National Native Title Tribunal

NATIVE TITLE Hot Spots

No. 26, November 2007

Contents

Recent cases

Determination of native title – Tennant Creek

***Patta Warumungu People v Northern Territory* [2007] FCA 1386**

Mansfield J, 3 September 2007

Issue

The issue before the court was whether to make a determination by consent in relation to an application for a determination of native title under s. 61(1) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

This application on behalf of the Patta Warumungu people in relation to various allotments in the town of Tennant Creek was filed in July 2006 and registered in September 2006. The areas surrounding Tennant Creek were the subject of a grant of land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (the ALR Act) but s. 3(1) of the ALR Act precluded land within the township of Tennant Creek from being available for such a grant.

The claim area

The claim area included 65 parcels of land covering approximately 42.1 sq km in and around the town of Tennant Creek in the Northern Territory. The traditional territory of the claim group, the Patta Warumungu people, was one of ten estates within the Warumungu language region.

The parties agreed that native title existed in 18 of parcels of vacant Crown land within the township, comprising 80% of the total claim area. His Honour Justice Mansfield was satisfied that one or more members of the claim group occupied those areas at the date the application was filed within the meaning of s. 47B(1)(c) of the NTA—at [6].

It was agreed that native title had been extinguished in the remaining 47 parcels of land within the township, consisting of residential and vacant industrial lots, as well as two larger parcels in the south east subject to a pastoral lease, and one larger parcel of vacant Crown land to the east of the township.

The court noted that the requirements of s. 87 were met in that:

- the s. 66 notice period had elapsed;
- a signed copy of the agreed orders had been filed with the court; and
- the court was satisfied that the orders were appropriate, within power and complied with s. 94A—at [8] to [11].

Evidence

The evidence before the court included:

- affidavits by the seven members of the claim group deposing to the basis of their membership of the Patta Warumungu people and their connection to the claim area; and
- a summary of two expert anthropological reports—at [13] to [17].

His Honour concluded that:

- the material relied upon by the parties adequately addressed the requirements of ss. 223 and 225;
- the statements of the applicants and the report supported the recognition of native title rights and interests possessed by the native title claim group;
- the parties likely to be affected by the proposed consent determination had sufficient access to independent legal representation;
- the Northern Territory, in providing its consent, had given appropriate consideration to the evidence and to the interests of the community generally;
- the material before the court suggested that both the applicants and the territory had carefully considered all that material and its significance;
- the terms of the proposed consent determination satisfied the requirements of s. 225 i.e. it was carefully worded, the native title rights and interests were appropriately specific and the nature and significance of the other interests in the area was clearly spelled out—at [18] to [20].

His Honour was satisfied that it was within the power of the court, and appropriate in the circumstances, to give effect to the proposed determination without a full hearing of the native title determination application—at [22].

Comments by the court

The court noted that:

- the large number of native title determination applications in the Northern Territory presented a 'considerable challenge' to ensure that they were dealt with in as efficient a manner as possible;
- with the support generally of the claimants (particularly through the Northern Land Council and the Central Land Council) and the Northern Territory, as well as other respondents, the court had adopted a strategy of hearing selected cases to determine particular issues of principle, or issues which related to the decided case, and to a number of others with similar geographical, cultural, social or legal characteristics;
- that process had almost been completed and it was expected that, as a result of those cases having been decided, many of the claims with which they had common features would progressively resolve by a series of consent determinations;
- this was the first consent determination in what the court hoped would be an 'escalating process';
- it had occurred in the framework of the overall strategy, reflected the active engagement of the parties and the fact that, in some respects, the outcomes which are negotiated may include outcomes beyond the declaration of the existence of native title rights and interests;
- the consent determination was accompanied by an Indigenous Land Use Agreement which had been achieved with the support of the National Native Title Tribunal;
- the Tribunal's role under the NTA was an important one and its capacity to contribute to mediated resolution of native title claims was well illustrated in the resolution of this application—at [23] to [24].

Determination

Native title was recognised in part of the determination area (the recognition area) and determined not to exist in relation to the remainder of the determination area.

The native title holders are Patta Warumungu Aboriginal people, as defined in the determination. The native title rights and interests recognised are the right to:

- use and enjoy the recognition area, including the right to conduct specific activities incidental to those rights;
- make decisions about the use and enjoyment of the recognition area by Aboriginal people who recognise themselves as governed by Aboriginal traditional laws and customs and who acknowledge the traditional laws and customs of the native title holders;
- the right to share and exchange natural resources obtained on or from the determination area, including traditional items made from the natural resources of the recognition area.

There are no native title rights and interests in minerals, petroleum or prescribed substances.

The other interests in the determination area noted in the determination include those held pursuant to mining and exploration tenements. The relationship between the native title rights and interests and the other interests in relation to the determination area is that:

- the other interests and the doing of any activity required or permitted to be done by or under the other interests, prevail over the native title rights and interests, but do not extinguish them, and the existence and exercise of the native title rights and interests do not prevent the doing of the activity;
- to the extent that the other interests are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title rights and interests continue to exist, but have no effect in relation to the other interests during the currency of those interests;

- if those other interests are later removed or otherwise cease to operate, either wholly or partly, the native title rights and interests will again have effect.

The Patta Aboriginal Corporation holds the rights and interests comprising the native title in trust for the common law holders pursuant to s. 56(2)(a).

Determination of native title – Newcastle Waters

***King v Northern Territory* [2007] FCA 1498**

Moore J, 26 September 2007

Issue

The issue in this case was whether the Federal Court should make determinations of native title in relation to six claimant applications made pursuant to s. 13(1) of the *Native Title Act 1993* (Cwlth).

Background

The nature and extent of the native title rights and interests that could be recognised was considered in *King v Northern Territory* [2007] FCA 944, summarised in *Native Title Hot Spots* Issue 25. The parties were ordered to submit a draft determination and related orders within six weeks of that decision. The applicants and Northern Territory each submitted a draft determination. The pastoral respondents were primarily in agreement with the draft submitted by the Northern Territory.

Determinations of native title

His Honour Justice Moore resolved a small number of differences between the parties over the exact wording of particular clauses within the two draft determinations. His Honour then made orders in the following terms:

- there be a determination of native title;
- the native title is not to be held on trust;
- an Aboriginal corporation, the name of which is to be provided within 12 months or such further time as the court may allow, be the prescribed body corporate for the purposes of s. 57(2) and perform the functions under s. 57(3);
- there be no order as to costs; and
- the parties have liberty to apply:
  - to establish the precise location and boundaries of the public works and adjacent land and waters referred to in Schedule D;
  - to establish the precise location of the boundaries of land on which the improvements referred to in Schedule D have been constructed and any adjacent land or waters the exclusive use of which is necessary for the enjoyment of the improvements; and
  - to establish whether any of the improvements referred to in Schedule D of the determination have been constructed lawfully.

Dismissal of claim made in response to future act notice – s. 94C

***Webb v Western Australia* [2007] FCA 1342**

French J, 28 August 2007

Issue

The issue in this case was whether the Federal Court should dismiss a native title determination application pursuant to s. 94C of the *Native Title Act 1993* (Cwlth) (NTA) as a consequence of receiving a report pursuant to s. 66C of the NTA from Native Title Registrar (the Registrar).

Background

Under the *Native Title Amendment Act 2007 (Cwlth)* (the 2007 amendments), s. 94C was inserted into the NTA. That section requires the dismissal of claimant applications made in response to future act notices if certain conditions are met. Section 66C, also inserted by the 2007 amendments, provides that the Native Title Registrar may advise the Registrar of the court of any applications that meet the criteria established by s. 94C(1) etc for dismissal. On 29 June 2007, the Registrar provide a report pursuant to s. 66C which was 'basic and tabular in form'—at [5].

