeting was taking place and voluntarily chose not to attend;
- the resolutions made at the meeting and the expert evidence of an anthropologist demonstrated those attending the meeting were representative of the claim group;
- the minutes of the meeting were accurate and those present made the resolutions recorded;
- the meeting resolved that there was not a process of decision-making under traditional laws and customs for decisions of this kind and this was supported by the anthropologist's evidence;
- those present at the meeting therefore adopted a decision-making process, in accordance with the requirements of s. 251B(b), and then decided to revoke the authorisation of the 'current applicant' (i.e. as presently constituted) and authorised a new group to form 'the applicant' in this proceeding—at [18] to [25] and [31] to [32].

Therefore, her Honour found that the requirements of s. 66B(1) were met—at [33].

Another member of the group comprising the current applicant, Patricia Johnson, also wanted to be removed from that group. Although there was no resolution to remove her passed at the meeting, Stone J was satisfied by the evidence that she did not wish to continue to be a member of the applicant group and that her name should also be removed—at [34] and [35].

Decision

For the reasons noted above, Stone J decided to exercised the discretion available under s. 66B(2) to replace the 'current applicant' (which included Mr Lawson, Ms Johnson and Mr Johnson)with a new applicant, comprised of the remainder of those included in the 'current applicant' plus two others who were duly authorised at the meeting to join group comprising 'the applicant'—at [36].

Stone J:

- stressed that, in making the order under s 66B(2), the court was not reflecting adversely on the conduct of Mr Lawson and Mr Johnson;
- noted that the order neither removed them from the claim group nor affected their standing according to traditional law and custom—at [36].

Costs in native title proceedings—s. 85A

Jagera People #2 v Queensland [2006] FCA 708

Spender J, 31 May 2006

Issue

The question in this case was whether a respondent seeking leave to discontinue proceedings to strike out a claimant application made under the *Native Title Act* 1993 (Cwlth) (NTA) should pay a proportion of the applicant's costs.

Background

On 8 February 2006, a notice of motion was filed by the Thompson family (the second respondent to the Jagera People #2 claimant application) seeking to strike out that application. Orders were subsequently made for the hearing of the strike-out application. On 25 May 2006, Shane Coghill (on behalf of the Thompson family) sought leave to discontinue the strike-out application. In support of the leave application, Mr Coghill stated that:

- the strike-out application was 'filed in good faith', under instructions, 'to assist the Thompson Family in their Native Title interests and in the public interest';
- however, having failed to get any legal assistance and being advised that it was unlikely to succeed, Mr Coghill was now instructed to seek leave to discontinue—at [1].

The applicant for the Jagera People (the native title claimants) did not object to leave being granted but sought orders that Mr Coghill pay a fixed proportion of the Jagera People's costs—at [2].

Law in relation to costs

His Honour Justice Spender noted that, in ordinary Federal Court proceedings, O 22 r 3 of the Federal Court Rules (FCR) would apply but that there was no provision in that rule to covering a case like this, where the leave of the court to discontinue was obtained. In such a case, the court 'would be conscious of the need to address and make appropriate orders as to costs to meet the justice of the case'—at [4].

However, as the court noted, where (as in this case) the matter involves the NTA, reference must be made to s. 85A of the NTA. That section provides (in paraphrase) that:

- unless the court orders otherwise, each party to a proceeding must bear their own costs;
- without limiting the court's power to make such orders, the court may order a party to pay some or all of those costs if it is satisfied that a party to a proceeding has, 'by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding'—at [5].

As his Honour noted, the following points emerge from the cases dealing with the interpretation of s. 85A:

- subsection 85A(1) was intended to remove any ground for anticipation or expectation that, unless cause is shown for another order, costs will follow the event;
- nonetheless, s. 85A acknowledged that the court had an overriding discretion as to costs and did not expressly impose a limit on the scope of the discretion;
- there was no requirement that a threshold condition be met before the court was empowered to make a costs order;
- therefore, the exercise of the discretion was not conditional upon proof of the occurrence of unreasonable conduct or the existence of special circumstances;
- subsection 85A(2) put beyond doubt the extent of the discretion in cases where a party acted unreasonably but did not control or limit the discretion available under s. 85A(1);
- the matters to be taken into account in making a costs order were left to the court's discretion, which must be exercised judicially;
- however, the starting point is that each party will bear their own costs unless the court determines it is appropriate in the circumstances to make an order for costs—at [6], referring to *Ward v Western Australia* (1999) 93 FCR 305 at [31] to [37] and *De Rose v South Australia (No 2)* [2005] FCAFC 137 at [8], summarised in *Native Title Hot Spots* Issue 16.

