National Native Title Tribunal

NATIVE TITLE Hot Spots

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Recent cases

Appeal in *Jango* compensation claim – Full Court

***Jango v Northern Territory of Australia* [2007] FCAFC 101**

French, Finn and Mansfield JJ, 6 July 2007

Issue

This case deals with an appeal to Full Court of the Federal Court against the dismissal of an application for a determination of compensation made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (the NTA). The main issues were whether the primary judge either:

- misread the compensation claim groups' case; or
- should have made a decision in their favour outside of the nature of their case as formally stated.

The Commonwealth filed a notice of contention in the appeal proceedings to support the judgment.

Background

The compensation application was brought in 1997 on behalf of a group of Yankunytatjatjara and Pitjantjatjara people whose native title rights and interests were said to have been extinguished in land around the town of Yulara in the Northern Territory. Their claim to hold native title at the time of the alleged extinguishment was based on the traditional laws and traditional customs of the Western Desert Bloc i.e. the members of the compensation claim group claimed native title as people of the eastern Western Desert.

Questions relating to both the existence (and extinguishment) of native title and any subsequent liability to provide compensation were heard as preliminary issues pursuant to orders made under Order 29 rule 2 of the Federal Court Rules. The determination of quantum was 'deferred pending resolution' of the preliminary issues. After a 42-day hearing, his Honour Justice Sackville (the primary judge) 'delivered...careful, lengthy and comprehensive' judgment—at [6].

Decision at first instance

In a joint judgment, their Honours Justices French, Finn and Mansfield outlined, at some length, the terms of the application and points of claim filed at first instance, the pre-trial directions and the main points of the reasons for judgment—at [7] to [61].

According to their Honours, the primary judge dismissed the application on the basis that:

- it had not been shown that the compensation claim group had, at the relevant time, any native title rights and interests the compensation claim area;
- the evidence presented did not prove the case for the existence of native title as formulated in the application and points of claim that were filed as a formal statement of the nature of the compensation claim group's case—at [31] and see *Jango v Northern Territory* (2006) 152 FCR 150; [2006] FCA 318, summarised in *Native Title Hot Spots* Issue 19.

Their Honours noted that the primary judge:

- emphasised that what was addressed was the case as put to the court on behalf of the compensation claim group;
- stated that finding this did not necessarily imply that none of the members of the claim group could establish native title had the case been conducted differently;
- took the view that the court was not entitled to consider a case that might have put to it but was not;
- pointed out this was not a criticism of the way the case was presented but that, nevertheless, the compensation claim group was bound by the conduct of their case—at [58].

The appeal

There were essentially two points to the appeal:

- the primary judge 'misread the pleaded case';
- '[q]uite apart from the pleadings', either ss. 51(1) and 94 of the NTA or the terms of the separate issue obliged the primary judge to determine who held native title at the relevant time

because it was found at first instance that some members of the compensation claim group may have held native title rights and interests over the compensation claim area at the relevant time—at [65] and see also [62].

Function of the application and points of claim in native title proceedings

Their Honours said:

- there was no express requirement in the NTA for the filing of pleadings in the usual sense of a statement of claim or defence;
- the court frequently ordered the filing of 'points of claim' in native title matters that set out contentions of fact and law in 'a less elaborate fashion' than a statement of claim;
- whether or not a document setting out the points of claim was a 'pleading' in the strict sense, its essential function was to define the case being put to the court;
- in native title proceedings, if the original application complied with the requirements of ss. 61(1) and 62, then the essentials of the case should have been disclosed in that application;
- points of claim may be filed to provide greater particularity and, to the extent that they define the nature and basis of the applicant's claim, will limit the range of matters that can be put before the court both in evidence and in argument;
- amendments may be made from time to time to the application and the points of claim, subject to the availability of appropriate measures being taken by the court to avoid unfair prejudice to the respondents—at [75] to [76].

In this case, it was agreed that the pleadings should 'state with sufficient clarity' the case to be met by the respondents. What was at issue was that the direction to file points of claim required the applicant 'to address [such] a host of specified matters' that it was a 'misnomer' to call such a document a 'pleading'—at [77].

Their Honours dismissed this point, saying that:

- what was important was not the term 'pleading' but the function it described, which was a fair and efficient system of procedure with clear rules governing the definition of the case;
- the question was not one of technicality but principally of practical fairness between parties and finality in the litigation;
- this was a matter 'of substance and not of form';
- there was nothing unique or *sui generis* (as had seemed to be implied by the appellants) about the court's function in native title proceedings—at [78] to [81].

Function of the court in compensation proceedings

The function of the court in an application for a determination of compensation was to be found by looking to ss. 50(2), 61 and 62 of the NTA. However:

> It is important to observe that these requirements do not limit the power of the Court to direct particularisation of the claim so that the case is more precisely defined and limited for the purpose of the proceedings.
>
> What the Court is then required to decide…is whether the right to compensation which is claimed is made out. That requires the antecedent determination whether there were in existence at some relevant time native title rights and interests whose extinguishment or impairment has given rise to the compensation right. It is for the applicants to assert and identify the native title rights and interests and the factual basis upon which they rest as part of their case for compensation. It is for the Court to determine whether those assertions are established—at [82] to [83].

Court's function does not entail a roving inquiry

Their Honours observed that:

> The Court cannot, in hearing a native title determination application or a compensation application, conduct a roving inquiry into whether anybody, and if so who, held any and if so what native title rights and interests in the land and waters under consideration. Such an inquiry is an administrative rather than [a] judicial function. Indeed, recent amendments to the NTA allow such inquiries to be carried out under certain circumstances by the National Native Title Tribunal—at [84].

Did the primary judge misunderstand the pleaded case?

On appeal, it was said that the finding that the case failed, because the evidence did not support a 'dichotomy' between (or 'combination' of) the pleaded 'conditions' and 'additional factors', reflected a fundamental misreading of the pleaded case which, it was said, made plain that native title rights and interests were held if a person satisfied 'at least one' of the pleaded conditions—at [87].

Their Honours dismissed this contention, saying that:

- the trial judge did not misread or misunderstand the case;
- there was no doubt that both the application and the points of claim identified conditions, at least one of which was necessary (and any of which was sufficient) to identify a person as holding native title rights and interests;
- the 'additional factors' were not propounded as criteria for the identification of a person as a holder of native title rights and interests but were formulated as relevant to the nature and extent of the rights and interests attributable to particular persons and their seniority and authority relevant to others;
- in this case, the 'dichotomy' was found in both the application and the points of claim;
- although the claimants' closing written submissions departed from that dichotomy, in closing oral argument, counsel for the claim group came back to the case set out in both the originating process (i.e. the application) and the points of claim—at [88] to [89].

Should the primary judge have made findings outside the pleaded case?

The appellants argued that the primary judge, having made findings as to the manner in which native title rights are acquired under the traditional laws and customs of the Western Desert bloc, ought to have proceeded to give effect to those findings in relation to all or some of the members of the compensation claim group, even where doing so meant departing from the case put to the court—at [90] to [91].

This was rejected, with their Honours reiterating that:

> [T]he NTA does not mandate the approach proposed by the appellants. It would have been inconsistent with the case presented by the appellants and which the respondents were prepared to meet…His Honour was entirely correct in making his decision within the framework of the case presented by the appellants. In so doing it must be emphasised that he recognised that an unduly rigid view should not be taken of the pleadings—at [92].

Their Honours also recognised the more fundamental difficulty facing the trial judge, which was that the evidence before him reflected 'such a variety of opinions, practices and assertions' that it could not be taken as establishing that the compensation claim group observed and acknowledged at the relevant time laws and customs of the Western Desert cultural bloc as pleaded in the points of claim—at [92].

Commonwealth's contentions on appeal

The only ground raised by the Commonwealth on appeal was that no compensation liability arose under the NTA because native title was validly extinguished before the NTA came into force—at [64].

Although the decision to dismiss the appeal made it unnecessary for the court to deal with the Commonwealth's notice, nonetheless their Honours considered it appropriate to indicate their views on those submissions—at [94].

The Commonwealth conceded that the various grants of fee simple estates relevant to this case were, subject to the NTA, invalid by reason of inconsistency with s. 10(1) of the *Racial Discrimination Act 1975* (Cwlth) (RDA). It was also conceded that the grants of the fee simple estates in question were 'previous exclusive possessions acts' (PEPAs) attributable to the territory for the purposes of *Validation (Native Title) Act 1994* (NT) (Validation Act). The Commonwealth's contention was that no liability for compensation arose. This rested on its view as to the effect of the registration of the grants pursuant to the *Real Property Act* 1886 (SA) (RPA), notwithstanding the invalidity of the grants themselves.

Their Honours said the answer to the Commonwealth's submissions lay in:

[T]he text, structure and purpose of Div 2 and 2B of Pt 2 of the NTA and in the complementary provisions of the Northern Territory's Validation Act, both statutes for present purposes confirming the extinguishment of native title rights and interests by 'previous exclusive possession acts'—at [98].

Among other things, it was noted that:

- according to s. 23C(1) of the NTA (and the Validation Act equivalent), a PEPA extinguished any native title in relation to the area covered by that act and the extinguishment was taken to have happened *when that act was done*;
- in this case, the PEPAs were done when the various fee simple grants were made by the Northern Territory;
- under s. 23J of the NTA, native title holders are entitled to compensation for any extinguishment by a PEPA but only to the extent (if any) that their native title rights and interests were not extinguished 'otherwise than under the NTA';
- the purpose of s. 23J is to limit, so far as possible, the entitlement to compensation to cases where the PEPA was invalid by reason of the RDA but subsequently validated by s. 14 of the NTA (actually, in this case, s. 8 of the Validation Act);
- under s. 23J (and s. 9H(2) of the Validation Act), compensation for extinguishment is to be assessed at the date at which the invalid acts (i.e. the grants of the freehold estates) were done—at [102] to [106], referring to *Wilson v Anderson* (2002) 213 CLR 401; [2002] HCA 29 at [51], summarised in *Native Title Hot Spots* Issue 1.

It was noted that the PEPAs in question were acts that had been 'validated' i.e. they were 'past acts' for the purposes of the NTA and the Validation Act. In other words, they were acts that, in the absence of the subsequent intervention of the NTA (and, via s. 19 of the NTA, the Validation Act) would have been invalid by virtue of the operation of the RDA and s. 109 of the Commonwealth Constitution. That invalidity was 'cured' by the intervention of the past act provisions of the NTA and the Validation Act.

In relation to s.19, at [109] their Honours referred to the joint judgment in *Western Australia v Commonwealth* (1995) 183 CLR 373 at 455, where it was said that:

> Section 19…does not purport to deny the overriding effect of the…[RDA] upon any inconsistent law of a State in the past. Section 19 removes any invalidating inconsistency between, on the one hand, a State law enacted in the future that purports to validate past acts attributable to a State and, on the other, the…[RDA] or any other law of the Commonwealth (including the *Native Title Act* itself). The validation of past acts attributable to a State is effected by a State law [e.g. the Validation Act] which, at the time of its enactment, is not subject to an overriding law of the Commonwealth. The force and effect of a past act [i.e. its validity]... is recognised only from and by reason of the enactment of the future State law but, from that time onwards, the force and effect of the past act is determined by the terms of the State law enacted in conformity with s 19.

After noting that the grants of fee simple (i.e. the previous exclusive possession acts) predated registration under the RPA, their Honours concluded that, whatever the consequence of registration might have been:

> [O]n and from the enactment of the Validation Act,…[native title] rights and interests were taken **for the purposes of NTA** [and the Validation Act] to have already been extinguished "completely"…by the anterior previous exclusive possession acts of the Northern Territory…i.e. by the making of the grants [in fee simple]…Nothing in the NTA provided for, or warranted, the undoing of that complete extinguishment.…[R]egistration did not…affect in any way an entitlement to compensation under the NTA given by s 23J. For its purposes, notwithstanding the later registration of the grants, the native title rights and interests in the lands granted would not have been extinguished "otherwise than under this Act"—at [111], emphasis in original,

referring to *Fejo v Northern Territory* (1998) 195 CLR 96 at [43].

This construction of s. 23C of the NTA (and s. 9H(1) of the Validation Act) also meant that the Commonwealth's alternative submission in relation to the 'gap' between the grant of the fee simple estates and registration must be rejected—at [111].

Decision

For the reasons given, the compensation claim group's appeal was dismissed—at [121].

Appeal by Ngarluma and Yindjibarndi – Full Court

***Moses v Western Australia* [2007] FCAFC 78**

Moore, North, Mansfield JJ, 7 June 2007

Issues

The main issue in this case was whether the Full Court of the Federal Court should uphold the primary judge's findings in relation to:

- whether native title was wholly extinguished by the grant of certain pastoral leases;
- the application of ss. 47A and 47B of the *Native Title Act 1993* (Cwlth) (NTA);
- the existence of native title in part of the determination area called the Karratha area;
- the description of the native title holders in the determination; and
- whether more than one prescribed body corporate could be nominated for the determination area.

Background

The primary judge, his Honour Justice Nicholson, handed down the main reasons for judgment relevant to this appeal in *Daniel v Western Australia* [2003] FCA 666, (summarised in *Native Title Hot Spots* Issue 6). Other outstanding issues, including the terms of the final determination of native title pursuant to s. 225 of the NTA, were dealt with in judgments delivered between December 2003 and March 2006.

The Ngarluma and Yindjibarndi peoples were partly successful in their claim to hold native title to the areas they claimed. Three overlapping claim groups were found not hold native title, although it was accepted that some members of one of those groups (the Wong-Goo-TT-OO) may be either Ngarluma or Yindjibarndi and, in that capacity, hold native title rights and interests—at [35], [40], [46] and [48] to [50].

Respondents claiming native title

The Full Court (their Honours Justices Moore, North and Mansfield) took the unusual step of commenting on an issue that was not raised on appeal. In relation to the decision at first instance in relation to an 'overlapping group', it was said that:

> In circumstances where the Kariyarra participated as respondents only and made no attempt to satisfy the learned primary judge that all of the requirements of the NTA had been met in respect of their overlap claim, it would not have been appropriate to nevertheless make a determination of native title [in their favour]…Of course, the obverse position, namely a decision that the Kariyarra people did not have native title…in those overlapping areas was able to be made, because competing evidence…was adduced. Such a conclusion did not have to address issues arising under s. 251B [which deals with authorisation of claimant applications] —at [18] and see [49] to [50].

On this point, see also *Kokatha People v South Australia* [2007] FCA 1057, summarised in this issue of *Native Title Hot Spots*.