Purpose of ss. 94C and 66C

According the the court:

> [T]he purpose of s 94C is to provide for summary dismissal of native title

> determination applications that have been filed to secure procedural rights with respect to future acts covered by the right to negotiate provisions of…the NT Act. The mechanism for summary dismissal is enlivened when… the procedural rights are effectively exhausted and the native title determination application is not being pursued to a mediated or litigated determination. This broad characterisation of the effect of the provisions is subject to their precise language. The report of the Native Title Registrar …is a statutory means for drawing to the attention of the Court applications which may meet the conditions for dismissal under s 94C—at [8].

His Honour Justice French noted that:

- the occasion for considering dismissal of native title determination applications under s. 94C arose upon the establishment of the facts set out in that section and the court must decide for itself that the facts existed;
- importantly, the court is not required to proceed to consider mandatory dismissal of a native title determination application even where the facts set out in the Registrar's report are undisputed or otherwise made out;
- paragraph 94C(1)(e) contemplates requiring an applicant to produce evidence in support of the application or to take steps to have the claim resolved or to consider whether the applicant has failed, within a reasonable time, to take steps to have the claim resolved;
- any such judgment would require an assessment of whether the applicant had engaged with the mediation process for which the NTA provides or had prepared, or complied with, directions for steps to be taken with a view to the trial of the action;
- the court does not proceed to consider dismissal until there has been a failure to comply with its direction under s 94C(1)(e)(i) or there has been a failure to take steps within a reasonable time to have the claim resolved—at [10] to [11].

French J concluded that:

> [B]efore it gets to the point of considering mandatory dismissal the Court has a degree of leeway…to move the applicants forward. The mandatory dismissal power, in effect, provides a tool or sanction to be used by the Court to dispose of applications lodged to get procedural rights and not otherwise being pursued—at [12].

Decision in this case

In his Honour's view, it was plain that the application in question was not filed simply to acquire procedural rights because:

- it covered a much greater area than that affected by the relevent future act notices;
- the applicants were working with the National Native Title Tribunal in the mediation process;
- the application took its place in a regional timetable of claims, having regard to available resources and regional priorities—at [13].

Therefore:

- this was not a case where the applicants had failed, within a reasonable time, to take steps to have the claims in the application resolved; and
- no direction pursuant to s 94C(1)(e) was necessary in the circumstances—at [13].

French J simply noted the Registrar's advice and indicated that this was the procedure he proposed to follow in future when such advices were provided and the occasion for consideration of mandatory dismissal did not arise—at [14].

Strike out of claimant application under s. 84C – Kabi Kabi #3

***Van Hemmen v Queensland* [2007] FCA 1185**

Collier J, 9 August 2007

Issues

The main issues before the court in this case were:

- whether a claimant application made under s. 13(1) of the *Native Title Act 1993* (Cwlth) (NTA) should be either struck out or summarily dismissed; and
- what (if any) costs orders should be made in favour of a non-party.

Background

Queensland South Native Title Service (QSNTS) was joined as a party to a claimant application, known as Kabi Kabi #3, and then sought to have

that application either struck out pursuant to s. 84C of the NTA or dismissed pursuant to O 20 r 2 of the Federal Court Rules (FCR).

The motion for dismissal was supported by Gurang Land Council (GLC), the State of Queensland and the applicant for an overlapping claimant application known as Kabi Kabi #2. Counsel for Kabi Kabi #2 also indicated to the court that they were prepared to discontinue their application if the Kabi Kabi # 3 proceedings were dismissed.

Kabi Kabi #3 was one of a number of native title determination applications instituted by members of the Kabi Kabi community in relation to essentially the same area north of Brisbane. There was a substantial overlap between the area covered by the Kabi Kabi #3 and Kabi Kabi #2 applications.

'The applicant' (as defined in ss. 61(2) and 253 of the NTA) for Kabi Kabi #3 consisted of 12 people who, it was said, were authorised to make the Kabi Kabi #3 application in accordance with a traditional decision-making process for making decisions of that kind i.e. they relied upon s. 251B(a). The native title claim group was described in the application as being comprised of the descendants of 12 named apical ancestors. Kabi Kabi #3 was not accepted for registration because the Native Title Registrar's delegate was not satisfied that the applicant was authorised as required by s. 190C(4).

'The applicant' for Kabi Kabi #2 consisted of three people. The native title claim group was described so as to include 11 of the 12 apical ancestors named in Kabi Kabi #3.

Application of s. 84C and O 20 r 2

Her Honour Justice Collier noted that:

- section 84C of the NTA was limited to an application made under s. 61(1) of the NTA and applied where the application failed to comply with ss. 61, 61A or 62;
- Order 20 rule 2 of the FCR was only enlivened if no reasonable cause of action was disclosed or the proceeding was frivolous, vexatious or an abuse of process;
- the courts have tended to equate the consequences of strike-out under s. 84C with those of summary dismissal under O 20 r 2 and so have acted cautiously on the basis that no court proceeding should be summarily dismissed except in a very clear case—at [6] to [8].

Collier J first considered the submissions in relation to s. 84C.

Submissions in support of strike-out

QSNTS submitted that the Kabi Kabi #3 applicant was not authorised as required under the NTA because (among other things):

- in the Kabi Kabi #3 application, it was said that the applicant was authorised in accordance with a traditional decision-making process whereby a number of unidentified 'elders' conducted meetings in 2005 but there was little evidence or detail of that process;
- there was clear affidavit evidence there had been no consultation with, or authorisation by, a number of other elders and family members who were descendants of the named apical ancestors;
- although the Kabi Kabi #2 and Kabi Kabi #3 applications covered a similar area and had 11 common apical ancestors, each application was said to be authorised by all the persons in the native title claim group;
- both could not be so authorised and either one or both of the applications must not be authorised in accordance with s. 61(1)— at [16].

Some of the examples of the lack of detail about the decision-making process QSNTS pointed to were that there was no indication of:

- which elders attended the meetings, whether they were present at each meeting and how they made decisions;
- which family each of the elders represented, what representation or consultation was accorded to families who did not have elders attending, who the 'other persons' who gave authorisation were or who authorised them to represent and speak for the descendants;
- the basis upon which the elders were identified and why elders who were not present were not required to be consulted.

In the affidavits filed in relation to the authorisation of the Kabi Kabi #3 application, it was said that:

> The Elders drive the traditional decision-making process of the native title claim group for decisions of this kind. The persons who comprise the Applicant are 10 Elders of the native title claim group and 2 persons authorised by the Elder of their families to represent their respective families...As required by our traditional laws and customs, *the Elders have consulted with the members of their respective families and one another about the need for and content of this Application* (emphasis added).

QSNTS submitted that no such consultation had occurred.

Kabi Kabi #2 submitted (among other things) that the decision-making process relied upon by Kabi Kabi #3 was 'seriously defective to the point of being incurable'—at [17].

The state submitted that:

- there could not be 'valid' authorisation of both the Kabi Kabi #2 and the Kabi Kabi #3 applications;
- material filed by Kabi Kabi #3 did not sufficiently address the authorisation issue;
- the current situation with competing claims would continue to waste more time and money in fruitless interlocutory applications—at [18].