Submissions of Jagera People

In support of their application for costs, counsel for the Jagera People submitted (among other things) that the following aspects of Mr Coghill's conduct were relevant:

- failing to communicate with the Jagera People about this matter;
- failing to respond in a timely manner to a facsimile of 23 May 2006 advising him that, if he did not withdraw the application by 24 May 2006, the Jagera People would seek costs against him if the strike-out application was unsuccessful—at [7].

The court noted (among other things) that, while Mr Coghill did not reply to the facsimile, he did file the notice of discontinuance the following day—at [8].

Not appropriate to make costs order

In the light of all the material before the court, including observations about attempts to resolve disputes about the Jagera People's claims put to the court by the representative body for the area, Spender J was not satisfied that it was appropriate to make any order as to costs because:

- this was not a case where 'an unmeritorious claim has been progressed in circumstances where costs are caused to another party';
- the failure to act by the close of business on 24 May 2006, being the deadline imposed by the Jagera people, was not an unreasonable act or omission which comes within s. 85A(2);
- while the court had as general power to make orders for costs, and a specific power where s. 85A(2) is satisfied, those considerations did not apply in this case—at [9] and [12] to [14].

Need for cooperation to resolve the dispute

His Honour commented that, while the court was conscious that there are further opportunities available to attempt to resolve what seemed to be genuine disputes:

- there seemed to be a 'great deal of lack of co-operation, if not lack of goodwill' in relation to the disputes between the Thompson family and the applicant in the Jagera # 2 claim;
- this case proved 'another illustration' that, unless the matters were 'dealt with constructively and in good faith,…acrimony will prevent the progression of any persons [sic] legitimate expectations as to native title rights'—at [10] to [11].

Decision

Spender J gave Mr Coghill leave to discontinue the strike-out application and noted that, pursuant to s. 85A, each party was to bear their own costs—at [15].

Future act agreement—proceedings to enforce

Ashwin v Minara Resources Ltd [2006] WASC 75

Master Sanderson, 10 May 2006

Issue

The issues considered in this matter included:

- the proper plaintiff in proceedings brought in the Supreme Court of Western Australia on behalf of a native title claim group to enforce a future act agreement;
- whether those proceedings should be struck out because the agreement they relied upon was enforceable.

Background

The Wutha people made two claimant applications under the old Act provisions of the *Native Title Act 1993* (Cwlth) (NTA) in 1996. Both were registered and Raymond Ashwin (one of the plaintiffs in this case) was the registered native title claimant (and, therefore, a native title party in any future act proceedings for both: see *Dimer/Askins/Western Australia* [2006] NNTTA 70, summarised in this issue of *Native Title Hot Spots*). After the new Act commenced in September 1998, both claims were amended and passed the registration test.

At around the same time (mid-1990s), Minara Resources Ltd's predecessor, Anaconda Nickel NL (Anaconda), as part of the development of the Murrin Murrin nickel project, reached agreement with a number of native title parties, including Mr Ashwin as the representative of the Wutha People, about the grant of various tenements. Around September 1996, an ancillary agreement and a state deed made for the purposes of s. 31(1)(b) of the NTA were signed by Anaconda (as the grantee party) and Mr Ashwin. Subsequently, the State of Western Australia (the state party) granted the various tenements covered by those future act agreements to Anaconda—at [6] to [7].

Master Sanderson noted that Anaconda was at all times 'content' to deal with Mr Ashwin and that:

> Given the scheme of the…[NTA], it is difficult to see how Anaconda could have dealt with anyone other than Mr Ashwin…who [as the native title party] held…the right to negotiate… [S]o far as Anaconda were concerned, the relationship between Mr Ashwin and the Wutha People was of no consequence—at [8].

In March 1998, both of the Wutha People's claimant applications were amended to add Geoffrey Alfred Ashwin, Ralph Edward Ashwin and June Ashwin as registered native title claimants along with Raymond Ashwin. All four (referred to below as the Ashwins) were the plaintiffs in the case summarised here.

Master Sanderson set out, in general terms, the issue between the parties:

> [T]he defendant [Minara Resources Ltd] has achieved everything it sought in its dealing with the Wutha People. On the other hand, the

> Wutha People say that the benefits they were to receive under the agreement…have not been provided by the defendant—at [13].

As a result, the plaintiffs brought proceedings in the supreme court (the main proceedings) to have Minara Resources Ltd (the company) comply with the terms of the ancillary deed—at [22].

In the case dealt with here, the company applied for:

- a stay of the main proceedings pending the identification of the proper plaintiffs; and
- strike out of the whole or in part of the statement of claim on a number of grounds.

Stay application—proper plaintiff

In seeking a stay of the proceedings, the company complained that:

- documents filed in the proceedings named a different plaintiff and/or named that plaintiff in a different capacity;
- it was entitled to know 'who its adversary is…. and what case is being made…against it'; and
- the documents filed made it impossible to ascertain those two things—at [14] and [17].