The issues on the appeal

The Ngarluma and Yindjibarndi peoples appealed against certain aspects of the reasons and orders at first instance. The State of Western Australia filed a notice of contention. The Commonwealth filed a cross-appeal. The issues raised were whether:

- native title was wholly extinguished by the grant of certain pastoral leases;
- subsection 47A(2) applied to the area covered by a pastoral lease and several freehold grants;
- section 47B applied to areas subject to temporary reserves made under s. 276 of the *Mining Act 1904* (WA);
- internal geographical limitations on the exercise of the native title rights and interests should have been imposed;

- native title should have been found to exist in an area located around the town of Karratha and extending to the western boundary of the claim area and northwards to the commencement of the Burrup Peninsula (the Karratha area);
- determining that the holders of the native title were the 'Ngarluma People' and the 'Yindjibarndi People', without further defining those expressions, was sufficient;
- subsections 56(2) and 57(2) allowed for more than one prescribed body corporate to be nominated in respect of the determination area—at [88] to [90].

Reasons for not making 'interim' consent orders

As the parties to the appeal were agreed that the Ngarluma and Yindjibarndi peoples should succeed on the first four issues noted above, orders were sought to that effect by the Ngarluma and Yindjibarndi peoples. However, the court refused to make those orders because:

- it appeared that, in exercising the powers conferred by the *Federal Court of Australia Act 1976* (Cwlth) in relation to its appellate jurisdiction, the court did not have power to partially dispose of an appeal;
- neither ss. 87(1)(c) or 68 of the NTA provide an additional source of power i.e. the court's power is not enlivened unless the court is satisfied the orders sought are otherwise within power—at [91] and [104] to [114].

Extinguishment by grant of pastoral leases

At first instance, it was found that the act of granting five pastoral leases had wholly extinguished native title, whereas other pastoral leases granted under the same provisions of the relevant Western Australian legislation were found to only partially extinguish native title rights and interests.

Pastoral leases of the kind considered at first instance are, generally speaking, what the NTA defines as 'non-exclusive pastoral leases' and, therefore, 'previous non-exclusive possession acts' which, as such, do not wholly extinguish native title—see *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward*, summarised in *Native Title Hot Spots* Issue 1) at [187] to [190], [192] and [194].

However, the five leases concerned were granted after the commencement of the *Racial Discrimination Act 1975* (Cwlth) (RDA), which sometimes gives rise to issues in relation to the application of the past act provisions of the NTA—see ss. 15(1)(a), 23G(3), 228 and 229 and *Ward* at [418] and [422].

From the reasons given at first instance, it was not apparent to their Honours why the primary judge considered that the five pastoral leases had wholly extinguished native title. It was noted that:

> The parties are agreed that the leases did not in fact have any further extinguishing effect than any [of the] pre-existing [non-exclusive] pastoral leases, and that, contrary to his Honour's findings, the grants of each of the leases were [sic] not past acts nor [sic] previous exclusive possession acts. In accordance with the principle established in *Ward*…, we consider that the parties' position in that regard is appropriate. Nothing has been identified to us which might indicate that those five pastoral leases should have any greater extinguishing affect than the other pastoral leases which affected parts of the claim area—at [113].

The court allowed the appeal in relation to the five pastoral leases and held that the determination should be altered accordingly—at [114].

Application of s. 47A

The Ngarluma and Yindjibarndi peoples contended that s. 47A applied to the Mt Welcome pastoral lease and several areas covered by freehold grants, referred to collectively as the 'Mt Welcome freehold titles'. They said that the first limb of s. 47A(1)(b)(ii) was satisfied i.e. that 'the area is held expressly for the benefit of… Aboriginal peoples or Torres Strait Islanders'.

If s. 47A applies, then all extinguishment brought about by the creation of a 'prior interest' must be disregarded for all purposes under the NTA and the non-extinguishment principle found in s. 238 applies (except in relation to public works)— on the latter point, see *Erubam Le (Darnley Islanders)(No 1) v Queensland* (2003) 134 FCR 155; [2003] FCAFC 227,summarised in *Native Title Hot Spots* Issue 7.

The argument put on appeal in relation to s. 47A was not raised at first instance, where reliance was placed on s. 47 instead. On appeal, leave was granted to raise the new argument based on s. 47A—at [121].

The areas in question

The relevant areas (the Mt Welcome pastoral lease and the Mt Welcome freehold titles) were held by the Mt Welcome Pastoral Co Pty Ltd, a company incorporated under general legislation i.e. the *Companies Act 1961* (WA).

All of the shares in the company, except for one held by a Ngarluma man, were held at the time of the trial by the Ieramugadu Group, a body incorporated under the *Associations Incorporation Act 1895-1969* (WA), also legislation of general application.

The members of the Ieramugadu Group are 'those aboriginals [sic] from time to time resident in and around the Roebourne district in Western Australia who are of the Jindjibandi, Ngaluma and Bandjima tribal groups together with such other aboriginals as have an established residential connection with the district'.

According to the court, there was no obligation on individual shareholders to either hold those shares or exercise the voting rights with respect to them 'for the benefit of' Aboriginal peoples, as distinct from their own personal interests—at [152].

Construction of s. 47A

Their Honours considered two lines of authority in relation to the meaning of 'held expressly for the benefit of...Aboriginal peoples' in the first limb of s. 47A(1)(b)(ii).

The Ngarluma and Yindjibarndi peoples relied upon the first line of authority, found in *Neowarra v Western Australia* [2003] FCA 1402 (summarised in *Native Title Hot Spots* Issue 9) and *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 (summarised in *Native Title Hot Spots* Issue 19). The state relied upon the second line of authority found in *Hayes v Northern Territory* (1999) 97 FCR 32 and *Risk v Northern Territory of Australia* [2006] FCA 404 (summarised in *Native Title Hot Spots* Issue 19).

Their Honours said:

> The point of difference between the two approaches…appears to be the perspective from which one considers whether land is "held expressly for the benefit of" Aboriginal peoples. *Neowarra* and *Rubibi (No 7)* appear to permit consideration of that question from the perspective of the entity holding the beneficial interest in the land set in the legislative context in which the entity was established. In *Hayes* and *Risk*, on the other hand, consideration of the issue is restricted to the perspective of the legislative or executive structure under which the grant or transfer itself was made, or to the perspective of the instrument which grants the relevant interest—at [138].

The court noted that:

- some support for the approach taken in *Risk* and *Hayes* could be drawn from the Senate's Supplementary Explanatory Memorandum to the *Native Title Amendment Bill (No 2) 1997* (Cwlth), which emphasised that grants which were not expressly for the benefit of Aboriginal peoples, but rather made in the 'normal way' to a specific person who happened to be an Aboriginal person, were not covered by paragraph 47A(1)(b);
- the practical effect of the provisions of s. 47A may further indicate that Parliament did not intend it to apply other than according to the expressed intention of the Crown—at [141] to [142].

The court went on to explore what the 'practical effect' of accepting Ngarluma and Yindjibarndi submission might be, including that:

- a lessee of an ordinary lease from the Crown could defeat the Crown's reversion by their own act, such as by subleasing the area expressly for the benefit of Aboriginal people;
- if the native title rights and interests in question extended to an exclusive right to use and enjoy the area, the Crown could not extend the lease or grant a fresh pastoral lease without confronting the future act regime under the NTA;

- if native title continued to exist in the Mt Welcome freehold titles (subject to the non-extinguishment principle), and the company chose to transfer those titles to a member of the public, the transferee would hold them subject to the non-extinguishment principle, with the unintended consequence that any attempt by the transferee to, say, sub-divide the land, may also be subject to the future act regime;
- even a change in the shareholding of the company so as to permit non-Indigenous persons to acquire shares, might constitute a future act—at [142] to [144].

Their Honours decided that: '[T]hose considerations lend support to the approach to the construction of s 47A(1)(b)(ii) adopted in *Risk* and *Hayes*'—at [145].

Context matters

The court noted that, even if the approach in *Risk* and *Hayes* was followed, 'each set of circumstances must be addressed separately, including in the particular legislative context in which those circumstances emerge'—at [145].

For example, the court accepted that, in *Neowarra*, the legislation under which the lessee (e.g. the Indigenous Land Corporation) was established may have supported a finding that s. 47A(1)(b)(ii) applied. That was:

> [A] matter of construction of the relevant legislation. It is not necessary to reconsider that decision in that respect. It clearly addresses different facts to those presently before the Court—at [149].

Section 47A did not apply in this case

It was found that:

- the expression 'Aboriginal peoples' in s. 47A(1)(b)(ii) 'contemplates some communal or collective benefit rather than individual personal benefit';
- the absence of any legislative or executive indication that the company was to hold the area subject to the Mt Welcome pastoral lease or the area subject to the Mt Welcome freehold titles for the benefit of Aboriginal peoples was sufficient to conclude that s. 47A(1)(b)(ii) was not enlivened;
- had the Ieramugadi Group, as the majority shareholder, procured a change to the company's memorandum and articles of association to require that the company's business and activities be conducted for the benefit of Aboriginal peoples, there may then have been some similarity to the circumstances addressed in *Neowarra* and adopted in *Rubibi (No 7)* but this was not the case;
- the view expressed in *Risk* and *Hayes* as to the reach of s. 47A(1)(b)(ii) was to be preferred;
- in this case, the connection between the potential provision of the benefit to Aboriginal peoples and the holding of the area in question was too remote to enliven the application of s. 47A(1)(b)(ii) —at [152] and [154].

As a result, s. 47A did not apply to the Mt Welcome pastoral lease or the Mt Welcome freehold titles and the appeal on this ground failed—at [155].

Application of s. 47B

This ground of appeal concerned whether s. 47B applied to the areas subject to temporary reserves made under the *Mining Act 1904* (WA) and continuing in force under the *Mining Act 1978* (WA)—at [157].

Section 47B provides that extinguishment of native title in relation to areas of vacant Crown land (or unallocated State land) must be disregarded, provided that (among other things) the area is not:

> [C]overed by a reservation…made or conferred by the Crown in any capacity…under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose—see s. 47B(1)(b)(ii).

The primary judge found that a temporary reserve of this kind was a 'reservation' for the purposes of s. 47B(1)(b)(ii) and, therefore, s. 47B did not apply.

On appeal, the Ngarluma and Yindjibarndi people accepted that these were 'reservations' but contended that, as these reserves were not areas 'to be used for public purposes or for a particular purpose', s. 47B did apply—at [159] and [164].

Their Honours said:

> Since the primary judge published his reasons at first instance, s. 47B has been the subject of consideration by the Full Court of this Court

> in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442… The issue in *Alyawarr*…was whether the proclamation of a townsite fell within the terms of s 47B(1)(b)(ii). Contrary to the observation of the primary judge…, the Court in *Alyawarr*…clearly did not consider that the exclusionary provision in s 47B(1)(b)(ii) should be applied 'as widely as possible'—at [165].

Following the reasoning in *Alyawarr*, their Honours said the issue must be determined solely by reference to the provisions of the Mining Act, and the instruments creating the temporary reserves, and the nature of the purposes for which the area subject to the temporary reservations were to be used—at [167] and [171].

Therefore, it was held (having regard to its beneficial purpose of s. 47B) that any limitation found in s. 47B(1)(b)(ii) should not be construed more widely than is necessary to achieve its purpose:

> The relevant use, whether for public purposes or for a particular purpose, must emerge from the reservation itself. It is "under" the reservation that the area is to be used for public purposes or for a particular purpose, as the word "which" is the relative pronoun for the reservation or other instrument made or conferred by the Crown. If the use of the word "under" was not intended to convey that the public purposes or the particular purpose could emerge in respect of the reserved area independently of the reservation itself, the words "under which" would not have been used and instead a simple conjunctive "and" would have been used. Consequently, although particular land may ultimately be used for a public purpose such as an airport site or a salt mine, such use cannot be regarded as occurring "under" a reservation authorised by s 276 of the Mining Act unless that section or the reservation made pursuant to that section and in its legislative context provide the necessary purposive character to the reservation—at [170].

After examining the legislation, their Honours concluded that:

> A reservation under s 276 of the Mining Act may lawfully be made without the area of the reservation being required for public purposes or for a particular purpose, and there is no requirement in s 276…that under a reservation the area is to be used for public purposes or for a particular purpose…In our judgment, the reservations under s. 276 of the Mining Act do not fall within the exclusionary provision in s 47B(1)(b)(ii)—at [175].

In case it was permissible to consider evidence as to the purpose for which the reserve was created (rather than confining the inquiry to the legislation), the court examined the evidence given but found it also showed that the reserves did not come within the exception provided by s. 47B(1)(b)(ii)—at [176] to [188].

Therefore, their Honours found the primary judge was wrong in concluding that s. 47B did not apply in respect of the areas the subject of reserves made under s. 276 of the Mining Act—at [189].

Were the disputed areas 'occupied' by the Ngarluma and Yindjibarndi peoples?

As a result of the finding in relation to s. 47B, a further contention, raised by the state, became relevant. After some refinements as to the precise areas in dispute, the court addressed the question of whether the requirement that, at the time of the making of the claimant application, the area of each reserve was 'occupied' by one or member of the claim group, was met—at [196] and [205].

The court said that:

- whether or not an area was 'occupied' for the purposes of s. 47B(1)(c) was a factual inquiry that must be considered in the context of each individual case;
- in this case, the primary judge did not make any findings regarding 'occupation' of the areas in dispute on appeal at the relevant time;
- the evidence considered at first instance for the purposes of 'connection' under s. 223(1) could also be relied upon to establish whether or not 'occupation' under s. 47B(1)(c) was satisfied—see [207], [210], [211] and [218], referring to *Hayes* at [162], *Western Australia v Ward* (2000) 99 FCR 316 at [449] and *Alyawarr* at [193] to [195].

It was found that most of the disputed areas were 'occupied' in the sense required and so s. 47B applied to those areas—at [235].

'Occupation' of areas within a town or a road not shown

In relation to evidence of occupation 'in the vicinity' of the township of Karratha, their Honours said that, while it may be inferred in the case of 'open' country that use of one part of that country involves the assertion being established over a wider general geographical area, the same inference could not readily be drawn in the case of a township: 'To live in a town does not itself suggest that the surrounding areas, or some of them, are also 'occupied' by the residents of the town or some of them'—at [231].

In relation to a narrow strip of land adjoining a road, their Honours found that mere travel along a road available to the public is not sufficient to establish occupation of an area adjacent to that road for the purposes of s. 47B(1)(c)—at [234], referring to Sundberg J in *Neowarra* at at [750], [752], [758] and [760].

Internal geographical limitations

The primary judge's determination limited the geographical area in which certain native title rights and interests might be exercised e.g. in the 'proximity' of river courses. The parties to the appeal agreed this finding should be overturned on appeal because recognition of native title rights and interests should not be limited only to those places where the evidence showed they were currently exercised.

Their Honours accepted that:

- current activity was, no doubt, a reflection of the more physically amenable places for those rights to be exercised
- it was not definitive of the places within the claim area where they have been, or may be, exercised;
- there may be cases where there is a real issue as to whether the determination of the particular native title right or interest should confine the area in which it may still be exercised—at [237] to [239].