Kabi Kabi #3 submissions

In opposing the motion for dismissal, the legal representative for Kabi Kabi #3 submitted (among other things) that:

- the application had failed the registration test because of a failure of authorisation but changes to the NTA meant the application had to be tested again;
- it would be premature for the court to 'close the administrative window of opportunity' opened by the changed to the NTA by dismissing the application;
- an adjournment until later in 2007 should be granted to allow Kabi Kabi #3 to 'take advantage of' the change in the law—at [19].

Affidavit evidence

The court had before it the affidavit of a consultant anthropologist contracted by QSNTS in which that anthropologist said (among other things) that he was not satisfied that all 'appropriate living Kabi Kabi descendants of the ancestors named on the Form 1 in each of Kabi Kabi #2 and Kabi Kabi #3' had been adequately consulted. There were also several affidavits from people who identified as Kabi Kabi deposing to the fact that they had not been consulted about the Kabi Kabi #3 application.

For Kabi Kabi #3, there was an affidavit:

- from one of the people named as the applicant that purportedly set out a process decided upon by the elders whereby authorisation should be via a meeting, advertised in the paper and attended by 'everyone', at which a vote could be taken to reach a 'majority decision'; and
- from a consultant anthropologist saying (among other things) that a 'majority decision' of a meeting held in accordance with Australian meeting conventions conformed to the 'traditional values associated with' Kabi Kabi decision-making if prior consultation was evident that included the opportunity for input by 'relevant parties', opportunity for 'relevant people' to speak to issues (before or during the meeting), adequate notice of the meeting through 'acceptable channels' and adequate opportunities to express both support for, and dissent from, possible courses of action.

Findings

While noting the caution with which courts approach strike-out applications, her Honour found it was appropriate to make an order pursuant to s. 84C because (among other things):

- both the lack of identification of 'elders' in the Kabi Kabi #3 application and the evidence of apparently well-respected members of the Kabi Kabi community that they neither authorised the application nor were consulted in relation to it indicated there was a serious issue of non-compliance with s. 61 in relation to authorisation;
- for the purposes of s. 251B(a), the evidence of the decision-making process did not have 'the level of collective interaction and discussion' to be expected in a traditional context and did not show that a majority vote was a method of decision-making in accordance with traditional Aboriginal law and custom of the Kabi Kabi people;

- if the authorisation process was not in conformity with traditional laws and customs for the purposes of s. 251B(a), then it was not clear that the native title claim group had agreed to, and adopted, any particular decision-making process in relation to authorising the application as required by s. 251B(b);
- the legal representative for Kabi Kabi #3 did not submit that the application was authorised in accordance with s. 61 but, rather, referred only to the opportunity to be re-tested for registration;
- no additional evidence was produced by Kabi Kabi #3 in these proceedings to demonstrate compliance with the authorisation requirement;
- there was nothing to show why the extra time sought by Kabi Kabi #3 would result in the key issue of the alleged authorisation of two applications by the Kabi Kabi people over a very similar area being addressed—at [22] to [29].

It was unnecessary in these circumstances for the court to deal with O 20 r 2 of FCR.

Costs in favour of non-parties

The Kabi Kabi #2, although not formally a party, sought costs in respect of the preparation of affidavits relating to a notice of motion filed in June 2006 by Kabi Kabi #3 (the June 2006 NOM) but discontinued May 2007. Prior to the discontinuance, Kabi Kabi #2 had indicated it would seek leave to be joined formally to the proceedings but did not do so.

Collier J reviewed s. 43 of the *Federal Court Act 1976* (Cwlth) in the light of s. 85A of the NTA and the relevant case law, going on the note that:

- there is no absence of jurisdiction to order costs *against* non-parties and the jurisdiction to do so could be exercised against persons who were considered to be the 'real parties' to the litigation;
- however, the order sought by Kabi Kabi #2 was *by* a non-party against a party and, while such an order was available, it would (if ever appropriate) be extraordinary and exceptional;
- no order for costs had been sought by the parties to the proceedings in relation to its discontinuance of the June 2006 NOM—at [39] to [40] and [47].

Her Honour considered the following points as relevant:

- the policy articulated in s. 85A was that parties usually bear their own costs and this policy was equally applicable to non-parties;
- the Kabi Kabi #2 applicant was analogous to an intervener and, as a general rule, conventional rules as to recovery of costs tended not to be applied to interveners;
- the Kabi Kabi #2 applicant was not obliged to file documents or do anything else in the proceedings;
- while having an interest in the proceedings for 'obvious reasons', there was 'no requirement of reason or justice' that entitled the Kabi Kabi #2 applicant to recover its costs;
- in these circumstances, and taking into account the principle that an order for costs in favour of a non-party would be exceptional, it was not appropriate to make any such order—at [48].

Decision

The court ordered that:

- the Kabi Kabi People #3 native title determination application be struck out pursuant to s. 84C;
- there be no order as to costs in favour of the Kabi Kabi #2 applicant in relation to the June 2006 NOM—at [31] and [49].

Registration test review – factual basis for the claim

Gudjala People # 2 v Native Title Registrar [2007] FCA 1167

Dowsett J, 7 August 2007

Issues

This case is about an application for review of a decision not to accept a claimant application for registration on the Register of Native Title Claims. The application for review was made under s. 190D(2) of the *Native Title Act 1993* (Cwlth) (NTA).

The main issues before the Federal Court were:

- whether a delegate of the Native Title Registrar had misled the applicant, denied the applicant procedural fairness or taken into account irrelevant material in making the registration test decision;

- whether the description of the native title claim group found in the application satisfied s. 190B(3);
- whether the application satisfied ss. 190B(5) to 190B(7).

The decision is important because it is the first case in which the court has considered in detail what is required to provide a sufficient factual basis for the purposes of s. 190B(5). The relevance of the decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3) to various conditions of the registration test is also considered for the first time.

Background

The Native Title Registrar must accept for registration the claim made in a claimant application if it satisfies all of the conditions found in ss. 190B and 190C. In any other case, the Registrar must not accept the claim for registration—see s. 190A(6).

The claimant application under consideration in this case was made on behalf of the Gudjala People in April 2006 (Gudjala People #2). In November 2006, a delegate of the Native Title Registrar decided it must not be accepted for registration because it did not meet the conditions found in ss. 190B(3), 190B(5), 190B(6) and 190B(7). In accordance with s. 190D(1), the applicant and the Federal Court were notified of this decision and the reasons for it. Subsequently, the applicant filed a claim registration review application pursuant to ss. 69(1) and 190D(2) (as it was then – now see s. 190F).

An earlier, related claimant application, known as the Gudjala 'core country' claim, was filed in 2005. The only significant difference between the two claims was that Gudjala People #2 covered some specific parcels that were, for reasons that are presently irrelevant, excluded from the core country claim. In March 2005, the core country claim was accepted for registration by the same delegate who considered, and rejected, Gudjala People #2.

Grounds for review

The grounds for review were that:

- the applicant relied to its detriment on misleading documents and information sent by the delegate;
- the material available to the delegate did not justify the application failing the test;
- the delegate took into account irrelevant material and failed to take into account relevant material;
- the decision involved an error of law;
- the applicant was deprived of procedural fairness in the decision-making process.

Nature of review

A claim registration review conducted pursuant to s. 190D(2):

- is not restricted to consideration and determination of a question of law but extends to determination of issues of fact and places the controversy constituted by the issues of fact and law before the court;
- it is not restricted to the material before the Registrar;
- empowers the court, if a ground of review is established, to make appropriate orders to do justice between parties in exercise of the original jurisdiction of the court— see the Full Court in *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 at [63] to [66].