At issue was the fact that:

- in the original writ of summons and statement of claim, Raymond Ashwin was named as the plaintiff but only the heading of the writ stated he sued 'for and on behalf of the Wutha People';
- in the amended writ and statement of claim, the other three Ashwins were added as plaintiffs and the reference to the Wutha People was removed;
- in an affidavit, Raymond Ashwin deposed that he and the three other named plaintiffs were all authorised to represent to Wutha People and to conduct the proceedings—at [14] to [17].

Proper plaintiff and representative proceedings

Before considering the specific issues raised, it was noted that:

- the company's position was that these were representative proceedings to which O 18 r 12(1) of the Supreme Court Rules applied;
- that rule states (among other things) that representative proceedings may be commenced and continued by 'any one or more' of those people who have the same interest in the proceedings and as representing all or some of those people;
- it is for the party commencing and continuing the proceedings to decide whether the rule applies, unless the court orders otherwise, and there is no requirement for court approval to do so;
- the factors the court takes into account in deciding whether proceedings commenced under the rule should continue include whether representative proceedings would be more expensive and prejudicial, whether the relevant group's consent is required, the right of members of that group to opt out, alterations in the description of the group and the provision of notice to various members of that group—at [18] to [20] and [23].

Master Sanderson was of the view that, against this background, there was 'probably no other realistic way to proceed' than by way of representative proceedings because:

- it would never be possible to determine 'with precision' who was included in the expression 'Wutha People';
- undertaking exhaustive inquiries into this would be expensive, time consuming and 'ultimately unnecessary';
- if the company was concerned that particular individuals may not be included in the proceedings, those individuals could be joined separately as plaintiffs;
- at present, there was no question of any direct monetary benefit passing to any of the Ashwins, noting that, if there had been, representative proceedings may not have been appropriate since the particular circumstances of each individual may need to be taken into account in that case—at [21] to [22].

Therefore, the master held that it was for the company, as defendant, to demonstrate that representative proceedings were inappropriate—at [24].

The company submitted that, because the action was originally commenced in the name of Mr Ashwin, the other three people could not be joined as plaintiffs without taking proper steps to do so.

The Ashwins argued that:

- the four of them, in their capacity as the registered native title claimant, were the proper plaintiffs; and
- naming Mr Ashwin alone in some documents was a misdescription that had been rectified.

Master Sanderson considered this 'an entirely arid argument' because, as was noted earlier, Mr Ashwin could commence these proceedings alone in any case. The fact that there were now four plaintiffs made no difference. Orders were made to regularise the position—at [25].

The company also argued the proceedings were defective because the representative capacity of the parties was not stated in the title to the action. Master Sanderson said this was also an 'arid' point because where, as in this case, the representative nature of the proceedings was entirely apparent from the statement of claim, there was no need for the title to the proceedings to mention the representative capacity in which they were brought—at [26].

Fiduciary duty plea

The company challenged the assertion in the statement of claim that the ancillary deed established a fiduciary relationship between the plaintiffs and the defendants. Master Sanderson considered the ancillary agreement, noting that the relevant clause (clause 11) anticipated negotiations conducted in good faith with the native title party 'with the object of reaching agreement on, but not limited to' certain identified matters.

The court concluded that the anticipation of negotiations in good faith could not alone give rise to a fiduciary relationship. 'There would need to be something more.' However, as there may be material facts that could establish there was a fiduciary relationship, the plaintiffs were given unconditional leave to replead their claim to fiduciary duty—at [30].

Strike out on ground of unenforceable agreement

The company argued that:

- clause 11 of the ancillary agreement was merely an 'agreement to agree' at some time in the future that did not give rise to any legal obligations and was, therefore, unenforceable;
- even if it was not to be characterised as an unenforceable 'agreement to agree', it was not enforceable because there was no process to resolve any disagreement between the parties. In the absence of such a process, either party may break off negotiations at any time for any reason, even where there was an obligation to act in good faith—at [31] to [33], referring to Australian authorities for the first point and English case law for the second.

The court noted that 'the strength of the defendant's argument must be acknowledged' since the authorities appeared to cast real doubt on the enforceability of clause 11 and the plaintiffs had 'no convincing argument' to put in answer to the defendant's case—at [34].

However Master Sanderson was not, on balance, satisfied that the pleadings ought to be struck out. This case was to do with native title and, while the master noted there was no separate branch of jurisprudence dealing with native title and nothing to suggest that common law principles of contract law were not applicable to native title agreements, 'care must be taken in what is a new and evolving area of the law'—at [35].