However, their Honours did not think that this case was in that category and the appeal on this ground was allowed—at [240].

The existence of native title in the Karratha area

This issue went to the heart of the primary judge's reasoning as to connection and, as a result, the court set out in some length the approach taken at first instance—at [241] to [300].

Late in the appeal proceedings, the state decided to rely primarily upon oral submissions made on its behalf on the hearing of the appeal, rather than its 'extensive written submissions'. This approach was criticised because it 'embarrassed' the Ngarluma and Yindjibarndi people, necessitated the filing of further submissions after the hearing concluded and 'limited the value of the engagement' between the court and counsel for the state—at [302].

That said, and with some difficulty, the court extracted two major propositions from the state's oral submissions:

- there was no continuity in the connection of the Ngarluma people by their laws and customs with the Karratha area because there was no evidence that the Ngarluma people occupied, or were present in, that area continuously from the acquisition of European sovereignty;
- the connection required by s. 223(1) is a connection by traditional laws acknowledged and traditional customs observed. The laws or customs relating to land at the acquisition of European sovereignty specified that rights and interests in the Karratha area were held by estate groups. The primary judge should have examined whether rights and interests were continuously held in accordance with that law and custom or some modification of it—at [301] to [303].

As noted earlier, in order to understand the arguments of the state (and the Commonwealth) on this issue, it was necessary to trace the reasoning of the primary judge. The technique used at first instance was to record the claims and findings in the body of the reasons for judgment and then refer to the evidence on which the findings were based in appendices to the reasons. The primary judge then laid out the applicable legal principles and went on to consider the historical, archaeological, linguistic and anthropological evidence—at [241], [247] and [248] to [300].

The primary judge referred to the work of Professor Radcliffe-Brown, who (in 1911) reported that tribes were essentially a collection of local groups each with its own defined territory. Professor Radcliffe-Brown considered the norm in the region was ownership of specific tracts of country by groups of patrikin. The case of the state rested on these concepts. Their Honours said that the way in which the primary judge dealt with the concepts was central to the issues raised in this part of the appeal—at [272].

Another issue of importance was 'the degree of connection', meaning whether or not evidence must be led in native title cases showing that all areas under claim had been used in accordance with traditional laws and customs. The issue arose because the state contended that the Ngarluma people had not led any, or any sufficient, evidence of connection in respect of certain areas, including the Karratha area. The primary judge concluded that authorities such as *Ward* indicated that physical occupation of the land was not a necessary condition for proof of continued connection and that it was not necessary to have a presence on every part of the land or to actively use every part of the land at all times—at [293] and [294].

Continuity in the connection with the Karratha area

Regarding the state's first proposition, as identified by the court, their Honours said that:

- while it may be accepted that the presence of Ngarluma people in the Karratha area was limited as contended for by the state, it was quite another thing to conclude that there was no evidence of the necessary connection of the Ngarluma people with the Karratha area;
- whether the Ngarluma people had established the necessary degree of connection was a matter of judgment involving an assessment of a wide array of evidence;
- the trial involved 81 hearing days, including 35 days 'on country' at 76 sites, hearing from 76 indigenous witnesses, six pastoralists and 11 expert witnesses (on matters of archaeology, history, linguistics and anthropology), so any assessment by the primary judge would be a 'complex process of assimilation of a large and diverse body of material';
- the approach taken by the trial judge, as set out in their Honour's reasons, illustrated 'the scope of the exercise and the interlocking nature of many of the issues so that findings on the evidence relating to one issue are often applied to other issues as well';
- a primary judge enjoys advantages that an appellate court does not, such as the opportunity to consider, and reflect upon, the entirety of the evidence as it is received at trial and to draw conclusions from the evidence, viewed as a whole—at [304] to [310], referring to *CSR v Della Maddalena* (2006) 224 ALR 1; [2006] HCA 1 at [17].

Their Honours dismissed the state's assertions that the Karratha area formed a relatively large part of the Ngarluma claim area because, even if it did, this alone did not demonstrate error on the part of the trial judge and, in any case, it was 'an insubstantial basis for asserting that the whole process of assimilation of the evidence on the subject has miscarried'—at [311].

Karratha area on the periphery

The state contended that Karratha area was on the periphery of the claim area. The court was of the opinion that this was not, in itself, significant unless it could be shown that this peripheral geographical position reflected a lack of connection to the Karratha area. The state failed to show this, which was sufficient to dispose of this contention. Their Honours noted that, in any case, '[m]any places figure in the historical, archaeological, and anthropological evidence which are fairly close to the Karratha area'—at [312].

Estate group argument rejected

As to the state's second proposition (i.e. that connection must be found by the traditional laws and customs concerning estate groups), their Honours found it necessary to 'disentangle' a number of separate arguments—at [314].

The state contended the primary judge wrongly reasoned backwards from the present exercise of native title rights and interests. Their Honours said this contention mistook the process undertaken by the trial judge who had:

- first set out the requirements of continuity derived from *Yorta Yorta*;

- held that the native title rights and interests presently observed were exercised within an existing normative system;
- considered the question of the traditionality of laws and customs;
- identified the necessity of considering whether current rights and interests have been exercised continuously from the acquisition of European sovereignty and whether they were derived from a normative system;
- reviewed the findings from the historical, anthropological, genealogical and lay evidence—at [315] and [324] to [328].

In rejecting this contention, their Honours observed:

> One curiosity about this argument is that, whilst the state raised it in relation to the Karratha area, if it is a good argument, it would apply to the whole of the claim area because his Honour adopted the same process of reasoning in relation to the entire claim area—at [331].

The state also contended the primary judge should have made a finding that, under the laws or customs applicable at the acquisition of European sovereignty, land was held by estate groups of patrikin.

The primary judge had taken steps in his reasoning:

- identifying the views of the expert anthropologists, and found there was a controversy about whether the estate group construct was a full reflection of the laws or customs relevant to the enquiry into the issue of connection required by s. 223(1)(b);
- concluding that the controversy did not need to be resolved because an anthropological opinion could not determine the matter and so it was necessary for the court to have regard to the evidence as a whole—at [316] and [335].

Their Honours concluded that:

- the trial judge had analysed the entirety of the evidence relating to the groups which held the native title rights and interests and rejected that they were held at the estate group level;
- that approach was consistent with the authorities referred to and there was no error in his approach—at [344].

Findings on society as defined in Yorta Yorta

The state contended the primary judge failed to make findings, or correct findings, as to the society which was said to have acknowledged and observed the laws or customs continuously. Their Honours found the trial judge identified the Ngarluma people and Yindjibarndi people as groups united in their acknowledgement and observance of laws and customs continuously since the acquisition of European sovereignty. There was, therefore, no error in the trial judge's approach to the identification of society as defined in *Yorta Yorta*—at [317] and [349].

Commonwealth's position – misapplication of Yorta Yorta

The Commonwealth contended that the primary judge relied upon a different approach to continuity and change (i.e. as explained by Gaudron and Kirby JJ in the minority) to that found in the majority judgment in *Yorta Yorta*. Their Honours:

- rejected the contention that there was such a difference in *Yorta Yorta* on that point;
- found that the trial judge did not assume that the acknowledgement and observance of laws and customs had been continuous but, rather, arrived at this conclusion by an assessment of all the evidence—at [352], [359] and [361].

Description of native title holders

After considering both a proposed description of the native title holders proffered by the state and the description of native title holders adopted in other cases, the primary judge arrived at the following descriptions of 'Ngarluma People' and 'Yindjibarndi People' in the determination:

> 'Ngarluma People' are Aboriginal persons who recognise themselves as, and are recognised by other Ngarluma People as, members of the Ngarluma language group.
>
> 'Yindjibarndi People' are Aboriginal persons who recognised themselves as, and are recognised by other Yindjibarndi People as, members of the Yindjibarndi language group.

On appeal, the state's argument (adopted by the Commonwealth) was that s. 225(a) required a more precise description of the native title holders and must be read with s. 61(4). Their Honours:

- rejected the contention that s. 225(a) required that the description of the native title holders must stipulate a method by which individual group members could be ascertained;
- found no argument on the facts to persuade the court that the description failed to comply with that section—at [373] and [375].

Prescribed bodies corporate

The primary judge made one determination of native title which set out the separate rights and interests of each of the Ngarluma and Yindjibarndi groups of native title holders over separate areas, apart from a small area of overlap in the vicinity of the Chichester Ranges. Orders were then made that one prescribed body corporate (PBC) would hold the native title rights and interests of the Yindjibarndi people in trust for the Yindjibarndi people and a second PBC would hold the rights and interests of the Ngarluma people in trust for the Ngarluma people.

On appeal, the Commonwealth contended that the scheme of the NTA demonstrated that Parliament intended there would be only one PBC for each determination area.

In their Honours' view, the Commonwealth's contentions did not suggest that the plain meaning of the sections in the context in which they appear should not apply and so this ground failed—at [381] to [386].

Decision

Most of the grounds of the appeal raised by the Ngarluma and Yindjibarndi peoples were upheld (i.e. with the exception of the ground in relation to s. 47A). The court was willing to make orders in the terms proposed by the parties on what were called the 'Extinguishment by Grant of Pastoral Leases' and 'Internal Geographical Limitations' issues and allowed the parties 28 days (or an extension with leave) to submit the final form of orders which give effect to their Honours' reasons—at [388] and [390].

No order was made as to costs—at [392].

Appeal by Wong-Goo-TT-OO – Full Court

***Dale v Moses* [2007] FCAFC 82**

Moore, North and Mansfield JJ, 7 June 2007

Issue

The main issue in this appeal to the Full Court of the Federal Court was whether the primary judge was right in deciding that the appellants, as a group (called the Wong-Goo-TT-OO), did not hold native title rights and interests. In a joint judgment, the court dismissed the appeal.

Background

In 2005, his Honour Justice Nicholson made a determination, subject to ss. 94A and 225 of the *Native Title Act 1993* (Cwlth) (NTA), recognising the native title rights and interests of the Ngarluma and Yindjibarndi peoples in the West Pilbara in Western Australia—see *Daniel v Western Australia* [2005] FCA 536.

At trial, and as required by s. 67, to the extent of any overlap with the area covered by the Ngarluma and Yindjibarndi peoples' application, orders were made to ensure that the Wong-Goo-TT-OO's application (among others) was dealt with in the same proceedings. The principal reasons for judgment in relation to the rejection of the Wong-Goo-TT-OO's claim were given in *Daniel v Western Australia* [2003] FCA 666 (*Daniel*, summarised in *Native Title Hot Spots* Issue 6).

Area claimed

The Wong-Goo-TT-OO claim area was divided into:

- a 'core' area, in which Wong-Goo-TT-OO claimed native title rights and interests to the exclusion of all others, which consisted of the *Thaluntha* estate (an area west of the Nickol River), the *Pularra* estate (between the Nickol and George Rivers) and the Dampier Archipelago;
- a 'non-core' area, in which they claimed shared native title with the Yindjibarndi People.

Claim group

The Wong-Goo-TT-OO claim group was made up of the Hicks, Ramirez and Douglas families, which were said to form a cognatic kin group. It was contended that:

- the Wong-Goo-TT-OO claim group was differentiated from the Ngarluma and Yindjibarndi peoples; and
- there was a separate and distinct law which gave rise to a separate and distinct native title west of the George River, an argument that rested primarily on the evidence of Tim Douglas, one of the Wong-Goo-TT-OO claimants.

Their claim to the Burrup was based upon a transmission of native title in the 1930s and early 1940s to Jack Hicks from two Aboriginal men, called Maitland and Island, who the Wong-Goo-TT-OO said were the last of Yaburara i.e. the tribe that lived on the Burrup at that time.

In final submissions at trial, the Ngarluma and Yindjibarndi people asserted that some of the members of the Wong-Goo-TT-OO claim group were included in their claim group, a proposition the primary judge was prepared to entertain.

Summary of primary judge's findings:

The primary judge dismissed the Wong-Goo-TT-OO's claim because:

- as a group, they had not shown they hold native title (a finding that was without prejudice to any rights that members of their claim group may have as Ngarluma or Yindjibarndi people);
- the Wong-Goo-TT-OO native title claim group did not form a single cognatic kin group and had not made out a claim to be a traditional group.

The primary judge also found that the Wong-Goo-TT-OO claimants could not establish continuity of existence as a group since sovereignty because:

- there was no evidence that the families whose history could be traced back to sovereignty had any common relation or purpose, other than their familial commonality (if it could be made out) before the constitution of the Wong-Goo-TT-OO group for the purposes of making a claim under the NTA;
- it could 'not be safely inferred that the actions of any one family were taken on behalf of the three families now constituting the group'.

Since their claim to be a traditional group was not made out, the primary judge found they could not establish connection, as a group, for the purposes of s. 223(1). Nor could they establish that they held native title rights and interests as such a group.

The claims in relation to connection to the *Thaluntha* area, based on the Hicks family's association, were rejected because:

- Jack Hicks was Yindjibarndi (a people whose traditional country did not include the *Thaluntha* area);
- Wilfred Hicks gave evidence that he had not asserted his rights to the *Thaluntha* area 'because he had been over-run by others';
- connection to the *Thaluntha* area from sovereignty had not been maintained.

The claim that the Wong-Goo-TT-OO were different from the Ngarluma and Yindjibarndi peoples failed because (among other things) the primary judge found that:

- there was a lack of reciprocity of recognition by the witnesses for Ngarluma and Yindjibarndi as to the status, authority and traditional connection of Tim Douglas and Wilfred Hicks;
- while Tim Douglas was 'unquestionably a witness of subjective truth…he could not be relied upon in making objective findings of fact';
- the recall evidence of Kenny Jerrold, a senior law man of the Yindjibarndi people (now deceased) should be accepted 'circumspectly';
- the evidence of a distinct *Bidara/bundut* law practised by the Wong-Goo-TT-OO, which was the basis for the claimed distinction with them and the Ngarluma and Yindjibarndi peoples '[could] not be accepted' because, apart from Mr Douglas, the other Wong-Goo-TT-OO claimants did not practise the distinct law so that it was not being practised in their core area;
- the Hicks and Ramirez claimants had not been initiated in accordance with *Bidara* law and the evidence established that Mr Ramirez did not acknowledge traditional laws and observe traditional customs in any case.

The Wong-Goo-TT-OO's claim to the Burrup, based upon an alleged transmission in the late 1930s and early 1940s from two men from a different native title 'society', was rejected, with the primary judge noting that, even if was assumed that the transmission did take place under the law and custom of whatever society Maitland and Island came from:

> [T]he assumption of that law and custom by...the Wong-Goo-TT-OO…would be a later adoption by a new society…Adoption by…[the Wong-Goo-TT-OO] through the Hicks family, if it occurred, had the consequence that the laws and customs so adopted were not laws and customs which could then be properly described as being the existing laws and customs of the earlier society; rather they owed their life to the later transmittee society. Consequently, the transmittee society…[the Wong-Goo-TT-OO] cannot establish their continuity from sovereignty under those laws and customs because to do so would involve them relying impermissibly on another society—at [383] of *Daniel*.