As his Honour Justice Dowsett noted, given the nature of the review, the court must consider for itself the adequacy or otherwise of the information provided by the applicant against the conditions of the registration test i.e. the court must form its own view—at [23] and [33].

The nature of the registration test and the Registrar's duty

Dowsett J noted that:

- while ss. 61, 61A and 62 'prescribe the content and form' of a 'valid' claimant application, compliance with those sections 'is not necessarily sufficient to secure registration of the claim';
- a claim may be accepted for registration 'only if' the Registrar is 'satisfied' as to all of the conditions prescribed by ss. 190B and 190C;
- under s. 190A(1), the Registrar has a statutory duty to consider, and decide, whether the claim made in the application under consideration meets the requirements of those provisions—at [2] and [11].

Delegate not bound by earlier decision

It was submitted that:

- the applicant in Gudjala People #2 was entitled to rely on the reasons given in relation to the core country claim when drafting the contents of application for Gudjala People #2 'for the purposes of passing the registration test'; and
- in circumstances where the same delegate considered both applications, that delegate became *functus officio* on making the first decision 'in respect of the second decision and it was not open to him to in effect reverse his own earlier decision'.

His Honour found that these arguments were 'misconceived' because:

- the delegate could not have considered the application 'at all' if f*unctus officio*;
- in fact, 'there was a statutory duty to do so' and the applicant's submissions failed to take account of that duty;
- the delegate 'was obliged to act in accordance with law, not in accordance with his own previous decision' and there could be 'no question' of delegate being bound to follow his own earlier decision if he considered that it incorrectly applied the NTA;
- in any case, the question was whether or not the delegate was correct in his view of Gudjala People #2 and so the decision concerning the core country claim was irrelevant to the court's task—at [8] and [11], referring to *Attorney-General (New South Wales) v Quin* (1989-1990) 170 CLR 1.

Procedural fairness

The allegation of a denial of procedural fairness took two forms:

- an allegation that errors in the decision denied the applicant an opportunity to have the application assessed according to the appropriate criteria;
- the fact that the core country claim satisfied the same delegate with respect to the same group, for the same country, with the same traditional laws and customs and represented by the same individuals 'contributed' to the unfairness of the decision not to register Gudjala People #2 'without reference to a cogent or relevant reason for a changed opinion and on erroneous bases'.

Dowsett J dismissed the first allegation because it confused procedural fairness with errors in the decision-making process, when errors alone will not usually amount to a denial of procedural fairness—at [13].

The second 'superficially more substantial argument' led the court to consider the duty conferred upon the delegate. Pursuant to s. 190A(5A):

> Before the Registrar [or delegate] has decided whether or not to accept the claim for registration, he or she may notify the applicant that the application may be amended under the Federal Court Rules.

His Honour found there was 'nothing' in the second allegation because (among other things):

- the decision to 'accept or reject an application is a purely administrative function' that depended upon whether or not the application under consideration satisfied 'the prescribed criteria';
- nothing in the NTA suggested that the delegate was to receive submissions about any proposed decision and, if anything, s. 190A(5A) suggested the contrary;
- no special requirements of procedural fairness arose simply because the same delegate considered both applications;
- the applicant was obliged to satisfy the delegate that the requirements of the test were met and could not rely upon 'past practices';
- the applicant was given a preliminary assessment that warned of possible inadequacies in relation to all of the conditions of the test it ultimately failed to meet, with the exception of s. 190B(6), and could 'hardly complain that other identified inadequacies led to a failure to satisfy the requirements of' s. 190B(6);
- it was made clear in the preliminary assessment that it was for the applicant to get independent legal advice and provide sufficient information to pass the test;
- exercising the discretion available under s. 190A(5A) to advise of possible 'shortcomings'

and give the applicant an opportunity to amend before the registration test decision was made was desirable but 'not necessary'—at [15] to [21].

Irrelevant material

The allegation that the delegate took into account irrelevant material by having regard to documents relating to other applications was dismissed largely because the delegate did not treat that material as 'generally relevant to his task' and made 'very limited' use of it. However, after referring to s. 190A(3), which provides that the delegate 'may have regard to such other information as he or she considers appropriate', Dowsett J commented that:

> [I]t would be…undesirable that the…delegate take into account information derived from other applications without affording the applicant an opportunity to comment upon it—at [23].

Error of law and other grounds

The allegations as to errors of law and the other grounds raised in the review application were dealt by his Honour in the examination of the delegate's reasons summarised below.

Relevance of *Yorta Yorta* to the registration test

The delegate had referred to the decision in *Yorta Yorta* concerning the meaning of 'traditional' in s. 223(1) when considering ss. 190B(5) and 190B(7) of the test. Paragraphs (b) and (c) of the former refer to 'traditional laws' and 'traditional customs'. Section 190B(7) refers to a 'traditional' physical connection.

His Honour summarised the major findings in *Yorta Yorta* before going on to consider the claim against s. 190B(3) and 190B(5) to 190B(7)—at [26].

Native title claim group description – s. 190B(3)

The relevant provision here was s.190B(3)(b), which requires the Registrar must be satisfied that the persons in the native title claim group are described in the application sufficiently clearly so that it can be ascertained whether any particular person is in that group. This part of the test responds to a similar requirement found in s. 61(4).

The description of the native title claim group in Gudjala People #2 was:

> The criteria for membership of the Gudjala native title claim group is in accordance with traditional laws acknowledged and customs observed by the Gudjala people who are traditionally connected to the area described in Schedule B…through:
>
> 1) physical, spiritual and religious association; and
> 2) genealogical descent; and
> 3) processes of succession; and
>
> who have communal native title in the application area from which rights and interests derive.
>
> The Gudjala native title claim group is comprised of all persons descended from the following [four named apical] ancestors.

The delegate considered that the paragraph identifying the claim group by reference to named apical ancestors would, of itself, be sufficient to satisfy s. 190B(3). However, the additional paragraph, which asserted membership was in accordance with traditional laws and customs etc., suggested to the delegate that membership of the claim group was not solely dependent upon descent from the named ancestors but the relevant laws and customs were not identified. This led the delegate to decide the description in the application was not sufficiently clear for the purposes of s. 190B(3)(b).

In relation to the submissions of the applicants, it was found that:

- as required, the delegate addressed only the content of the application in considering s. 190(3)(b);
- there was no error involved in the delegate accepting that the application complied with s. 61(4) for the purposes of 'procedural' condition found in s. 190C(2) but deciding that it did not meet the 'merit' condition found in s. 190B(3) because the NTA draws a distinction between ss. 190B(3) and 190C(2) as they apply to s. 61(4);
- in order to be entitled to registration, the application must 'comply with the quite precise test prescribed' in s. 190B(3)(b)—at [30] to [32].

However, given the nature of the review, it was also necessary for the court to form its own view as to whether there was compliance with s. 190B(3)(b). While this was a question that was 'not without difficulty' in this case, it was found that the 'better' view was that the application satisfied that condition of the test—at [33.

This was because the canons of statutory construction required the two parts of the claim group description to be read:

> [A]s part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open. The preferable construction…is that all members of the claim group are descendants of the four apical ancestors…Although I would not encourage a repetition of this approach…[,] it sufficiently identifies the members of the claim group by reference to apical ancestors—at [34].