This was particularly so because, in economic terms:

> [I]f the defendant's argument succeeds, the right to negotiate provisions contained in the [NTA] which can [lead]…to economic benefits to native title claimants will amount to nothing [which is]…an outcome which should be reached only after careful consideration of all relevant evidence. It is not a matter which should be determined on a pleading summons—at [35].

Decision

Orders were made to regularise the representative proceedings and allow the present four named plaintiffs to maintain the proceedings. The statement of claim was struck out only in relation to the plea of a fiduciary duty, with leave to replead that claim.

Future act agreement—proceedings to enforce

Brownley v Minara Resources Ltd [2006] WASC 93

Master Sanderson, 25 May 2006

Issue

This case dealt with an application by Minara Resources Ltd (the company) in the Supreme Court of Western Australia to:

- stay an action (the main proceedings) brought by Elvis Stokes and others (the first plaintiff) and North East Independent Body Aboriginal Corporation as trustee for the Wongatha Aboriginal Charitable Trust (the second plaintiff); and
- to strike out certain paragraphs of the statement of claim file in the main proceedings.

Background

In 1997, the company entered into negotiations with Bibila Lungutjarra Native Title Claimant Group (the Bibila people) and the Goolburthunoo Native Title Claimant Group (the Goolburthunoo people) as part of the process of developing a laterite nickel and cobalt project at Murrin Murrin.

The company negotiated an agreement with the Goolburthunoo people recorded in a deed dated 8 July 1998 (the ancillary agreement). Under clause 6.1 of the ancillary agreement, Anaconda Nickel NL (Anaconda, the company's predecessor) was to make annual payments of $1 million to the charitable trust established by the North East Independent Body (the NEIB Trust) as defined in the ancillary agreement.

The ancillary agreement provided that, if the NEIB Trust was not established by 30 June 1998, then an independent charitable trust would be established on terms determined by an independent arbitrator appointed by, and acceptable to, the native title parties (as defined in the ancillary agreement), Anaconda and the NEIB.

The NEIB Trust was not established by 30 June 1998. On 14 August 2003, Anaconda advised that it was rescinding the ancillary agreement. On 10 November 2004, the plaintiffs executed an agreement (the funding agreement) with IMF (Australia) Ltd (IMF) and Insolvency Litigation Fund Pty Ltd (ILF) with respect to funding these proceedings.

The second plaintiff alleged (among other things) it had suffered loss as a consequence of the company not making payment of the sum of $1 million per annum.

Whether the second plaintiff should be a party

The company argued that the second plaintiff should not be a party because it was not the NEIB Trust contemplated by the ancillary agreement, i.e. it was neither established prior to 30 June 1998 nor was it established after the appointment of an independent arbitrator as contemplated by clause 6.2(1) of the ancillary agreement.

The court decided it was not appropriate to remove the second plaintiff as a party to the proceedings and that the issues raised were really a question of the construction of the ancillary agreement. Without wishing to 'say too much' about the proper interpretation of that agreement, Master Sanderson noted that:

- the clause of the ancillary agreement that defined the NEIB Trust had no 'temporal qualification';
- while clause 6.2 of the ancillary agreement did say that, if the NEIB Trust was not established by 30 June 1998, then some other charitable trust 'will be established', this again was without 'temporal qualification' and 'just when such a trust is to be established is not specified';
- therefore, it was arguable that the second plaintiff satisfied the criteria that would allow it to be recognised as the NEIB Trust—at [14].

The company also argued that:

- the ancillary agreement required that the principal objects of the NEIB Trust must be for the purpose of furthering the social, economic, business development, educational and cultural welfare of the Aboriginal people of the north-eastern goldfields region of Western Australia;
- the trust established had objects that related solely to the Wongatha people;
- there was no evidence to establish that the 'Wongatha people' and 'the Aboriginal people of the north eastern goldfields area' were descriptions of the same people.

The court declined to strike out reference to the second plaintiff on this basis, again noting that to do so would involve construction of the agreement—at [16].

Application to stay proceedings as champertous

The remaining question was whether or not the fact that the action was being funded by a third party 'litigation funder' warranted granting a stay on the basis that the arrangement was champertous and an abuse of the court's process. Determining this question involved a consideration of a line of cases referred to as the *Clairs Keeley* cases, which are cited and discussed briefly at [18].

It was noted that the approach taken in those cases by the Full Court of the Supreme Court of Western Australia 'has not met with universal approval' in other states and is currently the subject of an appeal to the High Court. However, as there was 'no doubt' that *Clairs Keeley* cases were the law in WA at present, Master Sanderson noted they pointed to the critical question being the level of control the litigation funder had over the litigation—at [19] to [20].