Having found no transfer either at law or in fact, the primary judge went on to find that:

- connection to the Burrup had not been maintained, since continued acknowledgement or observance of the traditional laws and customs of whatever native title holding group or society Maitland and Island belonged to had not been shown;
- even if the evidence of the Wong-Goo-TT-OO was accepted as establishing traditionality of their law and custom, the evidence did not establish a continuing connection to the Burrup from the 1930s to the present.

The appeal

The Wong-Goo-TT-OO appealed against the decision at first instance, alleging it involved both a wholly inadequate appraisal of the Wong-Goo-TT-OO's evidence and a misdirection of what was required to establish the elements of native title under s. 223(1) of the NTA. The State of Western Australia cross-appealed.

The appeal court noted that:

> The notice of appeal…identified ten grounds... Most of the grounds incorporated a number of alleged errors. The significance of each alleged error was not entirely clear from the appellants' oral or written submissions. Similarly, it was often not readily apparent how the grounds were said to amount to appealable error, whether separately or together—at [35].

The court was of the view that these grounds could be 'usefully…understood as directed towards three main issues', which were that that the primary judge did not accept that the Wong-Goo-TT-OO claim group:

- was a cognatic kin group with continuous existence which had maintained connection with their core area since sovereignty;
- was separate and distinct from the Ngarluma and Yindjibarndi peoples;
- held native title to the Burrup—at [36].

However, after outlining the submissions of the principal parties on each of these issues at [37] to [105], the court considered the appeal grounds separately as outlined below.

Fact finding and the 'truth'

The primary judge concluded that that Tim Douglas, for the Wong-Goo-TT-OO, was 'unquestionably a witness of subjective truth'. However, the primary judge said that:

> [A]part from internal contradictions in his evidence, it became apparent in the course of the trial that, considered in the context of all the evidence…, he could not be relied upon in making objective findings of fact. His fervent belief in his subjective views stood out as unique and generally unsupported by other evidence—at [313] of *Daniel*.

In the Full Court's view, the primary judge was:

> [N]ot prepared to accept Mr Douglas' evidence as proof of the existence of facts which required objective proof. It was no different to saying, as trial judges often do, that while they accept a witness genuinely believed what he or she said had occurred was what had in fact occurred that their belief was misplaced. The account given by such a witness reflects that witness's conviction about what happened but not what in fact happened. It is true that his Honour did not explain in detail why he reached this conclusion nor did he set out the other evidence

> he accepted which pointed to that adverse conclusion. While it is something his Honour might have done…in a judgment of over 400 pages dealing with a multitude of issues, some economy in expression and reasoning was unsurprising. In any event, the conclusion expressed by his Honour reflected the singular advantage he had of seeing Mr Douglas and other witnesses give evidence as well as hearing all the evidence—at [107].

The court was of the view that there were only two possible matters of substance to which the appellants pointed that might demonstrate that the primary judge erred in rejecting Mr Douglas' evidence: reliance on Mr Douglas' evidence in some areas and the fact that Mr Douglas' evidence was said to be corroborated. However, it was necessary for the appellants to demonstrate that there was 'cogent and compelling evidence' establishing that the primary judge's conclusion concerning the credibility of Mr Douglas was wrong and they had not done so—at [110].

Misapprehension of the meaning and probative value of Mr Douglas' evidence

The appellants argued that the primary judge misapprehended the meaning and probative value of Tim Douglas' evidence regarding the practice of traditional laws and customs for the Roebourne area. The court commented that ground two failed because 'that evidence was the focus of' the comments at [313] of the decision at first instance quoted above in relation to the first ground of appeal—at [110].

Error in the treatment of Mr Douglas' evidence

The appellants argued that, if the primary judge been wrong in his treatment of the evidence of Tim Douglas, he should have made certain findings, including that the Wong-Goo-TT-OO held native title in their core claim area. The court found that the first and second grounds of appeal having failed, this ground could not be made out either—at [111].

Error in the interpretation of Mr Douglas's evidence

The fourth ground of appeal concerned the primary judge's observations that, if Mr Douglas' evidence was accepted, neither the Hicks nor Ramirez claimants would have any rights in the core area because they had not been initiated. The court was of the view that this ground raised a false issue because Mr Douglas' evidence was generally not accepted:

> All the primary judge appeared to be doing in making the observation was highlighting an inconsistency, or tension, in the appellants' case. It was a legitimate comment...There was evidence which would sustain a finding that Dallas Hicks and his sons and Ernie Ramirez and his son had not been initiated and without initiation their traditional rights as a land owner were incomplete— at [113].

Error in the treatment of recall evidence

The fifth ground of appeal was that the primary judge erred in his treatment of the recall evidence of Kenny Jerrold, a Yindjibarndi man who, when recalled by counsel for the Wong-Goo-TT-OO was cross examined about (among other things) a letter he had apparently signed that was sent to the Commonwealth Minister for Aboriginal Affairs.

The court noted that:

> At the outset of the cross examination it was apparent that Mr Jerrold had not read the letter even though he had subscribed to it. This set the tone for the cross examination and further examination of the witness who accused other witnesses, adverse to the appellants' case, of lying. There was no reason why, in the circumstances, the primary judge was obliged to treat this evidence uncritically. It was well open to the primary judge to indicate that this evidence given by this witness at this time should be treated circumspectly and no error arises from him having done so and, in substance, rejecting it—at [114].

Reciprocation and recognition

The sixth ground was that insufficient weight was given to the alleged reciprocal recognition of status and authority of Tim Douglas and Wilfred Hicks in their traditional country west of the George River. The court found that:

> The last particular in this ground concerns the observation of the primary judge…that in the

case of the evidence of Wilfred Hicks regarding the Thaluntha area, it had spoken of him not having asserted his rights because he had been overrun by others. The evidence his Honour was referring to was evidence elicited from Wilfred Hicks in chief. He gave evidence that he had full rights to the core area…However he qualified this evidence by saying…that the he did not exercise what he described as his full rights (to tell people which way they are allowed to go and where they are not allowed to go) because he had been overrun by other people. The word "overrun" was volunteered by the witness. He repeated the observation a little later and a clear import of his evidence was that he did not exercise the rights he was asserting he had. The primary judge was entitled to view this evidence as not supporting the appellants' contention that they held and exercised a native title right to possess, occupy, use and enjoy the land in question—at [115].

Connection and continuity

The seventh ground of appeal concerned the claim to constitute a group capable of holding native title, based on a familial relationship between the three families. The court noted that, while the primary judge accepted the Wong-Goo-TT-OO as a group for the purposes of standing to make their application, that said nothing about their claim to hold native title. The primary judge said that whether the requisite relationship in fact existed was a matter to be determined on the evidence and, ultimately, did not accept that the Wong-Goo-TT-OO claimants had discharged the evidentiary onus of establishing that relationship—at [116].

The court was of the view that:

- on the evidence, it was open to the primary judge to make the finding that there was no genealogical connection between the Ramirez family and the other two families, although there was some anthropological evidence of a link;
- the finding that the Wong-Goo-TT-OO were not a cognatic kin group 'was destructive, at a fundamental level', of their case as to how they presently, and had since sovereignty, constituted a group possessing and exercising native title rights and customs over their claim area—at [117].

The Wong-Goo-TT-OO also alleged that the primary judge was wrong in not finding that the Ramirez family were members of the group based on their self-identification as members and their acceptance as members by the group. The appellants also argued that his Honour could have concluded that the Ramirez applicants were not members of the group and still found that the group had continuity back to sovereignty—at [118].

As the appeal court understood it:

- these issues were not raised at trial;
- no separate native title application brought by the Douglas and Hicks families seeking a determination of native title;
- in any case, other findings stood against these alternative arguments—at [118].

Given the rejection at first instance of 'a more fundamental aspect' of the Wong-Goo-TT-OO's case referred to in the previous paragraphs, it was not necessary to address the subsidiary issue raised concerning whether the Hicks family had maintained a connection to the *Thaluntha* area—at [119].

Transmission of rights and interests

The court summarised the primary judge's findings in relation to the Burrup as follows:

- the evidence did not establish that the Wong-Goo-TT-OO were a society in the relevant sense i.e. in the context of s. 223(1);
- there was no direct evidence to support a finding that the traditional laws and customs in issue included a right of transmission;
- the evidence did not support a finding that there had, in fact, been a transmission of native title to the Burrup;
- even if a transfer had occurred, as a matter of both fact and law, the Wong-Goo-TT-OO would need to establish that such a transfer was permitted by, or was consistent with, the traditional law or custom of both the Wong-Goo-TT-OO and of the society to which the transferred land belonged and no such evidence was given—at [120] to [121].

Transmission of native title from one society to another

On appeal, it was argued that the primary judge erred in applying the principles discussed in *Yorta Yorta* at [44], where Gleeson CJ, Gummow and Hayne JJ spoke of the 'efficacy of rules of transmission of rights and interests'. The court concluded that the members of the High Court's discussion in *Yorta Yorta* was:

> [P]robably directed to intergenerational transmission of rights and interests under traditional laws within the society possessing rights and interests in the land under traditional laws and customs at the time of sovereignty. The observations of the members of the High Court do not establish a principle of the type apparently relied on by the appellants, namely that where the traditional laws and customs of one society provide for the transmission of rights and interests in land recognised by those laws and customs, then transmission to another society can be effected and the acquisition of the transferred rights in interest can ultimately be recognised as rights and interests of the transferee society for the purposes of the NTA. The primary judge was probably correct in rejecting this contention. However it is not an issue which it is necessary for us to explore as the legal proposition, if correct, would only be engaged and operate in the appellants favour if certain matters of fact were established. In the present case, the required factual foundation is lacking in several important respects—at [120].

Succession and judicial notice

On appeal, it was also argued that the existence of the right should be inferred from all the evidence and the fact that succession was well-known in traditional Aboriginal law and custom within Australia. However, the court noted that

> [T]he appellants bore the burden of establishing the existence of a right of transmission… It was not a matter about which, in effect, judicial notice could be taken. Additionally, the evidence relied on to support the inference that a right of transmission existed was identified at a high level of generality. The appellants have not demonstrated that the primary judge erred in concluding that the appellants had not established the existence of a right of transmission— at [121].

Transmission as a matter of fact

It was found that the appellants had not demonstrated that the primary judge was wrong to conclude that they had not established a transfer as a matter of fact because:

- the evidence of the central witness on this point, Dallas Hicks, was 'equivocal' as to whether there had been a transmission of rights to his father and whether the Burrup had been his father's country before his father met Maitland and Island;
- the closest Mr Hicks came to giving direct evidence that transmission had, in fact, occurred was by agreeing to propositions put to him in re-examination which embodied that conclusion—at [122].

It was found that the evidence relied upon by the appellants did not compel the conclusion that there had been a transmission and the primary judge was entitled to conclude that it was not demonstrated that transmission had occurred—at [122].

Decision

The Wong-Goo-TT-OO appeal was dismissed with no order as to costs—at [123].

Party status for PNG national – appeal to Full Court

Gamogab v Akiba [2007] FCAFC 74

Kiefel, Sundberg and Gyles JJ

Issue

This case deals with an appeal to the Full Court of the Federal Court against a decision to dismiss an application to be joined as a party to a claimant application known as the Torres Strait Regional Seas Claim—see *Akiba v Queensland (No 2)* [2006] FCA 1173 (*Akiba No 2*, summarised in *Native Title Hot Spots* Issue 21).

Background

Pende Gamogab, a citizen of Papua New Guinea (PNG), applied pursuant to s. 84(5) to be joined as a party to the Torres Strait Regional Seas Claim. Section 84(5) provides that:

> The Federal Court may at any time join any person 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 and it is in the interests of justice to do so.

In *Akiba No 2*, French J (the primary judge) concluded that Mr Gamogab had an interest that might be affected by a determination in the Torres Strait Regional Seas Claim. The finding that the Mr Gamogab had such an interest was uncontentious on appeal.

The primary judge then considered whether or not to exercise the discretion available under s. 84(5) to join Mr Gamogab in the light of:

- 1978 Australia-PNG Treaty concerning sovereignty and maritime boundaries in the area between the two countries (the treaty), the *Torres Strait Treaty (Miscellaneous Amendments) Act 1984* (Cwlth), the *Torres Strait Fisheries Act 1984* (Cwlth) and an article on the history contents of the treaty;
- the effect of a determination of native title made pursuant to s. 225 of the NTA and the 'defensive' use of a claim to hold native title in the absence of an application under s. 61(1);
- the concept of 'interests' for the purposes of joinder under the NTA— *Akiba No 2* at [18] to [28] and [37] to [49], referring to *Kokatha Native Title Claim v South Australia* (2005) 143 FCR 544; [2005] FCA 826 (summarised in *Native Title Hot Spots* Issue 15) at [24] and *Byron Environment Centre Inc v The Arakwal People* (1997) 78 FCR 1 (*Byron*).

The primary judge decided, in the exercise of discretion, that joinder should be refused, largely because of implications arising out of the treaty.

The village of Kupere, where Mr Gamogab lived, was not one of the 14 'treaty villages' whose inhabitants are accepted, under an exchange of notes between Australia and Papua New Guinea (PNG), as beneficiaries of the treaty. This meant that he was not recognised as a 'traditional inhabitant' with traditional customary rights under the treaty. French J said:

> There is a risk…that the joinder of Mr Gamogab will bring to bear on these proceedings debates between village communities in PNG about their respective interests in the Torres Region Seas Claim area. These are matters best left to the courts of PNG or to its executive government to resolve by agreement with the Australian government under the Treaty. As a matter of discretion I consider that the joinder of Mr Gamogab, notwithstanding his claimed interest, is undesirable. I consider that attention should also be given to the position of other PNG nationals who have been joined as parties—*Akiba No 2* at [48].

Assuming that the primary judge's decision was interlocutory, in which case leave to appeal to the Full Court was required, it was granted—see *Akiba v Queensland (No 3)* [2007] FCA 39 **(***Akiba No. 3*, summarised in *Native Title Hot Spots* Issue 24).

Majority decision on appeal

His Honour Justice Gyles (with his Honour Justice Spender agreeing) was of the view that the exercise of the discretion miscarried because the primary judge:

- misdirected himself as to the nature of the discretion being exercised;
- failed to give any, or any proper, consideration or weight to the statutory intention that all parties whose interests may be affected should be before the court at the one time to be dealt with by the one determination of native title;
- did not give any consideration to imposing terms which could 'cure' the possible risk attaching to joinder—at [50] and [64].