His Honour did note that:

> It is curious that laws and customs concerning physical, spiritual and religious association, genealogical descent and processes of succession should lead to the outcome that the only people who have *'communal native title'* in the area are the descendants of four apical ancestors. One would have thought it more likely than not that some such descendants…would fail in connection with physical, spiritual and religious association and/or processes of succession. As the laws and customs in question are not identified, this curiosity cannot be resolved. However subs 190B(3) requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification—at [33], emphasis in original.

Factual basis for claimed native title – s. 190B(5)

Subsection 190B(5) requires the Registrar to be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

a) that the native title claim group have, and the predecessors of those persons had, an association with the area; and
b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The court noted that the reference in s. 190B(5) to the factual basis upon which it is asserted that the claimed native title rights and interests exist was:

> [C]learly a reference to the existence of rights vested in the claim group. Thus it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)—at [39].

Identification of claim group is a necessary aspect in identifying the factual basis

Dowsett J emphasised that there was a relationship between the claim group description and the requirements of s. 190B(5):

> [T]he absence of any description of the basis upon which the apical ancestors were selected re-emerges in considering this aspect of the case. There may be many ways in which to describe a claim group, any one of which may be sufficient to satisfy the requirements of subs 190B(3). However that task is undertaken, it will eventually be necessary to address the relationship which all members claim to have in common in connection with the relevant land...
>
> Identification of the claim group, the claimed rights and interests and the relationship between the two are not totally independent processes. The identified rights and interests must belong to the identified claim group. Subsection 190B(5) requires a description of the alleged factual basis which demonstrates that relationship. The applicant may not have been obliged to identify the relationship between the

claim group and the relevant land and waters in describing the claim group for the purposes of subs 190B(3), but that step had to be undertaken for the purposes of subs 190B(5)—at [40] and [41].

After noting the material relied upon by the delegate, including affidavits from two members of the claim group and an anthropologist's report, his Honour went on to examine the evidence under each of paragraphs (a) to (c) of s. 190B(5).

Association with the area – s. 190B(5)(a)
The factual basis provided must support the assertion 'that the native title claim group have, and the predecessors of those persons had, an association with the area'.

The affidavit evidence of the two claimants identified their relationship to the apical ancestors and set out the association each claimant had with the claim area and the association of their parents and grandparents. His Honour was somewhat critical of the anthropologist's report in relation to this issue, noting that:

- in much of the report, it was unclear whether the writer was expressing opinions or stating facts;
- some parts of the report seemed to refer to views and opinions concerning Aboriginal culture and norms generally, rather than to those relevant to Gudjala People #2;
- a statement in the report that 'documentary and oral historical material obtained in the course of my work make it clear that this family has maintained a presence in the claim area at all times since non-indigenous occupation' was, at best, merely a summary of relevant facts not otherwise identified—at [46] to [47].

Dowsett J noted the delegate's comment that, in the absence of any evidence as to the size of the claim group or as to the number of predecessors over the years since the days of the apical ancestors, it was impossible to assess the group's association with the claim area or that of their predecessors—at [51].

His Honour went on to say that:

> Even if it be accepted that all members of the claim group are descended from people who had an association with the claim area at the time of European settlement, that says nothing about the history of such association since that time. Some members of the claim group and their predecessors may be, or may have been, so associated, but that does not lead to the conclusion that the claim group as a whole, and their predecessors, were similarly associated—at [51].

It was found that the application did not demonstrate the required association because:

- while the affidavit evidence of the two claimants may have demonstrated that they, and their families, presently have an association with the claim area, and that their predecessors have had such association since European settlement, it did not demonstrate that the claim group *as a whole* presently has such association;
- while this did not mean all members must have such association at all times, there must be evidence that there is an association between the whole claim group and the area claimed;
- similarly, there must be evidence of such an association between the predecessors of the whole group and the area over the period since sovereignty;
- the affidavit evidence did not 'go so far' and the anthropologist's report provided opinions and conclusions rather than any alleged factual basis for such opinions and conclusions or for the claim—at [52].

Traditional laws and customs – s. 190B(5)(b)
The requirement here is that the factual basis is sufficient to support the assertion 'that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests'.

It was found that, in order to satisfy s. 190B(5)(b):

- that factual basis must be capable of demonstrating that there are traditional laws and traditional customs acknowledged or observed by the native title claim group and giving rise to the group's claim to native title rights and interests;
- in accordance with *Yorta Yorta*, the requirement in s. 190B(5)(b) that the laws and customs be

'traditional' means that 'they must have their source in a pre-sovereignty society and have been observed since that time by a continuing society';

- the task at s. 190B(5)(b) is to identify the existence, at least at the time of European occupation, of 'a society of people, living according to identifiable laws and customs, having a normative content';
- such laws and customs must 'establish normal standards of conduct or, perhaps, be prescriptive of such standards';
- there can be no relevant traditional laws and customs unless there was, at sovereignty, a society 'defined by recognition of laws and customs from which such traditional laws and customs are derived';
- the 'starting point' for s. 190B(5)(b) must be identification of an Indigenous society at the time of sovereignty or, at least, at the time of European occupation (1850 to 1860 in this case);
- while the apical ancestors used to define the claim group need not be shown to be, in and of themselves, such a society, at some point the applicant must 'explain the link between the claim group and the claim area', which would 'certainly involve the identification of some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage';
- the Gudjala People #2 claim should be understood as relating to the core country claim and so the relevant society should be sought in the larger area covered by that application—at [62] to [67].

After considering the evidence, Dowsett J found that:

> [T]here is no evidence of any known connection between the…apical ancestors, save for their presence in this relatively large area…[Two of them]… seem to have lived on stations. There is no evidence as to the relationship between station owners and indigenous employees on the one hand, and any pre-existing indigenous society on the other. One is inclined to infer that, in 1850-1860, there were groups of indigenous people in the area, but there is no evidence concerning them. There is certainly no factual basis for inferring that there was a society defined by its acknowledgement and observation of laws and customs—at [68].

Further, the evidence of contact in 'modern times' amongst the family or clan groups identified in the anthropologist's report as members of the claim group was 'scant'—at [69].

Therefore, s. 190B(5)(b) was not satisfied because:

> On the material presently available, I find no factual basis supportive of an inference that there was, in 1850-1860, an indigenous society in the area, observing identifiable laws and customs. For the purposes of subs 190B(5), it is not necessary to go further—at [70].

While it was not necessary to do so, his Honour did go on to say that there was also 'scant' evidence concerning the 'broader question' of whether there were 'traditional' laws and customs currently acknowledged and observed by the claim group. That evidence consisted of what was said in the affidavits of two claimants, in particular those of William Santos, and the anthropologist's report—at [70] to [77].

Dowsett J noted (among other things) that:

> Much of it may well have been handed down to…[Mr Santos] as oral tradition, but there is nothing in the affidavit material which would link those laws and traditions [i.e. as described by Mr Santos] to any particular time in the period since 1850-1860 or, in particular, to that period. A certain amount of Mr Santo's evidence might be said to describe laws and customs which are normative in nature. Although some of it asserts rights and interests in land, none of it identifies traditional laws and customs derived from a pre-sovereignty society, which support or justify the claim group's claims. It is impossible to understand why descendants of the identified apical ancestors have rights and interests in the land whereas others have not—at [78].

As to the anthropologist's report, his Honour noted that:

- the basis for the opinion that 'it may reasonably be concluded that the claimed area belongs to the Gudjala People' was by no means clear;

- much of the discussion of traditional laws and customs in the report referred to writings concerning north-west Queensland generally;
- there was no 'real' basis given in the report for the inference that the Indigenous community 'associated with the Gudjala area have clearly not abandoned the legal principles on which their system of land tenure is based and continue to today to be guided by laws and customs which have their origin in pre-contact time';
- while the report may have described a society having apparently traditional laws and customs, there was no basis for inferring that those laws and customs originated in any pre-sovereignty society;
- while an inference that some or all of those laws and customs had been handed down through two or more generations may have been open, it was 'impossible to say any more than that'—at [79] to [81].