In this case, it was found that:

- the terms of the funding agreement with IMF and ILF (the litigation funder) left the plaintiffs in control of the litigation;
- the plaintiffs appointed their own independent solicitors well before the involvement of IMF and ILF;
- therefore, the plaintiffs' interests were not subservient to those of the litigation funder and the funder is not a 'mere cipher';
- the plaintiffs were in a contractual position where they can make informed decisions about the litigation—at [20].

The defendant's argument that the court could go behind the clear wording of the agreement and conclude that the litigation funder controlled the proceedings was rejected because 'as a matter of law', control rests with the plaintiffs—at [21].

Decision

The court found that it was not appropriate to grant a stay of the proceedings. The defendant's application was dismissed.

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 National Native Title Tribunal in right to negotiate applications are published both at www.nntt.gov.au/futureact/Determinations.html and http://www.austlii.edu.au/au/cases/Cwlth/NNTTA.

Consent determination—factors tribunal considers

***Foster /Copper Strike Ltd/Queensland* [2006] NNTTA 61**

Member Sosso, 19 May 2006

Issue

The main question in this matter was: What factors are relevant when the National Native Title Tribunal, as the arbitral body, is asked to make a future act determination by consent in circumstances where not all of the people comprising the native title party have signed agreements in principle?

Background

The applicant (and, therefore, the native title party—see below) in the registered claimant application to which this matter related was jointly comprised of 28 people. An agreement had been reached in principle that two future acts (the grant of exploration licences) could be done and an application had been lodged with the tribunal pursuant to ss. 35 and 75 of the *Native Title Act 1993* (Cwlth) (NTA) in which a 'consent' future act determination was sought.

Affidavit evidence showed that 21 of the 28 people who jointly comprised the native title party had signed two 'in principle' agreements. Of the remaining seven:

- three were deceased;
- three could not be located; and
- one refused to sign, not because he objected to the terms of the agreements but because of disagreements he had with others who constituted the native title party—see [8] and [13] to[17].

Meaning of 'native title party'

The 'native title party' relevant to these proceedings was a 'registered native title claimant' in relation to the relevant land or waters: see ss. 29 and 30.

Therefore, the 'native title party' was:

> [T]he person or persons whose name or names appear [sic] in the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the land or waters: s. 253.

Since the NTA provides that, where more than one name appears in the register, the persons are jointly 'the applicant', all 28 people named in the register were, jointly, the 'native title party': see s. 61(2)(c) and *Dimer/Askins/Western Australia* [2006] NNTTA 70, summarised in this issue of *Native Title Hot Spots*.

The tribunal noted that, while the members of the native title claim group who are the duly authorised 'applicant' have the carriage of a claimant application and other members of the native title claim group cannot take any step in the proceeding:

> [T]he authority given to the…applicant is not open-ended and the relevant person or persons must act in good faith…with the aim of advancing the interests of the claim group… and in accordance with the interests and wishes of the…claim group—at [34].

Consent determinations

The tribunal referred to and adopted its earlier decisions on the power of the tribunal, in appropriate circumstances, to make a future act determination under s. 38 with consent of the parties and without conducting an inquiry, despite the absence of any express statutory power to do so—at [24] and [27].

After noting several key issues, the tribunal summed up its approach as follows:

> In short, when looked at as a whole, the scheme of section 39 enables the Tribunal to make consent determinations that truly accord with the interests and wishes of the [native title] claim group, despite the fact that due to unforseen circumstances there is not an ability for all the persons who collectively comprise the…[native title party] to execute a contract. However…[this] is only permissible when it is clear from the evidence…that there is not internal dispute within the persons comprising the…[native title party] or the wider claim group on the doing of the future act from the perspective of the merits of the agreement or the potential impact of the act—at [31].

Member Sosso went on to acknowledge that the scheme of the NTA put the tribunal on notice that, 'wherever possible', it should 'promote agreement-making and recognise the primacy of any reasonable agreement reached between the negotiation parties'—at [33].

However:

> It needs to be emphasised…that the Tribunal is not bound to make a determination in accordance with an agreement reached between the negotiation parties…There may be instances where the agreement is flawed, contrary to public policy, falls outside the jurisdiction of the Tribunal or is contrary to law…The Tribunal has an inherent discretion, when taking an agreement into account, to go beyond or even not to accept it…The key issue…is that the Tribunal be satisfied of two essential matters. First, that the determination is in accordance with the law, and second, if it is based on the asserted "in principle" agreement of the parties, the "agreement" was properly made—at [33].

Factors relevant to consent

In deciding whether a 'native title party' is actually consenting to a s 38. determination, the tribunal noted that two matters are of central importance:

- whether the agreement had been endorsed by the wider native title claim group, either specifically or because it was of a type that the particular claim group had previously given general consent to; and
- the reason why people comprising the native title party had not executed the agreement, e.g. they could not be located, had passed away, were incapacitated or refused for reasons unrelated to either the terms of the agreement or the process adopted by the claim group in endorsing the agreement—at [37].