Gyles J was of the view that the primary judge:

- 'appeared to consider that the discretion to join or not to join a party was, in effect, at large', which was wrong;
- failed to consider whether any risk arising from joinder of Mr Gamogab could be dealt with by imposing conditions upon joinder that prevented Mr Gamogab from relying upon inappropriate matters—at [56].

After setting out the relevant provisions found in ss. 66 and 84, Gyles J noted that Mr Gamogab could have been joined to the proceedings as of right 'if he had applied in time' i.e. within the period prescribed by s. 66(10). This, it was said:

[I]ndicate[s] that the principal issue which arises under s 84(5), assuming the threshold as to affectation of interests is reached, is to assess the prejudice occasioned to the other parties and the Court by the delay in applying to be joined. It would be odd in this day and age if delay in applying, in itself, were to radically prejudice a potential party. That view is consistent with the "in rem" nature of the proceeding (see s 225)—at [59].

Gyles J noted that:

- joinder of parties is a necessary aspect of the management of all litigation and there are always rules of court governing that topic;
- it is fundamental that an order which directly affects a third person's rights or liabilities should not be made unless the person is joined as a party;
- once the nature of the statutory discretion is understood, the risk referred to by the primary judge could hardly outweigh the evident statutory purpose of having all parties, whose interests may be affected, before the court at the one time so that they could be covered by the same determination of native title;
- no finding was made that there was any prejudice to any party by reason of a late application for joinder—at [60] to [61], referring to Order 6 of the Federal Court and *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410.

Conditions could be imposed

His Honour noted (among other things) that:

- the docket judge could control the proceeding to prevent truly irrelevant or inappropriate arguments or material being advanced by a party and the Commonwealth (as a party to the proceedings) should be in a good position to judge that situation;
- an appropriate term could have been constructed imposing conditions upon a grant of leave to be joined;
- the management of a large native title claim is difficult, with the number of parties entitled to be joined being one contributing factor;
- that said, there was good reason for joinder because the interests of the parties may be affected by a determination in the proceedings;
- while the width of the construction of 'interests' under s. 84 had a 'significant' impact, the remedy to any case management difficulties it gave rise to did not lie in excluding persons whose interests may be affected 'in the exercise of an unconstrained discretion by individual judges';
- the very width of the interests that may be affected by a determination indicated that every party was not to be treated in the same way in the management of the case and the docket judge had considerable discretion as to the extent to which a party was permitted to participate in the process;
- Mr Gamogab accepted that there would be limitations on what he could rely upon if joined—at [63] and [65], referring to *E I Du Pont De Nemours & Co v Commissioner of Patents (No 5)* (1989) 87 ALR 491 and *Byron*—at [63] and [65].

Conclusion

Gyles J noted that, while there were well known limits upon an appeal court intervening in relation to the exercise of judicial discretion on a matter of practice and procedure, a decision to exclude a party is a particular kind of decision on a matter of practice and procedure. In this case, the appeal should be allowed because the exercise of discretion by the primary judge miscarried—at [64].

The discretion having miscarried, it was found that 'it is clear that joinder should have been permitted'. While it was open to the Full Court to make an appropriate order, it was preferable that the docket judge 'consider whether terms should be imposed upon the joinder and, if so, what those terms ought to be'—at [66].

Decision

The majority decision was to allow the appeal, set aside the orders dismissing Mr Gomogab's application for joinder and remit the matter to French J. As to costs, it was noted that s. 85A of NTA, which did not apply 'in terms' to an appeal, did refer to 'proceedings' in the Federal Court and so it appeared there was no scope for a costs certificate to be granted under the *Federal Proceedings (Costs) Act 1981* (Cwlth)—at [49] to [50] and [66] to [67].

Dissent
Her Honour Justice Kiefel dissented, finding that that appeal should be dismissed with no order as to costs. Her Honour's reasons are not summarised here—see [1] to [48].

Determination of native title – Strathgordon Mob

***Malachi v of Queensland* [2007] FCA 1084**

Greenwood J, 26 July 2007

Issue
The issue was whether the Federal Court should make a determination by consent recognising the existence of native title in respect of 118,000 hectares bounded in part by sections of the Edward and Coleman Rivers of Cape York Peninsula on the western side of Cape York, described generally as Strathgordon—at [2].

Background
A claimant application seeking a determination of native title over the Denman Pastoral Lease was lodged in 1997 (QC97/17) under the *Native Title Act* 1993 (Cwlth) (NTA). This application was withdrawn and a further claimant application filed on 29 May 2003. This is the claim dealt with here—at [1] and [11].

Native title claim group
The court noted that the native title holders are a group within a broader regional society whose relationships extend from the Kendall River in the north to the Mitchell River in the south. They are affiliated to the determination area by laws and customs that are shared by other Aboriginal people in the region, the majority of whom now reside in the communities of Aurukun, Pormpuraaw and Kowanyama.

The claimants are the descendents of the Bakanh, Wik Iyeny and Olkol/Olkola language groups. The ethnographic evidence showed that in the claim area parcels of land were and are held by descendents (lineages) based on patrifiliation (and occasionally by adoption) properly described as clans. Six clan parcels or estates were identified but inter-marriage had created a network of linked families. Accordingly, the claimants sought recognition of native title in area on behalf of the interlinked 'Strathgordon Mob'—at [4] to [7].

Court's power to make a determination
After reviewing the historical and anthropological evidence, his Honour Justice Greenwood was satisfied that the claimants had established all of the elements required by s. 225 of the Act—at [38].

The rights and interests were characterised as 'core and contingent interests' as parts of an integrated and complimentary system of land tenure for distributing rights (entitlements) and responsibilities in connection with the land across an Aboriginal population occupying a particular area or region—at [27].

Greenwood J was satisifed that the agreed determination of native title was within power and that it was appropriate to make it by consent of the parties. The court noted that, despite s. 87A, inserted when the *Native Title Amendment Act* 2007 (Cwlth) commenced on 14 April 2007, the agreement proposed a determination of native title for the entirety of the claim area and so the appropriate source of the court's power was s. 87 of the NTA—at [19].

The native title holders
The native title is held by the Strathgordon Mob, being:

- the descendants of certain named ancestors; and
- those persons adopted by those descendants in accordance with the traditional laws acknowledged and traditional customs observed by those descendants.

Determination of native title
Native title is recognised in the determination area. In relation to:

- land, it consists of the right of possession, occupation, use and enjoyment to the exclusion of all others; and
- water, it consists of the non-exclusive rights to hunt and fish in or on, and gather from, water for the purpose of satisfying personal, domestic and non-commercial communal needs and the non-exclusive right ton take and use water for the purpose of satisfying personal, domestic or non-commercial communal needs.

Prohibitions and restrictions
No native title exists in 'minerals' as defined in the *Mineral Resources Act* 1989 (Qld) and 'petroleum' as

defined in the *Petroleum Act* 1923 (Qld) and the *Petroleum and Gas (Production and Safety) Act* 2004 (Qld).

The native title is subject to, and exercisable in accordance with, the laws of the State of Queensland and Commonwealth and the traditional laws acknowledged and traditional customs observed by the native title holders.

Application of s. 47A(1)(b)(ii)

The Denman Pastoral Lease was purchased by the Indigenous Lnd Corporation on behalf of the traditional owners in October 2000. The lease, limiting the use of the land to pastoral purposes, was transferred to the *Poonko Strathgordon Aboriginal Corporation*. The parties agreed that s. 47A applied to the area subject to the lease.

Prescribed body corporate

The native title is not to be held in trust and the Thaa-Nguigaar Strathgordon Aboriginal Corporation (Aboriginal Corporation) is to:

- be the prescribed body corporate for the purposes of s 57(2) of the NTA; and
- perform the functions mentioned in s 57(3) of the NTA after becoming a registered prescribed body corporate.

Determination of native title – Ngarla People

***Brown v Western Australia* [2007] FCA 1025**

Bennett J, 30 May 2007

Issue

The issue in this case was whether the Federal Court should make a determination under the *Native Title Act* 1993 (Cwlth) (NTA) recognising the existence of native title over certain areas subject to several claimant applications made on behalf of the Ngarla.

Background

The parties agreed to a determination being made recognising the existence of the Ngarla's native title. The Strelley Pastoral Pty Ltd (which included Aboriginal people who have a claimant application on foot that overlaps part of the Ngarla application) consented to the making of the determination on the basis that the order made, and any findings of fact or conclusions of law implicit in it, are confined to the determination area as defined in this case i.e. determination area A.

Power of the court – ss 87 or 87A?

A question arose as to the applicable provision of the NTA. Amendments to the NTA made on 15 April 2007 inserted s. 87A, which applies where a consent determination is sought over only part of the area covered by a native title determination application. The court can now rely on s. 87 only if satisfied that the determination is not one that could be made under section 87A. It was found that:

- the exercise of the discretion available s. 87A imports the same principles as those applying to the making of a consent determination of native title under s. 87;
- the discretion conferred by ss. 87A and 87 must be exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose of the NTA;
- the NTA is designed to encourage parties to take responsibility for the resolution of the proceedings, without the need for litigation and the court's power must be exercised flexibly and with this purpose in mind—at [22] to [23].

The court was, therefore, satisfied both that:

- a determination of native title in the terms set out by the parties was within the power of the court;
- it was appropriate to do so, pursuant to s. 94A and either ss. 87A or 87(1)(a)(ii) and 87(1)(b) —at [25] to [29].

Determination

Native title was recognised in relation to that part of determination area A landward of the lowest astronomical tide (LAT) of the mainland coast. Native title was not recognised in relation to any area seaward of the LAT—at [3].

Trustee prescribed body corporate determined

The Ngarla people were determined to be the common law holders of native title. Their native title rights and interests are held in trust by the Wanparta Aboriginal Corporation, a prescribed body corporate for the purposes of s. 56—at [4].

Rights and interests recognised
The nature and extent of the native title rights and interests recognised are non-exclusive rights to:

- access and camp;
- take flora, fauna, fish, water and other traditional resources (excluding minerals);
- engage in ritual and ceremony;
- care for, maintain and protect from physical harm, particular sites and areas of significance to the common law holders— at [5(1)].

Sections 47A and 47B apply in relation to certain areas—at [7].

Qualifications
The native title rights and interests do not confer:

- possession, occupation, use and enjoyment on the common law holders to the exclusion of all others;
- a right to control the access of others.

They are exercisable in accordance with the traditional laws and customs of the common law holders for personal, domestic and non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes) and are subject to, and exercisable in accordance with, the laws of the state and the Commonwealth, including the common law—at [8].

Rights to minerals and petroleum as defined in state legislation are not included but the right to take and use ochre, to the extent that ochre is not a mineral pursuant to the Mining Act 1904 (WA), was recognised—at [6].

Relationship between native title and other rights and interests
The relationship between the native title rights and interests and the other rights and interests is that:

- to the extent that any of the other rights and interests is inconsistent with the native title rights and interests, the native title rights and interests continue to exist but have no effect in relation to the other rights and interests to the extent of the inconsistency during the currency of the other rights and interests; and otherwise,
- the existence and exercise of the native title rights and interests does not prevent the doing of any activity required or permitted to be done by, or under, the other rights and interests and the other rights and interests, and the doing of any activity required or permitted to be done by or under the other rights and interests, prevail over the native title rights and interests and any exercise of the native title rights and interests, but do not extinguish them — at [10].

Determination of native title – Gunditjmara People

***Lovett v Victoria* [2007] FCA 474**

North J, 30 March 2007

Issue
The issue in this case was whether the Federal Court should make a determination of native title by consent in favour of the Gunditjmara People pursuant to s. 87(1) of the *Native Title Act 1993* (NTA).

Background
His Honour Justice North described the application area as being bounded on the west by the Glenelg River, to the north by the Wannon River and extending as far east as the Shaw River. Lady Julia Percy Island and coastal foreshore between the South Australian border and the township of Yambuk were also included. The application for a determination recognising native title covered Crown land and waters, including state forests, national parks, recreational reserves, river frontages and coastal foreshores.

The original claimant application was filed on behalf of the Gunditjmara People in August 1996. A second application was later made to cover areas excluded from the first. There were 170 respondents, including mining, farming, local government, fishing, beekeeping, and recreational interest holders—at [1] and [2].

In January 2007, orders were made dividing the application area into Part A and Part B, with the latter being an area over which the Framlingham Aboriginal Trust had responsibilities under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth). The determination made in this case does not include Part B.

Procedural history
In December 2002, North J referred the claim to the National Native Title Tribunal for mediation.

The Gunditjmara People then supplied the state with anthropological assessments, genealogies and other evidence to support their claim to native title. In February 2005, after assessing the material, the state decided it was not persuaded to agree to a consent determination recognising native title—at [13] to [15].

As a result, North J held an early evidence hearing in March and April 2005, where evidence was given on country by several witnesses. At the conclusion of the hearing, his Honour noted that he was surprised that negotiations had not proceeded more quickly in view of the strength of the evidence that had been led, which included evidence of:

- the development of fishing technology, including the existence of fish traps and remains of house sites, suggesting a long standing connection with the country visited;
- the witnesses' personal heritage and that of the Gunditjmara People;
- Commonwealth and state government sources recognising the Aboriginal heritage of the area, including that part of the area was placed in the Commonwealth's National Heritage List 'less than 12 months before the early evidence hearing'—at [17] and [18].

North J concluded that:

> [I]n light of what I have seen, and in the view I have formed in a preliminary way of the strength of the applicant's case, I am not prepared to see this case meander on for very much longer—at [18].

Intensive negotiations followed the hearing but, despite substantial progress, no agreement had been reached by mid-2005 and so the court shifted the focus to preparation for trial, ordering a conference of experts (see O34A r3 of the Federal Court Rules) to be convened by two deputy registrars of the court. This led the claimants and the state to ask the deputy registrars to conduct a more general mediation—at [19] to [24].

In November 2005, the state offered to settle the claim and recognise the Gunditjmara People's native title. The offer was put to the Gunditjmara People and, by February 2006, resolution in principle was achieved. As a result, other respondents were brought into the mediation, eventually leading to an agreement to apply to the court for a an order setting out a determination of native title.

Power to make the orders sought – s. 87

North J noted that s. 87 must be construed in the context of the NTA as being designed to encourage parties to take responsibility for resolving proceedings without the need for litigation: 'The power [to make the orders] must be exercised flexibly and with regard to the purpose for which the section is designed'—at [34] to [36].

His Honour said that:

- the primary considerations were whether there was an agreement and whether it was freely entered into on an informed basis;
- the court was not required to examine whether the agreement was grounded on a factual basis that would satisfy the court at a hearing of the application;
- the court must be satisfied that the state party has taken steps to satisfy itself that there is a credible basis for an application—at [38].

Although the court was not privy to what happened in mediation, North J was able to confirm the contention of the parties that the agreement reached between the parties was genuine because the court had exercised very close supervision and control over the process—at [42].