The court concluded that the 'real deficiencies' in the application were 'twofold':

- it failed to explain how, by reference to traditional law and customs presently acknowledged and observed, the claim group was limited to descendants of the identified apical ancestors; and
- no basis was given to support an inference that there was, at and prior to 1850-1860, a society which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group—at [81].

Claim group continued to hold the native title – s. 190B(5)(c)

The requirement here was that there be a sufficient factual basis to support the assertion that 'the native title claim group have continued to hold the native title in accordance with those traditional laws and customs'.

Dowsett J found that the application did not satisfy s. 190B(5)(c) because it:

> [I]mplied a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date and at the time of sovereignty. The difficulty is the inability to demonstrate the existence, at that time, of a society observing laws and customs from which current traditional laws and customs were derived. This difficulty led the Delegate to conclude that this requirement has not been satisfied. I agree—at [82].

Some native title rights and interests can be established prima facie – s. 190B(6)

Subsection 190B(6) provides that the Registrar must consider, prima facie, that 'at least some of the native title rights and interests claimed in the application can be established'.

In considering this requirement, his Honour referred to the definition of 'native title or native title rights and interests' in s. 223(1) and the findings in *Yorta Yorta* at [86] that:

- 'native title rights and interests' are rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question; and
- 'traditional' refers to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.

It was found that, for the reasons given earlier in relation to traditional law and traditional custom in this case, s. 190B(6) was not satisfied—at [87].

Traditional physical connection – s. 190B(7)

This condition of the test requires the Registrar to be satisfied that at least one member of the native title claim group has, or had, a 'traditional' physical connection with any part of the application area. Dowsett J decided that the application did not meet the condition found in s. 190B(7) because there was 'no basis for inferring that there was a society of the relevant kind, having a normative system of laws and customs, as at the date of European settlement'—at [89].

Decision

The application for review was dismissed because the court found that the conditions in s. 190B(5) to 190B(7) were not met.

Comment

This court's findings will have a significant impact upon the application of various conditions of the registration test, particularly s. 190B(5). The Registrar is in the process of providing information on the application of the test in the light of his Honour's findings direct to applicants, Representative Aboriginal/Torres Strait Islander bodies and native title service providers. In the meantime, if readers have any queries in relation to a particular matter, please contact Louise Bygraves, Senior Delegate—Communications, freecall 1800 640 501.

Strike out of claimant application under s. 84C – Southern Arunda Yunkunjatjara Ngura ritja claim

***Kite v South Australia* [2007] FCA 1662**

Finn J, 2 November 2007

Issues

The main issues in this case were:

- whether the Federal Court should strike out a claimant application pursuant to s. 84C of the *Native Title Act 1993* (Cwlth) (NTA);
- whether the claim group as described in the application included all the people who hold the native title claimed;
- whether all of the members of that group satisfied the criteria said to give status as native title holders.

Background

The State of South Australia sought to have a claimant application filed by John Kite struck out pursuant to s. 84C or summarily dismissed pursuant to s. 31A *Federal Court of Australia 1976* (Cwlth) (FCA). The two main grounds the state relied upon were that:

- the native title claim group did not include all of the persons who hold the native title claimed; and
- the claim group as described was incapable of authorising the making of the application.

As the court noted:

- section s. 84C empowers the court to strike out an application that does not comply with ss. 61, 61A or 62 of the NTA; and
- section 31A of the FCA permits the court to summarily dismiss the whole of a proceeding if it is satisfied that the applicant has no reasonable prospect of successfully prosecuting the application—at [2].

The court relied upon s. 84C in this matter.

The application, brought by Mr Kite on behalf of the Southern Arunda Yunkunjatjara Ngura ritja (SAYN) claim group in August 2007, overlapped seven other claimant applications, including the Kokatha application and the Antakirinja Matu-Yankunytjatjara application. The claim group was made up of five named individuals.

The court noted that:

- the SAYN application appeared to be 'another instalment in the disintegration of agreements struck at Spear Creek' in May 2004, which sought to resolve overlapping native title claims in parts of South Australia;
- in one of the Spear Creek agreements, Mr Kite was described as a member of the former Kokatha Munta claim group, with his membership (later withdrawn) being founded, apparently, on the Kokatha ancestry of his mother, Mrs Gladys Kite;
- Mr Kite and his family had been involved in the Kokatha application but did not fall within the current claim group description in that application;
- the application for the Antakirinja Matu-Yankunytjatjara claim included Gladys Kite and all her descendants, something Mr Kite was apparently unaware of and sought to have rectified;
- in the second of the affidavits Mr Kite filed in these proceedings (the second affidavit), he acknowledged that all five members of his claim group were members of the extended family of his mother, indicated that the former Kokatha Munta claim was made on the basis of Kokatha ancestry and stated that his mother was of Kokatha ancestry.

In the second affidavit, Mr Kite went on to say (among other things) that:

- the SAYN claim was not based upon Kokatha ancestry but upon 'my father's and his father's ancestry and upon the paternal ancestry of the other members' of the SAYN claim;
- under 'my traditional law and culture, my father's father and his ancestors are the basis of my capacity to be one of the claimants' in the SAYN claim;
- four of the five claim group members had capacity to make that claim (i.e. apart from Adam Tunkin) through 'our paternal grandfather Bill Kite and his ancestors, more so than through my father or the other claimants' fathers';
- the fifth member of the claim group, Mr Tunkin, was a member on the basis that his father was a relative of Mr Kite's mother, he was adopted by Mrs Kite's father and he was recognised as '*ngura*ritja' for a big part of the claim area because, among other things, of his father's status as *ngura*ritja (which the court noted was said by the state to be a Western Desert Bloc term for 'land owner').

Further, Mr Kite said in the second affidavit that the members of the claim group believed they 'are the people who are qualified to make this claim for native title rights and interests in the country to which the claim applies' as *ngura*ritja (i.e. as 'traditional custodians of the claimed land') because:

- they were 'the descendants of grandfather Bill Kite', who had 'extensive knowledge of traditional laws and customs and about where his country was and his relationship with that country';
- Bill Kite and his ancestors 'were traditional custodians of the claimed country from a time prior to white settlement of South Australia in 1825';
- they all knew and lived by 'our traditional laws and customs', which 'deal with people's connections with country';
- those traditional laws and customs made it 'clear who can speak for country, what rights those people have in respect of the country and also what responsibilities they have';
- the people who could speak for the country were 'those who have been taught our traditional laws and customs and then, having learned them, have been willing to remember them and acknowledge that those traditional laws and customs are binding upon them';
- the five members of the SAYN claim were 'the only descendants of grandfather Bill Kite and his ancestors who fit this description, today';
- the members of the claim group's extended family 'who have not learned and who do not now live by the traditional laws and customs of grandfather Bill Kite and his ancestors', were 'not qualified' to claim traditional country and were 'content' that Mr Kite and the four other members of the claim group 'hold the traditional knowledge and…perform the traditional role of exercising the traditional claims upon, and responsibilities toward our grandfather's country'.