It was acknowledged that, where (as in this case) numerous persons comprise 'the applicant' (and, therefore, the 'native title party') there is 'an inherent risk that, if there is disagreement:

- the decision-making process will be stymied; and
- in a future act context, this may result in an 'impasse with a claim group being incapable of entering into commercial arrangements with grantee parties'—at [35].

In these circumstances, the tribunal does not have a 'charter or a legislative head of power' to assist a claim group which is 'in gridlock because of internal disputes'—at [36].

If the native title party is incapable of reaching accord in right to negotiate proceedings due to such disputes, then (subject to various pre-conditions being met), an application may be made under s. 75 to the tribunal for a future act determination. Where this is the case, the member was of the view that there was no scope for a consent determination:

> [I]t is clear that the native title party is not consenting. It cannot consent if it is internally divided. So, the Tribunal must undertake a proper inquiry and carefully weigh up the section 39 criteria before making a determination—at [36].

It was noted that, on becoming aware of discord within the claim group or between the persons comprising the native title party about the terms of the agreement or the doing of the relevant future

act, the tribunal is on notice that evidence will be needed to demonstrate it is appropriate for a consent determination to be made.

Consent may be inferred if refusal unrelated to future act

Member Sosso went on to make clear that:

> [I]f a person who is one of those persons comprising the…[native title party] refuses to execute an agreement [relevant to proceedings before the tribunal] for reasons that are unrelated to the terms of the proposed agreement or the possible impact of the proposed future act on the matters outlined in…[paragraph] 39(1)(a), then it is open to the Tribunal to work on the assumption that there has been a true accord between the negotiation parties. The Act requires a high duty of care, akin to a fiduciary duty, from persons carrying out the responsibilities of an applicant [and therefore a native title party]…Native title is by its very nature communal…It does not entail empowering people to deviate from the traditional laws and customs of their claim group…[and] it is not intended to allow a recalcitrant applicant to exercise in bad faith a right of veto over commercial negotiations to the detriment of the wider claim group interests—at [39].

Decision

In this matter, the tribunal was satisfied that:

- the wider claim group had previously endorsed agreements in identical terms to the 'in principle' agreements relevant to these proceedings;
- none of the seven people comprising the native title party had refused to sign the proposed agreements on relevant grounds;
- the failure of other previously named persons comprising the native title party to execute the agreements was due to the representative body's failure to locate them, despite its best endeavours—at [40].

Given these findings (among others) and after ensuring that it was within power, the tribunal made the determination sought by consent i.e. the future acts may be done subject to compliance with the native title and heritage agreement lodged with the tribunal in these proceedings—at [45].

Future act determination application a nullity—native title party deceased

***Dimer/Askins/Western Australia* [2006] NNTTA 70**

Member O'Dea, 8 June 2006

Issue

The main issues in this decision were:

- whether there was a 'native title party' in proceedings brought pursuant to s. 35 of the *Native Title Act 1993* (Cwlth) (NTA) in circumstances where all those who jointly comprise that party were dead when the application was made;
- if not, whether a representative body could be authorised by the relevant native title claim group to make the application; and
- if not, whether it was open to the arbitral body (in this case the National Native Title Tribunal) to substitute another party as the applicant.

Background

The Goldfields Land and Sea Council (GLSC), the native title representative body for the area concerned, lodged an application pursuant to ss. 35 and 75 for a future act determination to be made, purportedly by consent, in relation to the grant of two exploration licences. The only 'native title party' (as defined in the NTA—see below) was comprised of two people who were both dead when the application was made.

The inquiry

During the inquiry, the tribunal raised the question of the capacity of the 'native title party' to either consent to the doing of the future act or bring the application in these circumstances. To assist the tribunal address that issue, the parties were directed to:

- lodge evidence showing why the GLSC believed the native title party had consented to the doing of the relevant future acts (i.e. the grant of two exploration licences); and
- make submissions going to how the tribunal was empowered to make a determination in the

absence of any living 'applicant' (and, therefore, any native title party—see below) in the claimant application to which the proceedings related—at [8].

A solicitor employed by the GLSC subsequently gave evidence confirming (among other things) that the relevant native title claim group (via a working party) had authorised him to sign on behalf of the native title claim group and that it was pursuant to this authority that:

- he made the future act determination application; and
- believed that consent had been given to the exploration licences being granted.

The solicitor also deposed to the fact that the native title claim group did not intend to amend the relevant claimant application to replace the applicant at any time in the immediate future.

The government party (the State of Western Australia) submitted (among other things) that it was open to the tribunal to make a determination, referring to ss. 139 and 109(1) of the NTA.