The combination of the documentary evidence, limited evidence from several senior Gunditjmara people and visits to important sites satisfied North J that it was appropriate to make the orders sought—at [41] to [45].

Further, it was found that s. 94A, which requires the order to set out the details of the matters mentioned in s. 225 of the NTA, was satisfied and so the terms of the order were within the power of the court—at [44] and [45].

Decision

His Honour decided that a determination of native title should be made in terms of the agreement, going on to note that:

> This day marks…a special achievement for the Gunditjmara People. They have won another battle to cement their place in this country

and in history. But their success is a shared victory. By doing justice to the Gunditjmara People, the State, the Commonwealth and the other respondents have taken a step to right past wrongs and lay a basis for reconciliation between indigenous and non-indigenous Australians—at [55]

Connection guidelines

His Honour took the opportunity to criticise the 'overly demanding nature of the investigation conducted' by some states as reflected in 'complex connection guidelines':

> The Act does not intend to substitute a trial… conducted by State parties for a trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application. The Act contemplates a more flexible process than is often undertaken in some cases. These comments relate to the requirements of s 87, and are not intended to reflect on the conduct of the State in this case—at [38].

Nature of the native title rights and interests

The determination area covers over 133,000 ha. In relation to it, the Gunditjmara People are recognised as having non-exclusive native title rights to:

- access or enter and remain on the lands and waters;
- camp on the lands and waters landward of the high water mark of the sea;
- use and enjoy the land and waters;
- take the resources of the land and waters;
- protect places and areas of importance.

The determination also specifies areas amounting to 7600ha over which native title has been completely extinguished.

Other interests

The determination:

- sets out the nature and extent of other interests in the area and the relation between the native title interests and those other interests;
- provides that where, and to the extent of, any inconsistency between the native title rights and interests and the other interests, native title rights and interests have no effect during the currency of the other interests.

Prescribed body corporate

Gunditj Mirring Traditional Owners Aboriginal Corporation was determined to hold the determined native title in trust for the native title holders pursuant to s. 56(2) of the NTA—at [46].

Respondent claiming native title seeking recognition of native title

Kokatha People v South Australia [2007] FCA 1057

Finn J, 16 July 2007

Issue

This case raised a 'controversial question of construction' of the *Native Title Act 1993* (Cwlth) (NTA) i.e. did the Federal Court have jurisdiction to make a determination of native title under s. 225 in favour of a person claiming to hold native title who had not made a claimant application under s. 61(1) but was a respondent to a claimant application brought by others?

Background

In 2005, in accordance with s. 67, the court made orders to ensure that each of the Kokatha, Barngarla and Arabunna people's claimant applications were dealt with in the same proceeding, to the extent that the area each application covered overlapped (the overlap proceedings).

At one time, an application brought by the Kuyani overlapped part of the area covered by the Kokatha application but it had been struck out because it was not authorised as required by s. 61(1)—see *McKenzie v South Australia* (2005) 214 ALR 214; [2005] FCA 22, summarised in *Native Title Hot Spots* Issue 14.

One of the people who made the application on behalf of the Kuyani, Mark McKenzie, was a respondent to the Kokatha application—see *Kokatha Native Title Claim v South Australia* (2005) 143 FCR 544; [2005] FCA 826 (*Kokatha No. 1*, summarised in *Native Title Hot Spots* Issue 15) and s. 84(3).

In February 2006, Mr McKenzie and others filed a fresh Kuyani application that partly overlapped the area subject to the Kokatha application. This second Kuyani application 'suffered from the same vices' as the first and so a notice of discontinuance was filed in May 2006—at [9].

However, Mr McKenzie remained a respondent to the Kokatha application either because:

- he claimed to hold native title in relation to part of the area covered by that application; or
- he had a native title 'interest' that may be affected by a determination in the proceedings—see ss. 84(3)(a)(ii) and (iii).

Mr McKenzie did not file a fresh Kuyani application under s. 61(1). He did, however, file a draft statement of facts and contentions in the overlap proceedings, disputing the Kokatha claim to have inhabited the area he claimed an interest in prior to sovereignty and asserting that the Kuyani people had, at that time, native title rights and interests in that area. The draft statement of facts and contentions concluded thus:

> In the event that a determination is made in these proceedings that only the Applicants, or any of them, hold the common or group rights as native title holders, and having regard particularly to s. 61A of the *Native Title Act 1993*, Mr McKenzie's lawful interest as native title holder (and those of other Kuyani in his position) will not be able to [be] adequately recognized, and such a determination is opposed.
>
> Again having regard particularly to s. 61A…, and for the same reasons as advanced in the previous paragraph, Mr McKenzie opposes a determination that native title does not exist over the claim area.
>
> Mr McKenzie seeks a determination under section 225…that the common or group rights in respect of the hachured area on the attached map are held by the Applicants on a shared basis with Mr McKenzie and other Kuyani with ancestral connection to that area, in accordance with *Murranginhi* traditional law and custom.

It was the third paragraph that prompted the State of South Australia to file the motion that asked whether or not the court had jurisdiction to make a determination of native title in favour of a person such as Mr McKenzie, who did not have a claimant application under s. 61(1) on foot but was a respondent to the claimant application brought by the Kokatha People on the basis of his claim to hold native title.

Finn J noted that the third paragraph of the draft statement of facts and contentions was 'offensive' i.e. it sought a positive determination of native title in favour of Mr McKenzie and 'other' Kuyani, notwithstanding that they did not have a claimant application on foot—at [11].

Objectives of the NTA

His Honour noted that '[t]wo not altogether harmonious objectives' of the NTA were 'revealed' in the issue raised by the state's notice of motion, namely:

- getting a final determination under s. 225 as to whether or not native title existed in relation to a particular area and, if it did, who held it; and
- adherence to the processes and procedures chosen by Parliament for determining native title claims—at [36]

In the end, the issue was 'one of statutory interpretation having regard to the text, structure and purposes' of the NTA—at [37].

Provisions of the NTA

Finn J observed that significant procedural and substantive requirements for applications under s. 61 were introduced by the *Native Title Amendment Act* 1997 (Cwlth) (the 1998 amendments). One of those changes related to the authorisation of claims—at [17].

Under s. 61(1), as amended in 1998, a native title determination application may be made by:

> A person or persons **authorised** by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group [emphasis added].

As his Honour said:

> It is difficult to overstate the centrality of the requirement of 'authorisation' in the scheme

> laid down by the Act…Both s 61 and s 62 prescribe mandatory requirements in the application itself relating the fact of, and the basis of, the authorisation of the person or persons making the claimant application. Section 84C in turn permits any party to a…determination application to apply at any time to this Court to strike out an application which does not comply with the requirements of s 61….or s 62—at [17] to [18].

The views expressed by his Honour Justice Lindgren in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (*Harrington-Smith No. 9*) were 'gratefully' adopted. In that case, at [1170] to [1172], Lindgren J said:

> Proper authorisation is the foundation for the institution and maintenance of a native title claimant application under s 61 of the new Act…Authorisation is 'fundamental to the legitimacy of native title determination applications', and is 'not a condition to be met by formulaic statements in or in support of applications'…Where the authorisation requirement of s 61(1) is not complied with, the non-compliance is fatal to the success of the application.

Finn J noted that 'authorisation has been the rock upon which Mr McKenzie's two native title determination [applications] have foundered'—at [20].

Notification and party status

His Honour found that:

- the NTA contemplated that a person claiming native title in an area subject to a s. 61(1) application should be given notice of that application and was entitled to become a party to the proceedings in relation to that application;
- such a person was entitled, as a party (subject to the court's discretion), to oppose the making of a determination of native title;
- the notice required by s. 66 must include a statement that, as there could be only one determination of native title for an area (see s. 68), if a person 'did not become a party' to the application, there may be 'no other opportunity for the court' to take into account 'that person's native title rights and interests' in relation to the area concerned—at [21] to [22], referring to ss. 66(3), 66(10), 84(3)(a)(ii) and 84(8).

The phrase used in s. 66(10)(b) is 'become a party'. Finn J noted that:

- 'it does not stipulate' that a person should make an application under s. 61(1);
- this was notwithstanding the requirement in s. 67 that, to the extent that the area covered by two or more applications for a determination of native title made under s. 61(1) overlapped, the court must ensure those applications were dealt with in the same proceedings—at [23].

Section 84 deals with party status in relation to s. 61(1) applications. His Honour noted that it:

- allowed a person who claimed to hold native title to become a party without necessarily becoming an applicant by making a claimant application under s. 61(1);
- gave the court a general power to order that any person (other than an applicant) cease to be a party to the proceedings—at [25] to [27], referring to ss. 84(3)(a)(ii) and s. 84(8).

At [13], his Honour cited with approval Mansfield J's comment in *Kokatha No. 1* at [24] that:

> Where there may be a competing native title group who claim communal rights and interests which may be affected by a determination in [this] claim, but there is no application by that group over the claim area, the members of that group should not be precluded from putting forward their claim in a defensive attempt to avoid the dilution of those interests.

Character of a determination of native title under s. 225

Finn J noted that:

- while the requirement found in s. 94A that a determination of native title under s. 225 must be made in accordance with the procedures in NTA 'bordered on the pedantic', it emphasised an important characteristic of the NTA i.e. its 'insistence both on adherence to prescribed procedures and on compliance with prescribed requirements';
- an 'approved' determination of native title (see ss. 13 and 253) had a primary role in the scheme

of the NTA and, being declaratory of rights (i.e. *in rem*), was 'absolute';

- however, an 'approved' determination also had an 'indefinite character' because application could be made under s. 61(1) to vary or revoke it on the limited grounds set out in s. 13(5);
- however, s. 61(1) prescribed that such an application could only be made by certain entities, namely the relevant Commonwealth, state or territory minister, a registered native title body corporate or the Native Title Registrar;
- importantly, an application to vary or revoke an 'approved' determination could not be made by a person claiming to hold native title—at [28] to [29], referring to ss. 61(1), 13(1)(b), 13(5) and s. 213(1) and *Western Australia v Ward* (2003) 213 CLR 1 at [32].

Must an approved determination be made?

Section 225 defines a determination of native title as a 'determination of whether or not native title exists in relation to' a particular area. His Honour was of the view that an order dismissing an application for a determination of native title on the grounds of failure of proof was not a 'determination of native title—at [31], referred to *Harrington-Smith No. 9* at [4005].

Finn J noted that, notwithstanding the either/or character of s. 225 (i.e. native title either exists or does not), previously the court had said it could decline to make a determination of native title, as defined in s. 225, if the interests of justice so required e.g. if the evidence failed satisfactorily to disclose, one way or the other, whether or not native title existed—at [31], referring to *Western Australia v Ward* (2000) 99FCR 316 at [219].

His Honour was of the view that it was 'by no means uncommon' for this to occur and that the discretion not to make an 'exclusive positive' determination may be more significant where native title is 'asserted defensively' by a respondent to s. 61(1) proceedings—at [32], referring to *Jango v Northern Territory* (2006) 152 FCR 150 at [791], *Jango v Northern Territory* [2007] FCAFC 101 at [75] ff, *Quall v Northern Territory* [2007] FCAFC 46.

Comment

It may, with respect, be drawing a long bow to say it is 'by no means uncommon' for the court to exercise a discretion to decline to make a determination under s. 225 following the hearing of an application for a determination of native title (which, according to ss. 61(1) and 253, can be either claimant or non-claimant). This can be illustrated by the three decisions his Honour relied upon.

The two *Jango* decisions dealt with an application under s. 61(1) for a determination of compensation, not a application for a determination of native title. Subsection 13(2) of the NTA applied, which meant that a 'current' determination of native title was only required if the court was going to make a determination of compensation, which was not the case in *Jango.* This point of distinction was noted by his Honour Justice Sackville in the second decision cited by Finn J.

The citation Finn J gives for *Quall v Northern Territory* is a reference to Full Court's decision in *Risk v Northern Territory* [2007] FCAFC 46 (*Risk*, summarised in *Native Title Hot Spots* Issue 24). It is correct that, in that case, the court said at [178]:

> Bearing in mind both his Honour's observation that the only evidence directly supporting this claim came in effect from Mr Quall…and the changing composition of the claim group to which we earlier referred in passing, the dismissal of the claim in this manner was unobjectionable. The case was in substance disposed of on the basis of insufficiency of evidence. His Honour's reasons make quite plain where that insufficiency lay.

What neither the Full Court in that case nor Finn J in this case seem to appreciate is that, shortly after publication of the reasons for decision on 13 April 2006, the primary judge in *Risk* made a determination pursuant to s. 225 that native title did not exist—orders made on 17 May 2006. Details of that determination have been entered in to National Native Title Register, as required by s. 193.

The decision in *Harrington-Smith No. 9* appears to be the only case in which, following the full hearing of applications for a determination of native title made under s. 61(1), the court

declined to make a determination under s. 225 on the basis of a lack of proof. The existence of such a discretion in those circumstances is contested by the Commonwealth in its 'non-claimant' application (also, according to s. 61(1), an 'application for determination of native title' for the purposes of s. 67), which overlapped the claimant applications the subject of that decision but was not 'dealt with in then same proceedings' as s. 67 seemed to required—see the last page of the summary of that case in *Native Title Hot Spots* Issue 24.

On this point, see also *Sampi v Western Australia (No 3)* [2005] FCA 1716 (summarised in *Native Title Hot Spots* Issue 14) at [3] to [4] and, in relation to a non-claimant application, see *Kennedy v State of Queensland* (2002) 190 ALR 707; [2002] FCA 747.

Was a determination in favour of Mr McKenzie within jurisdiction?

Finn J noted that, in *Kokatha No. 1*, Mansfield J found that persons claiming to hold native title who did not have a s. 61(1) application on foot could not get a 'positive' determination of native title because:

> [T]he prescriptive structure in the Act for the making of an application for the determination of native title under s. 61, with the procedural requirements of s. 62, and, since…the 1998 amendments…, the authorisation requirements under s. 251B are clear. They provide the only vehicle for the positive determination of native title rights and interests— *Kokatha No. 1* at [23].

Finn J found support for this view in the Full Court's decision in *Moses v Western Australia* [2007] FCAFC 78 at [18] (summarised in this issue of *Native Title Hot Spots*), were it was said that:

> A determination of native title must be made in accordance with the provisions of the NTA, including its requirements regarding proof of the composition of the claim group and proper authorisation of the named applicants. In circumstances where the Kariyarra people participated as respondents only and made no attempt to satisfy the learned primary judge that all of the requirements of the NTA had been met in respect of their overlap claim, it would not have been appropriate to nevertheless make a determination of native title in their favour—at [43].

Section 67 not applicable

As s. 67 did not apply in this case, the state's notice of motion directly raised the question of whether or not the court had jurisdiction to make a determination of native title under s. 225 in favour of a person who did not, or group which did not, have a s. 61(1) application on foot.