The court noted that:

- to the extent that there was any assertion that Mr Tunkin was a descendant of Bill Kite, it was inconsistent with what Mr Kite had said earlier about Mr Tunkin;
- a handwritten genealogy in evidence indicated that, while Bill Kite was Mr Kite's grandfather, he was the great-grandfather of three other members of the claim group—at [11] and [14].

Statutory framework

His Honour Justice Finn referred to the applicable principles as set out in *Reid v South Australia* [2007] FCA 1479 (summarised in this issue of *Native Title Hot Spots*) at [22] to [30], noting in passing that:

> [T]he indispensable nexus between traditional laws and customs and claimed native title rights and interests is made plain in s 223(1)… which recognises "communal, group or individual rights and interests of Aboriginal peoples" in relation to land where "the rights and interests are *possessed* under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples"—at [18], emphasis in original.

It was also note that:

- the proper identification of the native title claim group, as required by s. 64(1), is the central or focal issue of a native title determination application because it is that group which

provides the authorisation under s. 251B and a determination recognising native title is made in that group's favour;

- therefore, a subset of what 'truly' constitutes a native title group cannot itself be a claimant group under s 61(1), although if a sub-group of a community sharing traditional laws and customs alone possessed rights and interests in a particular area, that sub-group may itself constitute a native title claim group;
- the court's power to strike-out under s. 84C should be exercised only where the claim as expressed is untenable upon the version of the evidence favourable to the respondent to the strike out—at [21] to [22] and [24].

Consideration

Finn J was of the view that the application was 'fatally flawed' in a number of respects.

It was noted firstly that, on its face, the application form contained 'apparent contradictions, ambiguities and infelicities that would have required systematic address' if the claim was not struck out, for example:

- the assertion that the rights and interests claimed were 'individual rights and interests';
- the general rights described did not 'accommodate the differing bases of the connection to the claim area of the four Kite descendant claimants and of Adam Tunkin';
- while the application suggested that the claim group members' status as native title holders was derived by means of ancestry in some manner, the evidence was that Mr Kite's instructions to counsel were 'adamantly and repeatedly: you claim through your grandfather';
- the grandfather relied upon for the purposes of the application was Bill Kite but only one of the five claim group members was the grandchild of Bill Kite;
- the description of native title rights and interests in the application suggested that Aboriginal peoples other than the claim group acknowledged the same traditional laws and observe the same customs in relation to the claim area;
- Mr Kite submitted that the five claimants were 'not inevitably asserting that they have failed to include all possible members of their claimant group in their claim' but, rather, were acknowledging there may be others who hold native title in the parts of the same country 'on the basis of different groups' laws, customs and traditions'.
- this was not what was said in the application and there was no evidence suggesting that there may be other native title holders observing different laws and customs in relation to the claim area or parts of it—at [25] to [26].

The matters of substance identified by the court were:

- whether the designated claim group constituted the entirety of the possible native title group suggested by the application and evidence, given the 'inherently contradictory character' of the application itself (called the sub-group claim) and Mr Kite's conception of who is possessed of native title rights and interests (called the trust-like claim);
- the actual composition of the claim group itself and the basis of its membership, in the light of the members' relationship to Bill Kite and Adam Tunkin's membership of the group—at [24] and [35].

The state submitted that:

- the native title rights and interests listed in the application form presupposed a wider claim group that included, at least, female membership;
- no such membership was disclosed;
- the application form recognised ancestry 'as the author of the status as native title holder' yet there were descendants of Bill Kite who were not included in the claim group;
- the court should infer that the claim group is 'simply a sub-group of the wider community of Bill Kite's descendants'.

Sub-group claim

It was found that the application was defective on its face because it revealed that there were other people who could claim native title under the same

traditional laws and customs as the claim group. While this was something that could be cured by an appropriate amendment, Finn J was of the view that other deficiencies in the application meant that this would not save the application—at [28].

Trust-like claim

In relation to the 'trust-like' claim, it was noted that this gave rise to 'a more controversial question'. The genealogical evidence indicated there were 'considerably more living descendants of Bill Kite' than the claim group members, but Mr Kite asserted that the claimed native title rights were held by the five member of the claim group alone—at [29].

Mr Kite's submissions were that:

- the 'wider community' (i.e. other descendants of Bill Kite, excluding the five named claimants) had the benefit of those rights but were not the holders of those rights;
- the rights were held 'in the custody of' the five named male claimants 'for the benefit of' the 'wider community of Bill Kite descendants';
- Mr Kite's affidavit did not assert that there were only five men entitled to enjoy the traditional rights described but asserted that those rights were held by the five men named.

While not suggesting that common law trust had any place in native title claims, 'for ease in exposition' Finn J described this as a 'trust-like' claim in that:

- the basis of the claim is that the five claim group members, as *ngurarita*, are the traditional custodians of the claimed land and alone were entitled to speak for it;
- the wider community of Bill Kite descendants was, on the evidence, excluded because members of the 'extended family' had not learned, and did not now live by, the traditional laws and customs 'of grandfather Bill Kite and his ancestors', and were 'not qualified to claim traditional country';
- the wider community was said to be 'content' that the five claim group members held the traditional knowledge and performed the traditional role of exercising the traditional claims upon, and responsibilities toward, 'our grandfather's country'—at [30]

It was noted that, in written submissions, there was a 'variant' on who were the possessors of 'knowledge', namely that:

- Mr Kite was not saying that the five claimants were the only ones with the requisite knowledge;
- 'quite differently', he was saying that the five claimants were the individuals 'holding and having authority to commence' the claim 'in respect of the rights, for the benefit of themselves and the wider community of descendants of Bill Kite and that man's ancestors'—at [31].

His Honour considered that the trust-like claim 'gives some reason for pause' because:

> The application and the accompanying evidence when considered most favourably to Mr Kite… does suggest (subject to what is later said) that there is a basis for asserting the claim group members were, in accordance with traditional law and custom, authorised to make the claim (i.e. as Ngurarita); that they were entitled to speak for the country; and that they had particular responsibilities in relation to the land claim. But the doubt it engenders is that these matters have had some part to play in contriving the claim group itself. That doubt is exaggerated by the not altogether satisfactory explanation given of the "rights" of the wider community of descendants of Bill Kite to enjoy or to have the benefits of the native title rights and interests claimed. Nonetheless, it is said on Mr Kite's behalf that the division between holding the claimed rights and interests on the one hand, and having the benefit or enjoyment of them on the other is a factual proposition that is not to be tested on the present motion—at [33].

His Honour decided he was 'obliged to give Mr Kite the benefit of the doubts I have' but observed that, while the court was not prepared to assume that the particular traditional laws and customs of an Aboriginal group could not 'produce the type of internal relationship within a community such as is advanced in this claim', nonetheless:

> I have some concern that in this matter the claim may well owe more to concepts drawn from common law conceptions of property than from traditional laws and customs. I refer in particular to the apparent equation here of the idea of being a "holder" of native title rights and interests with that of being the "owner" of those rights and interests—at [34].

Actual composition of the claim group

As to the actual composition of the claim group, and the basis of its membership, Finn J considered the members' relationship to Bill Kite. It was noted that:

- the application, when considered in light of Mr Kite's evidence and submissions, hung on descent from Bill Kite and the contention of Mr Kite that 'you claim through your grandfather';
- Mr Kite alone of the claim group was Bill Kite's grandchild;
- the application and the evidence did not address the status of the three other Kite-descended claim group members (i.e. excluding Mr Tunkin) by reference to their respective grandfathers;
- Mr Kite's affidavit proceeded on the incorrect assumption that all of the claim group members were Bill Kite's grandchildren;
- this error was coupled with the 'opaque ancestral basis' upon which it was stated in the application that the members of the claim group had 'acquired their status as native title holders'—at [36] to [37].