Having considered the evidence and the submissions, and for the reasons set out below, the tribunal:

- indicated that it was not satisfied that a future act determination could be made;
- decided that the future act determination application was a nullity.

The statutory framework

The tribunal noted that, pursuant to s. 75, an application under s. 35 may be made to the tribunal by any 'negotiating party' as this is defined in s. 30A, i.e. either the government, grantee or native title party. In this case, the application was purportedly made by the 'native title party'.

Member O'Dea set out the way in which that term is defined in the NTA:

- pursuant to s. 253, it has the meaning given by ss. 29(2)(a) and (b) and 30 and, in this case, s. 29(2)(b) was the relevant provision;
- therefore, the 'native title party' in this matter was 'any registered native title claimant' in relation to the relevant land and waters;
- a 'registered native title claimant' in relation to land and waters is defined in s. 253 to mean 'a person or persons whose name or names appear [sic] in an entry on the Register of Native Title Claims [the register] as the applicant in relation to a claim to hold native title in relation to the land and waters';
- in this case, there was only one claimant application on the register in relation to the relevant land and waters;
- all of the people whose names appeared in the entry on the register as 'the applicant' in that application were dead prior to any decision by the native title claim group to either enter into any agreement with the grantee party or make the future act determination application—at [12] to [13].

The member went on to note that:

- a claimant application may be made by 'the person or persons authorised [in accordance with s. 251B] by all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed', paraphrasing s. 61(1);
- the person or persons so authorised is or are the applicant and, if more than one person is authorised, they are jointly 'the applicant', referring to s. 61(2)(c);
- the NTA 'bluntly excludes all others who may be part of the "native title claim group" from being considered part of the applicant', referring to s. 61(2)(d);
- section 62A gives the applicant the power to 'deal with all matters arising' under the NTA in relation to that claimant application—at [14].

No native title party in this case

Member O'Dea was of the view that this statutory framework was such that:

> It is an inescapable conclusion…that, if there is no living applicant, there is no party empowered to act on behalf of the native title claim group which is essential to the process of dealing with 'any matters arising under this Act'—at [15].

It was noted that:

- the problem could be remedied by a Federal Court order to replace the current applicant with a new, duly authorised applicant;
- the native title group in this matter had indicated it was inconvenient to do so at present;
- while replacing the applicant might be 'time-consuming[,]…complex' and may trigger the application of the registration test, the native title claim group had 'no alternative' but to seek to replace the current applicant;
- this was because none of the people who are part of the native title claim group, but not part of the applicant, 'can have any formal role in taking any steps in the matter'—at [17], referring to *Foster/Copper Strike Ltd/Queensland* [2006] NNTTA 61 (*Foster*) at [34], summarised in this edition of *Native Title Hot Spots*.

Therefore, in circumstances where all those comprising the 'native title party' are dead, the tribunal has no capacity to assist the native title claim group—at [18].

Member O'Dea acknowledged that this finding 'thwarted' the wishes of the negotiating parties and that the evidence indicated that the native title claim group wanted the consent determination to be made. However, the tribunal was required to decide whether it could make a future act determination in this matter for the reasons noted above, i.e. there was no 'native title party' for these proceedings—at [19].

Consent and the competency of application

While it was 'indisputable' that the framework of the relevant provisions of the NTA (e.g. ss. 38, 109(1) and 139) indicated that the tribunal should, wherever possible, promote agreement-making, this did not assist in the current situation because:

> [T]here was no…[native title party]…and, therefore, not only could it not be said that the…[native title party] consented to the proposed…[future act determination], it was not competent to make the s. 35 application—at [20].

The member noted that the 'critical question' was whether the native title party, as defined in the NTA and noted above, had consented to the making of the determination. In relation to this case, this meant 'in a nutshell' that:

> [I]f none of the persons who collectively comprise the…[native title party] have either executed or consented to the agreement there is no accord between the negotiation parties as one of those parties is incapable of reaching agreement—at [23], quoting Member Sosso in *Foster* at [38].

Substitution of competent party no cure

The tribunal rejected the government party's proposal to remedy the situation by substituting a competent party because:

- if a plaintiff is dead at the commencement of proceeding, that proceeding is a nullity and cannot be cured by amendment, referring to *Halsbury Laws of Australia* at [325–1470];
- the application in this case was brought under s. 75 after the death of the persons who were entitled to bring it (i.e. the native title party);
- therefore, it is a nullity and this cannot be cured by amendment—at [24] to [26].

Decision

The application was dismissed pursuant to s. 148(a).

Comment

The tribunal noted that, while it was open to another negotiation party to bring an application under s. 75, the problem of how it could be dealt with by consent without any living native title party would arise again—at [27].

With respect, in this case, there is a more fundamental issue. There was no native title party with whom the other negotiating parties could negotiate in good faith prior to making the application.