It was found that the NTA, 'properly construed', required a negative answer:

> [A] s 61 native title determination application is required to enliven the Court's jurisdiction to make a determination of native title in relation to the determination area…[T]he language of s 225 does not detach the determination of native title from the application made for the determination. It is the determination made on the application that becomes the "approved determination of native title" which has such far reaching significance in the scheme of the Act—at [47].

Finn J found support for this view in:

> [T]he detailed prescriptive requirements of s 61 and s 62 and of s 251B in relation to authorisation, description of the claim group etc…It would be surprising if [after the 1998 amendments], having insisted upon an applicant's compliance with such requirements, the Legislature would leave a non-applicant respondent unconstrained in advancing a claim for a determination of native title. The lack of any express provision dealing with such a non-applicant respondent is in my view explicable. It is clear from the frame of the Act that a person or group that seeks a positive determination is required to make a s. 61 determination application under the Act—at [48].

However, his Honour pointed out that this was not intended to call into question the right of a 'non-applicant' claimant to either be joined as a party to an application for a determination of native title made under s. 61(1) or rely defensively on their native title 'interest' to oppose or to qualify a claim made in such an application. Rather:

What a successful defensive use of such native title rights or interests can possibly secure is the exercise by the Court not to make either a positive exclusive determination of native title in favour of an applicant or a negative determination that native title does not exist in the claim area. What it cannot secure is a s 225 determination in the non-applicant's favour—at [50].

Any inconvenience that a successful 'defensive' use of a claim to native title could entail:

> [I]nheres in the scheme of the Act itself… [I]n the ability of the Court not to make a determination in the face of a successful defensive use of claimed native title rights, that scheme does not condemn a non-applicant claimant to the injustice of extinction of his or her rights and interests—at [51].

Decision

It was declared that a determination of native title could not be made in favour of Mark McKenzie and other Kuyani under the NTA—at [4] and [53].

Native title on pastoral lease in the Northern Territory – Newcastle Waters

***King v Northern Territory* [2007] FCA 944**

Moore J, 26 June 2007

Issue

The issue in this case was the nature and extent of the native title rights and interests that could be recognised under the *Native Title Act 1993* (Cwlth) (NTA) where those rights and interests co-existed with the rights granted under a pastoral lease in the Northern Territory.

Background

The relevant parts of the six claimant applications before the court were comprised of:

- areas subject to the Newcastle Waters and Murranji stations (both of which were perpetual pastoral leases);
- stock routes within the boundaries of those stations;
- two reserves within the town of Newcastle Waters, one for a garbage dump and the other for 'commonage'.

The native title claimants were the members of nine estate groups, the members of six neighbouring estate groups (the neighbouring estate groups) plus the spouses of members of those estate groups. Each estate group was associated with a definable tract of land. All the groups were Mudburra or Jingili or mixed Mudburra/ Jingili groups.

The history of the proceedings is set out in the reasons for decision. In brief, there was an eight-day hearing that was substantially confined to the issues of the existence and extent of native title on the area before the court. Oral evidence was given on country by 13 Aboriginal witnesses and one of the pastoralists. Expert evidence was given an anthropologist called by the claim groups. The Northern Territory and the pastoralists provided further evidence and tendered various documents relevant to the issue of the extent of co-existence of native title with other rights and interests. Final submissions were then made—at [29] to [60].

There was a late submission made by Yarabala Pty Ltd (Yarabala), the lessee of the neighbouring Beetaloo station, which put in issue numerous matters not put in issue by any of the other respondents. The applicants objected to this on the basis that Yarabala did not participate in the trial or seek to make oral submissions at the hearing of final submissions. Yarabala then filed new submissions, characterised by the court as being:

> [T]hat if one or more of the rights and interests in the bundle comprising native title was partially inconsistent with the valid grant of inconsistent rights, then the remnant was a partially extinguished native title right and interest—at [43].

His Honour Justice Moore found that these submissions should be rejected:

> They involve an unsupportable amalgam of concepts concerning the content of traditional laws and customs and the nature of rights which might be capable of recognition under the NTA… The scope of these proceedings and the path they have taken flowed from procedural orders made on earlier occasions… It was too late for Yarabala to seek to alter the course of the proceedings—at [44].

Native title holders

Moore J found that the evidence supported a finding that the 15 estate groups constituted a single native title holding community or society. For the purposes of ss. 223 and 225 of the NTA, the claim was 'properly' described as 'communal'—at [8] to [18].

Moore J explained that the decision in this case was confined to areas of contention between the parties because it was 'mostly conceded that…use of the land by the [native title holders]…and their forebears was in accordance with traditional laws and customs'—at [2].

Native title rights and interests claimed

At the court's request, the native title claimants filed a final statement of issues in dispute, agreed to by the respondents, which Moore J acknowledged was valuable in identifying the issues, the submissions and evidence in relation to them—at [61].

Draft proposed orders and a draft determination identified the claimed native title rights and interests. Non-exclusive native title rights and interests to use and enjoy parts of the claim area were identified for the six estate group holders. A smaller set of those rights and interests were claimed for the neighbouring nine estate groups and the spouses of the estate group members—at [21] and [23].

The territory proposed that a clause be added to the draft determination (apparently accepted by the applicants in regard to 'non-exclusive' native title areas only) stating that that the native title rights and interests are subject to, and exercisable:

- only in accordance with the traditional laws and customs of the native title holders;
- for the personal or communal needs of the native title holders which are of a domestic or subsistence kind and not for any commercial or business purpose;
- in accordance with the valid laws of the Northern Territory of Australia and the Commonwealth—at [27].

Not all the claimed native rights and interests claimed were at issue. His Honour commended the parties on reaching agreement on the existence of various rights and on the description of many of those rights and interests—at [42].

Moore J then made findings on the contentious rights as follows. (The non-contentious rights are not discussed here).

Right to travel over, move about and to have access to non-exclusive areas

It was found that the evidence established the existence of a native title right to travel over, move about and have access to non-exclusive areas, such as the pastoral leases. The Northern Territory agreed with the applicants' formulation, on the understanding that it did not include a right to be permanently located at any particular place on the area subject to the pastoral leases. The pastoralists adopted these submissions but proposed the right be reformulated as:

> The right to travel over, move about and to have **limited** access to the non-exclusive areas.

Implicit in the pastoralists' submission supporting the inclusion of the qualifying word 'limited' was that:

> [A] pastoralist could insist on a person seeking to exercise a native title right to access, not exercising the right near cattle if accompanied by a dog or, if exercising the right by entering a paddock through a closed gate, could only exercise the right on the basis that the gate would be closed—at [67].

It was found that the qualification was unnecessary:

> Once it was established…that the right of access existed it was to be expressed in terms fully expressing the right. The applicants accepted… that in the event of a conflict …the pastoralist's rights prevail—at [69].

Right to take and use the natural water resources on the non-exclusive areas

There was no dispute that the evidence established a native title right of water usage. The applicants preferred the terms 'natural water resources', the territory preferred 'natural free water' and the pastoralists preferred 'natural free standing and free flowing water resources.' The pastoralists wanted to distinguish between water that they captured and possessed (e.g. in a dam) from water in naturally occurring sources.

Moore J found both 'resources' and 'free' were unnecessary but that it was necessary to clarify any limitation as so the right recognised was:

To take and use the natural water on the non exclusive areas and for the sake of clarity and the avoidance of doubt this right does not include the right to take or use water captured by the holders of…[the perpetual pastoral leases]—[78].

Right to live, to camp and for that purpose to erect shelters and other structures and to camp on the non-exclusive areas

The pastoralists and territory proposed that the right to camp should be expressly limited so that none of the estate group members could live permanently on the non-exclusive areas. Moore J found this qualification was unnecessary in relation to the neighbouring estate group members because the right to camp did not include living permanently.

In regard to the other 'primary' primary estate groups, his Honour noted what was said on a native title 'right to live' on land subject to a pastoral lease in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr*, summarised in *Native Title Hot Spots* Issue 16). The leases in question there were 'historical' i.e. no longer in force when the determination of native title was made.

In that case at [131], the Full Court held that:

> Just as the right to live permanently on the land does not necessarily give rise to inconsistency with the pastoral leaseholder's rights, neither does the right to erect a permanent structure. The existence of such a structure does not preclude a pastoralist's right to require its removal in the event that it conflicts with a proposed exercise by the pastoralist of a right under the lease. It is not inevitable that such a conflict will arise at.

Moore J held that:

- the court was bound by *Alyawarr* to conclude the grant of the pastoral leases did not extinguish any native title right to live or camp on leasehold land;
- while the leaseholds in this case were current and not historical (as was the case in *Alyawarr*), this was not (as the territory had submitted) a relevant point of distinction—at [85].

There was unchallenged evidence from the claim group of both the existence of the right to live on their country and the exercise of that right. It was noted that, although the evidence did not establish a current widespread observance of the 'right to live' on the claim area by the exercise of building permanent dwellings, it did not compel the conclusion that they did not now possess that right in the statutory sense—at [86] to [92], referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 at [84], Gleeson CJ, Gummow and Hayes JJ, summarised in *Native Title Hot Spots* Issue 3.

Moore J held that:

> [T]he critical question concerns possession of the rights and interests and not their exercise ….The relevant right should be viewed as having the same content as the right discussed…in *Alyawarr*. That right does not necessarily involve permanent settlement at a particular place…Ultimately, [such] a right…cannot be exercised in a way that derogates from the leaseholder's rights… If, for example, the assertion of the…right involved the construction of a modern brick building on land used or proposed to be used for grazing or for some other purpose…authorised by the… lease, then its exercise would almost certainly derogate from the leaseholder's rights. In such circumstances the leaseholder could insist on the removal of the structure…or prevent its construction—at [93].

Right to light fires on the non-exclusive areas for domestic purposes

Moore J held the unchallenged evidence was that the native title right was not only used for cooking and heating but also for burning bark for domestic purposes, boiling foliage for medicinal purposes and manufacturing *nulla nullas*. No right to set alight vegetation was claimed. However, Moore J accepted that 'domestic purposes' could be interpreted to include setting alight vegetation and held it was appropriate to add the words 'but not for the clearance of vegetation'—at [99].

If was also found that the powers under legislation such as the *Bushfires Act 1980* (NT) merely regulated the exercise of native title rights and interests—at [100].

Right to maintain and protect sites and places on the non-exclusive areas that are of significance under their traditional laws and customs

The respondents contended the right should be qualified to make it clear it did not give the native title holders a right to exclude persons. Moore J noted the findings in *Attorney-General (NT) v Ward* (2003) 134 FCR 16; [2003] FCAFC 283 (summarised in *Native Title Hot Spots* Issue 8) at [24] to [25] and *Alyawarr* at [136] to [140], going on to hold that:

> In view of what has now been said by the Full Court on two occasions, it is inappropriate that words of qualification or clarification be included when they are demonstrably unnecessary—at [105].

Right to share or exchange subsistence and other traditional resources obtained on or from the non exclusive areas

The pastoralists opposed this claimed right arguing it was not a right in relation to land and therefore not recognisable by the common law. Moore J held he was bound by *Alyawarr* to reject the submission that the claimed right was not in relation to land—at [106] to [107].

Extinguishment on garbage reserve

The area concerned, which was within the town site, was reserved in 1964 for the 'purposes of a garbage reserve'. In 1971, approval was given for it to be used as a depot for depositing garbage for the purposes of regulation 30 of the *Public Health (Night-Soil, Garbage, Cesspits, Wells and Water) Regulations 1960* (NT).

The approval for reserved land to be used as a garbage depot created both a right to deposit garbage and an obligation to do so. Moore J found that:

> [T]he creation of a right to deposit garbage coupled with an implied obligation on third parties to do so involved an assertion of a power to determine how the land should be used which was inconsistent with the continuation of what might be described as some of the core native title rights in this matter such as to travel over, move about and have access to the land, to hunt and fish, as well as to live on the land…The assertion of the power concerning use was inconsistent with the continuation of those rights and they were extinguished—at [115].

Extinguishment by improvements on pastoral leases

It was common ground that both historical and current pastoral leases were 'previous non-exclusive possession acts' that engaged Division 2B of Part 2 of NTA and the territory's equivalent provisions. The territory contended (and the applicants accepted) that all of the grants had the same effect on native title i.e. partial extinguishment—at [119] and [121] to [122].

The improvements in issue consisted of:

- a homestead, a house, sheds and buildings;
- bores, turkey nests, squatters' tanks constructed dams or other constructed stock watering points;
- the homestead airstrip and highway airstrip—at [130], [148] and [153].

The applicants conceded that native title had been wholly extinguished in parts of Newcastle Waters and Murranji stations by lawfully made improvements. They also conceded, 'in principle', that native title was also extinguished over the adjacent land necessary for enjoyment of those improvements. However, they submitted that:

- the respondents' case was in regard to potential conflict of activities, not rights, which was rejected in *Alyawarr* ; and
- any conflict would be provided for by s. 23G(1)(a) i.e. the rights granted under the lease prevailed over, but did not extinguish, native title rights and interests—at [147].

Moore J noted that:

- the pastoral leases in question extinguished various native title rights, including any native title right or interest amounting to the right to exclusive possession, occupation, use and enjoyment;
- it was not determined in *Ward* which other native title rights and interests would be

inconsistent with rights conferred by the grant of a pastoral lease, although views were expressed about certain rights;

- the eight pastoral leases in question extinguished the native title right of permission to use or have access, independently of the *Validation (Native Title) Act* (NT) (Validation Act)—at [123], referring to *Ward* at [192], [194] and [425] and s. 9M(1)(a) of the Validation Act.

As in *De Rose v South Australia (No 2)* (2005) 145 FCR 290; [2005] FCFCA 110 (summarised in *Native Title Hot Spots* Issue 15), Moore J found that:

> [T]he native title rights and interests are extinguished over the land on which the improvements are **constructed** and any adjacent land the use of which is reasonably necessary for or incidental to the operation or enjoyment of the improvements—at [163], emphasis added.

As it is the exercise of the right to construct improvements that extinguishes native title, the determination will be expressed in terms of extinguishment by improvements made at the time of the determination—at [170].

His Honour found that:

- the construction of stockyards and trap yards extinguished the applicants' native title rights;
- where there was no evidence that other airstrips and roads, tracks, laneways and mustering routes involved anything being constructed (i.e. it was just an area used for that purpose), the area was capable of being use by both native title and non-native title interest holders—at [137] to [138], [142] to [146], [155] and [157] to [160].

Extinguishment by public works

The issues here were:

- whether the gas pipelines constructed and operated by NT Gas pursuant to pipeline licences under the *Energy Pipelines Act 1981* (NT) and registered energy supply easements were public works for the purposes of the 'previous exclusive possession act' provisions of the NTA and Pt 3 of the Validation Act;
- whether certain areas of land were adjacent to and necessary for, or incidental to, the construction, establishment or operation of a public work for the purposes of s. 251D NTA.