Therefore, the tribunal's power to deal with the application would not be enlivened, regardless of who made the future act determination application, i.e. an application by any other party could not be accepted in any case. This is because negotiation in good faith with the *native title party* (rather than with the native title claim group) is

one of the pre-conditions to the exercise of the tribunal's power (see, for example, *Walley v Western Australia* (1996) 67 FCR 366) and, in this case, there was no such party.

The member also noted that, alternatively, the state could validly grant the exploration licences, relying upon s. 28(1)(b), i.e. immediately before the future acts (the grants) were done, there was no native title party. In any case, 'there is nothing to prevent the grantee party and the native title [claim] group from honouring the agreement they reached'—at [27].

Although not noted by the member, the lack of any living applicant is also an issue in relation to the claimant application in the Federal Court. The Full Court has twice noted that, because of the way 'claimant application' is defined in s. 253, the absence of an 'authorised applicant' means there is no 'claimant application' before the court: see *Noble v Mundraby* [2005] FCAFC 212 and *Noble v Murgha* [2005] FCAFC 211, summarised in *Native Title Hot Spots* Issue 16.

Future act determination—power to impose agreement as a condition

Enmic Pty Ltd/Borinelli/Western Australia [2006] NNTTA 29

Deputy President Sumner, 31 March 2006

Issue

The issue noted here was whether the National Native Title Tribunal, as the arbitral body, had power to impose conditions on the doing of a future act when making a future act determination by consent.

Background

The negotiation parties in this right to negotiate proceeding consented to a determination under s. 38 of the *Native Title Act 1993* (Cwlth) (NTA) that the future act (the grant of a mining lease) may be done subject to undertakings made by the grantee party and native title party to be bound by the terms of an ancillary agreement between them.

Power to impose conditions in a consent determination that the act may be done

Deputy President Sumner noted (among other things) that:

- while the tribunal has a broad power to impose conditions, it is subject to some statutory limitations;
- the tribunal had previously made future act determinations 'subject to' or 'pursuant to' an agreement between the parties;
- a future act determination in that form raises the question of whether the terms of the agreement become conditions of the tribunal's determination;
- therefore, the tribunal will only do so after seeing the relevant agreement and satisfying itself that it does not contain terms that the tribunal cannot impose as conditions of a future act determination—at [10] to [11].

Heritage protection agreements

One of the agreements in this matter was a heritage protection agreement (HPA). It was noted that these are usually relatively simple agreements containing provision for the payment of fees for the conduct of heritage surveys. It was found that the HPA in this case contained no terms which the tribunal could not impose as conditions of a future act determination—at [11].

The ancillary agreement

The tribunal noted that the second agreement, referred to as an ancillary agreement, contained a clause relating to the payment of compensation. This was determined to be something the tribunal had no power to impose as a condition of a future act determination—at [12].

The question then was whether the terms of agreement would become conditions of the tribunal's determination if that determination was made in the terms sought by the parties. The draft determination in this matter was subject to the grantee party's undertaking to 'be bound' by the terms of the ancillary agreement. In an earlier

matter, the tribunal had made a determination in similar terms: see *BHP Billiton Minerals Pty Ltd/Abdullah/Western Australia* [2005] NNTTA 40 (summarised in *Native Title Hot Spots* Issue 16).

However, the tribunal reconsidered the issue in this case because it was concerned that, 'despite the intentions of the parties', the terms of the ancillary agreement *would* become conditions of the determination, 'something which is beyond power' because of the clause in the agreement relating to the payment of compensation— at [13] and see [11].

The tribunal also noted its comments in other matters that, even if it was within power to make a determination 'subject to' an agreement or conditional on the parties being 'bound' by the terms of that agreement, this may not have any practical effect above and beyond what is already provided for under the NTA, i.e. making the terms of an agreement the conditions of a determination 'would not enhance the rights…a native title party would have under the agreement'. This was said to be because a future act determination, subject to conditions, 'has effect as if the conditions were terms of a contract among the negotiation parties', i.e. this is 'something which is secured by the agreement itself'—at [14] and see s. 41(1).

It was also proposed that the future act may be done subject to an 'acknowledgement' by the grantee and native title party that the ancillary agreement 'stands as a properly executed agreement between the parties'. The tribunal agreed with the submission of the government party that, whether the conditional determination of this kind is made or whether there is a public recording in the tribunal's reasoning of the parties' intent to be bound, the result is the same, i.e. evidence of the parties' *bona fide* intention at the time of the agreement—at [17].

Decision

The tribunal accepted an alternatively worded minute of consent determination executed by all the parties that avoided raising doubt about the imposition of conditions and then made a consent determination that the future act (i.e. the grant of the mining lease) may be done—at [23].