Evidence was given of the history of the pipelines in support of the submission the they were public works.

Moore J accepted that the pipelines were fixtures. However, to come within the scope of the definition of a 'public work' in s, 253 of the NTA, it had to be established that they were constructed on behalf of a statutory authority—[177] to [178].

NT Gas asserted it constructed the main pipeline on behalf of the Northern Territory Electricity Commission (NTEC), a statutory authority, the functions of which were later taken over by the Power and Water Corporation (PAWC). The applicants disputed that the pipelines were constructed 'on behalf of' a statutory authority.

Moore J held:

- the expression 'on behalf of', in the context of s. 253, is intended to comprehend the construction or establishment of a public work where its construction or establishment is done by the Crown or an emanation of the Crown indirectly rather than directly i.e. the work is constructed by a person or body for the Crown or an emanation of the Crown;
- as there was no evidence of whether the NTEC exercised any control over the construction of the pipelines or what the nature of the control was, the main pipeline was not a public work as defined;
- public works that were not in dispute all gave rise to the question as to areas 'adjacent' to them fell within the expanded definition in s. 251D NTA—at [183], [185] and [187].

Section 251D NTA provides:

> Land or waters on which a public work is constructed, established or situated
>
> In this Act, a reference to land or waters on which a public work is constructed, established or situated includes a reference to any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work.

It was conceded by the applicants that Newcastle Waters road, which was not subject to a road

reserve, was a public work which extinguished native title rights and interests. It was held that native title had been extinguished in the 50m corridor either side of the centreline of the road as the land being adjacent land 'necessary for or incidental to' the operation of the road —at [190] to [194] and [213].

His Honour accepted the interpretation of 'adjacent' as used in s. 251D given in *Neowarra v Western Australia* [2003] FCA 1402 (summarised in *Native Title Hot Spots* Issue 9), where his Honour Justice Sundberg said at [656]:

> The word "adjacent" does not just mean "next door to" or "very close to". Its meanings include "adjoining", "contiguous" and "bordering". The tracks here fit those descriptions. They adjoin, border and are contiguous to the site even though they only meet it over a small area, namely the width of the track.

Moore J went on to find that the meaning of 'adjacent' must be considered in the context of the extended definition which is to ensure that:

> [A]reas around and immediately proximate to public works were available (and unencumbered by native title rights and interests) to facilitate the initial construction or establishment and ongoing operation of the works—at [216].

Four gravel pits used to maintain the Stuart Highway, and their associated access tracks, were found to be 'adjacent' to the highway in the sense contemplated by s. 251D. However, long access tracks associated with seven gravel pits used for the Buchanan Highway were not 'adjacent' to the highway for the purposes of s. 251D. Nor were storage dams and roads serving the Buchanan Highway at a distance—at [195] to [201] and [216] to [218].

In relation to Bore RN23745, it was found that s. 251D was directed to the land necessary to the operation of the bore and not to the 100 metres radius submitted as necessary to avoid pollution of the water source. The evidence did not establish the four bores on the stock routes were constructed by the Crown or a statutory authority and so they were not public works—at [204] and [219] to [220].

Application of s. 47B

Under s. 47B(2), extinguishment of native title is to be disregarded. However, it does not apply if the relevant area is covered by, among other things:

> [A] …proclamation, [or] dedication…made or conferred by the Crown in any capacity…under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose–see s. 47B(1)(b)(ii)

An issue arose whether or not s. 47B applied to areas of vacant Crown land that were subject to:

- a proclamation of a town (Newcastle Waters) under s. 111 of the *Crown Lands Ordinance 1931-1963* (NT) on 17 December 1963;
- a declaration of a heritage place within the town under s. 26(1)(a) of the *Heritage Conservation Act 1991* (NT) (HC Act) on 11 November 1993.

Moore J considered *Alyawarr* at [174] to [190], which related to an area subject to a proclamation under the same legislation as in this case, where it was found that:

> In summary,…s 47B(1)(b)(ii) did not apply because, firstly, a proclamation for a broadly expressed purpose [i.e. a townsite] which encompassed a variety of potential but unascertained uses was not a proclamation for a particular purpose, and secondly, that the mere proclamation of a townsite, which might comprise largely private property holdings by lease or otherwise, did not constitute a public or particular purpose, within the meaning of s 47B(1)(b)(ii)—[233].

The respondents sought to distinguish *Alyawarr* on the basis that no tenure had ever been granted in Hatches Creek, while Newcastle Waters had houses, roads and a school.

Moore J held there was no basis for distinguishing *Alyawarr* and confirmed the Full Court's test at [188] that:

> Whether the land "is to be used" for a prescribed purpose was to be gleaned from the proclamation and constating legislation. Those instruments provide an objective test for determining the question—at [238].

On the application of s. 47B, see also *Moses v Western Australia* [2007] FCAFC 78, summarised in this issue of *Native Title Hot Spots*.

Declaration of a heritage place

On 11 November 1993, one of the lots in the townsite was declared a heritage site under s. 26(1)(a) of the HC Act. The territory contended that the declaration was for a 'public purpose', namely environmental protection. Reference was made to the objects of the HC Act. The principal object of the HC Act is to provide a system for the identification, assessment, recording, conservation and protection of places and objects of prehistoric, protohistoric, historic, social, aesthetic or scientific value—at [244] to [245].

Moore J held (among other things) that:

- the declaration was comprehended within the s. 47B (1)(b)(ii) categories of 'reservation, proclamation, dedication, condition, permission or authority' and it was 'demonstrably' for a public purpose;
- the objects of the HC Act made it clear that a declaration was to protect and preserve a place of historic and social value;
- the question posed by s. 47B(1)(b)(ii) was whether the area 'is to be used' for a public purpose;
- the mere making of the declaration under s. 26(1) (a) did not give the land the character of land which 'is to be used' for public purposes;
- section 47B applied to the land the subject of the declaration—at [247] to [250].

Strike out under s. 84C – Noonukul application

Walker v Queensland [2007] FCA 967

Collier J, 3 July 2007

Issue

The issue in this case was whether the Federal Court should strike out a claimant application pursuant to s. 84C of the *Native Title Act 1993* (Cwlth) (NTA).

Background

Dennis Walker filed the claimant application in question on behalf of the Noonukul of Minjerrabah (the Noonukul application) under s. 61(1) of the NTA in 2006. The area covered by that application substantially overlapped the area covered by claims made on behalf of the Quandamooka people. A notice of motion was filed on behalf of the Quandamooka people seeking joiner and, if joined, to have the Noonukul application struck out.

Queensland South Native Titles Services (QSNTS), acting for the Quandamooka people, submitted that the strike out application was brought because the Noonukul application would impede the progress of the Quandamooka people to a consent determination recognising their native title. This was because the State of Queensland would not engage in mediation if there were overlapping claimant applications.

Orders were made joining the Quandamooka people as a respondent. At the hearing of this matter, there was no appearance by the Noonukul applicant nor were any documents filed. Her Honour Justice Collier was satisfied that all attempts had been made to make the Noonukul applicant aware of the hearing and so proceeded to decide the matter on the basis of documents filed by QSNTS and the state— at [3] to [9].

Strike out application

The notice of motion to strike out the Noonukul application was brought pursuant to both s. 84C of the NTA and Order 20 rule 2 of the Federal Court Rules.

Her Honour Justice Collier noted that section 84C:

- is limited to native title determination applications made under the NTA and refers to 'strike-out', whereas O 20 r 2 deals with either a permanent stay or summary dismissal of the proceedings;
- applies where an application does not comply with ss. 61, 61A or 62, whereas O 20 r 2 is only enlivened if no reasonable cause of action is disclosed, the proceeding is frivolous or vexatious, or the proceeding is an abuse of process;
- is concerned with matters of form and authority rather than the merit of any native title determination;
- was a power that should be used only when the court is satisfied that a clear case has been made—at [16] and [18].

Collier J held (among other things) that:

- the evidence in this case showed a lack of clarity as to the persons making up the native title claim group and, in any event, the Noonukul application was not authorised by all of the claim group as required by s. 61(1);
- the Noonukul application did not comply with s. 62—at [37] to [43].

Failure to comply with ss. 61 and 62 supported the motion to strike out, with her Honour noting that:

- the evidence was that members of the Noonukul claim group were also members of the Quandamooka claim group and had a right to participate in the decision-making processes;
- the Noonukul application would prevent the resolution of native title issues over the land subject to the Quandamooka claims—at [44] to [45].

Decision

Collier J held that:

- the serious and fundamental deficiencies in the Noonukul application could not be cured by amendment and it should be struck out pursuant to s. 84C of the NTA;
- it was unnecessary to consider whether the application should also be summarily dismissed pursuant to O 20 r 2 of the FCR—[44] to [46].

Right to negotiate applications

Relevance of cultural heritage legislation to interference with sites and uranium exploration to major disturbance

***Freddie /Western Australia/Globe Uranium Ltd* [2007] NNTTA 37**

Sumner DP, 14 May 2007

Issue

The issues before the National Native Title Tribunal summarised here were whether:

- the *Aboriginal Heritage Act 1972* (WA) (AHA) provided protection for sites of particular significance for the purposes of s. 237(b);
- the fact that exploration for uranium was proposed made any difference to consideration of s. 237(c).

Background

The native title party lodged an expedited procedure objection application pursuant to s. 75 of the *Native Title Act 1993* (Cwlth) in relation to the proposed grant of an exploration licence over an area of north east of Wiluna in Western Australia.

The Tribunal noted recent amendments to both the *Mining Act 1978* (WA) and the standard conditions attached to an exploration licence, particularly s. 63(aa), which introduced a requirement that ground disturbing work will not be permitted unless a programme of work had been approved by a prescribed officer i.e. an environmental officer in the Western Australian Department of Industry and Resources—at [8] to [12].

AHA and s. 237(b) of the NTA

Paragraph 237(b) provides that:

> A future act is an ***act attracting the expedited procedure*** if...the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders…of the native title in relation to the land or waters concerned.

The Tribunal was satisfied that the evidence established that the *Tjukurrpa* (Dreaming track) passed through the proposed licence area and was a site of 'particular significance' for the purposes of s. 237(b).

The native title party contended the AHA and its regulatory scheme were insufficient to make interference with sites of particular significance unlikely and that the AHA was irrelevant to the Tribunal's inquiry in relation to s. 237(b) —at [46] to [48].

The Tribunal referred to a number of cases that confirmed the relevance of provisions of the AHA to s. 237(b)—at [49] to [53] and [60], referring *Walley v Western Australia* (2002) 169 FLR 437; [2002] NNTTA 24 at [22] and [50] to [51]; *Champion v Western Australia* (2005) 190 FLR 362; [2005] NNTTA 1 (*Champion*) at [15] to [35]; [68] to [72]; *Parke /Western Australia/ Ammon* [2006] NNTTA 65 (*Maitland Parker*) at [32] to [41]and *Little v Western Australia* [2001] FCA 1706; [2001] AILR 50.

The native title party further contended that the AHA could not be relied upon to limit the likelihood of interference with sites for the purposes of s. 237(b) because:

- Ministerial approval under s. 18 of the AHA (consent to interfere with a site) may be a future act;
- if the government did not give notice of such an act, then Ministerial consent under s. 18 would be an invalid future act;
- since no notice is, in fact, given of proposed consents under s. 18, it must be presumed that the government party does not consider them to be future acts;
- as such, the protective provisions of the AHA do not protect area and sites the subject of s. 237(b).

The government party contended that, if consent under s. 18 of the AHA was a future act, then it was one to which subdivision M applied, in which case there were no procedural rights for a native title holder because none were afforded to an 'ordinary title holder'—see s. 24MD(6A) and s. 253.

The Tribunal was persuaded by the government party's argument but did not reach a conclusion on the point because:

- there was nothing before the Tribunal to suggest that, for the purposes of the predictive assessment required by s. 237(b), interference as a result of consent given under s. 18 of the AHA was likely to occur; and
- even if consent given under s. 18 of the AHA was a future act, it was separate from the future act with which the Tribunal's inquiry was concerned, which was the proposed grant of an exploration licence under the Mining Act.

The Tribunal decided that:

- the approach to s. 237(b) in previous inquiries would be followed; and
- on the evidence, there was nothing to suggest the regulatory scheme under the AHA would be ineffective;
- therefore, it was unlikely that there would be interference with the dreaming track in question— at [60] and [64] to [67].

Uranium exploration and s. 237 (c)

Paragraph 237(c) provides that:

> A future act is an ***act attracting the expedited procedure*** if…the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

The native title party contended that:

- there were no regulations or guidelines directly relevant to exploration for uranium, which included the increased risk of radioactive contamination;
- radioactive contamination continuing for a long period of time (i.e. over 10,000 years) would constitute a major disturbance for the purposes of s. 237(c)—at [18].

The grantee party:

- provided a sample of the *Radiation Safety Manual* (RSM) and stated it abided by the RSM when exploring for calcrete hosted uranium;
- asserted the *Uranium Guidelines* will be complied with;
- contended that uranium exploration is heavily regulated, referring to *Mining Act*, the *Mines Safety and Inspection Act 1994* (WA), codes of practice, the RSM and the *Uranium Guidelines*;
- noted its own compliance with best practices and its undertakings as to how exploration will be conducted—at [19] to [21].

The Tribunal summarised the government party's contentions, noting that condition 4 of the standard conditions of grant required a Radiation Management Plan (RMP) if there was a likelihood of encountering radioactive material. Affidavit evidence deposed to a RMP needing to demonstrate adequate measures to control the exposure of radioactive materials generated through mining operations and that any such exposure must be below the dose level set by the *Mines Safety and Inspection Regulations 1995* (WA) and, in any case, kept as low as reasonably practicable—at [23] to [25].

The Tribunal found that:

- it was satisfied that the grantee party was aware of its responsibilities to ensure the exploration for uranium is carried out with the minimum of health risks to the public and to its employees;
- there was no evidence to suggest the government's regulatory scheme would be ineffective in relation to exploration for uranium;
- apart from the native title party's contentions in regard to the special circumstances of uranium

exploration, there was nothing in this matter to suggest the proposed exploration was likely to cause a major disturbance for the purposes of s. 237(c);

- the existence of the government's contradictory policy of allowing uranium exploration and not uranium mining was not relevant;
- a number of additional factors, including that there were no Aboriginal communities in the area of the proposed grant, the land rehabilitation requirements and undertakings, and that there were no topographical or environmental factors which would cause the general community to think exploration would cause a major disturbance, led to the conclusion that exploration for uranium was not likely to cause a major disturbance—at [32], [70] to [83] and [85] to [86].

Determination

Having also found that s. 237(a) was also satisfied, the Tribunal determined that the grant of the exploration licence was a future act that attracted the expedited procedure—at [87].