As a result, the court was satisfied that:

- the application itself did not 'reveal an intelligible basis upon which the claimants themselves each derive their claimant status by descent';
- the application and the evidence, taken together, were embarrassing—at [37].

Adam Tunkin's membership of the claim group

It was conceded that the fifth claim group member, Adam Tunkin, was not a descendant of Bill Kite, although the affidavit evidence purported to 'qualify' Mr Tunkin on the basis of descent, which could not be so—at [38].

There was evidence that Mr Tunkin appeared to have a Kokatha connection, that there were other possible native title claimants observing different laws and customs with rights and interests in the land claims and that the claim overlapped the Kokatha application.

His Honour was of the view that the 'best that can be said' on the evidence was that, while Mr Tunkin may be able to speak for the country, 'no satisfactory explanation for his membership of the claim group has been advanced':

> His presence simply reflects the confusion and disorder that attends so much of this application…Recognising the difficulties posed by the evidence concerning Mr Tunkin, Mr Kite's counsel acknowledged, though he did not concede, that Mr Tunkin might not "make the grade" in establishing claim group membership. It was suggested, nonetheless, that he could be excised from the claim group and that it proceed with the remaining four members—at [41].

It was found that:

- there was no acceptable explanation for Mr Tunkin's inclusion in the claim group;
- leave to amend the application to excise his name from the claim group would not be given because the basis upon which the remaining group members (apart from Mr Kite) are asserted to be within the group by virtue of their relationship with their respective grandfathers (who are not Bill Kite) had not been adverted to at all in this matter—at [42].

Authorisation

It was found that:

> The vices in the membership of the claim group carry over into the alleged authorisation of Mr Kite to bring the claim itself. I need say no more about this, other than to observe that this particular claim group is itself probably best described as self-identifying and self-authorising and is objectionable for those reasons…The process of authorisation described in the affidavit accompanying the Form 1 suggests as much—at [43].

Decision

The court made an order that Mr Kite's application be struck out pursuant to s. 84C of the NTA.

Strike out of claimant application under s. 84C – Kokatha Nation Claim

***Reid v South Australia* [2007] FCA 1479**

Finn J, 21 September 2007

Issues

The main 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

In May 2007, Richard (Ningil) Reid filed a claimant application pursuant to s. 61(1) of the NTA, called the Kokatha Nation Claim (KNC). The area it covered overlapped (among others) the area covered by the Kokatha claimant application (Kokatha claim).

Mr Reid then purported to file two amendments to the KNC application. His Honour Justice Finn proceeded as if leave to amend had been given in relation to first amended application. If the court did not do so, then the original KNC application would have to be stuck-out. This was because Mr Reid (the person named as 'the applicant' in KNC) was specifically excluded from the native title claim group contrary to the requirement in s. 61(1) that the applicant (among other things) must be a member of the native title claim group—at [6].

Finn J noted that Mr Reid appeared to have made the KNC as a result of his long standing dispute with those making the Kokatha claim. Mr Reid was an acknowledged Kokatha elder and was also both a member of the native title claim group in the Kokatha claim and a respondent to it. Material before the court showed Mr Reid had been involved with the Kokatha claim. He had, for example:

- participated in a meeting held in January 1999, when the Kokatha people authorised the Kokatha claim without dissent;
- been present at a meeting held in May 2004 where he (and others) signed a document (the Spear Creek agreement) recording that Roger Thomas was to be responsible for the Kokatha claim and related matters and Messrs Reid and Starkey were to be 'responsible for all Aboriginal law, culture and heritage'—at [4].

Later, Mr Reid retracted his approval of Mr Thomas and unsuccessfully sought to have the Kokatha claim struck out for want of authorisation—see *Thomas v South Australia* [2004] FCA 951, summarised in *Native Title Hot Spots* Issue 11.

In this case, a notice of motion was filed by the State of South Australia seeking either strike-out under s. 84C of the NTA or dismissal under the *Federal Court of Australia Act 1976* on the grounds that the:

- native title claim group description was unclear;
- claims were made impermissibly on behalf of a sub-group;
- claimed bases of authorisation did not meet the requirements of the NTA; and
- application failed to comply with the requirements of ss. 61A and 62 of the NTA—at [3].

On 17 August 2007, Finn J ordered that the KNC be struck out pursuant to s. 84C. However, the operation of that order was suspended pending the publication of the reasons for decision summarised here.

His Honour was at pains to point out that:

> Both the State and the ALRM [the representative body]…sought a costs order… for the purpose of providing a clear message to any further potential native title claimants that it is necessary to ensure that matters of form and procedure are strictly to be adhered to when lodging claimant applications…I do not regard deterrence to be a permissible reason for a costs order. This said, the fact and circumstances of this successful strike out motion ought be of no little interest to persons who have made, or who are contemplating making, claimant applications in relation to claim areas that overlap that in the Kokatha overlap proceedings—at [63].

Statutory framework

Finn J considered the nature of authorisation under ss. 61(1) and 251B and the tie between membership of the native title claim group and authorisation. Reference was made to the well accepted principles that:

- proper identification of the claim group is central to a native title determination application;
- it is the native title claim group that provides the authorisation under s. 251B;
- a subset, or part of, what truly constitutes a native title group cannot itself be a native title claim group under s. 61(1);
- where the class membership is described for the purposes of s. 61(4)(b), the application must describe the persons who are within the class 'sufficiently clearly so that it can be ascertained whether any particular person is one of those persons';
- non-compliance with the authorisation requirement of s. 61(1) is fatal to the success of an application (but note the new discretionary power of the court in s. 84D(4) on this point);
- authorisation must be by all the persons who constitute the native title claim group in respect of the common or group rights and interests comprising the particular native title claimed—at [23] to [29], referring to *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 at [1171] to [1172] and [1186]; *McKenzie v South Australia* (2005) 214 ALR 214; [2005] FCA 22 (*McKenzie*) at [41] to [43]; *Colbung v Western Australia* [2003] FCA 774; *Landers v South Australia* (2003) 128 FCR 495; [2003] FCA 264 at [35], summarised in *Native Title Hot Spots* Issue 24, Issue 14, Issue 6 and Issue 5 respectively) and *Risk v National Native Title Tribunal* [2000] FCA 1589 at [30] and [60] to [61].

As his Honour noted: 'A clear purpose of the s 84C procedure is to avoid the further incurring of expenses in relation to an application that is fatally flawed'—at [60].

Claim group description did not comply with s. 61

His Honour noted the native title claim group description in the KNC application consisted of a list of 103 people, followed by the reference to 'other living Kokatha persons as described in Attachment A' to the application.

Attachment A stated that the native title claim group 'also has the capacity to contain':

- 'descendents of prior attendees and participants in KPC [the Kokatha Peoples Community Inc, a body incorporated under the *Associations Incorporation Act 1985* (SA)] meetings and activities, (if they are not already in the claim group) and if they are have the necessary ancestry relating to inheritance (i.e. if they are valid Kokatha). Such live persons or live descendents will be included in the claim group in due course (at the discretion of KPC Elders and Advisors)';
- 'live descendents of prior Custodians over parts of the Kokatha Nation Territory. Such persons will be included in the claim group in due course (at the discretion of KPC Elders and Advisors)';
- 'adopted persons from other tribes (and their Kokatha descendents) using criteria such as whether such people acknowledge and are schooled in Kokatha law and custom, participate in Kokatha activities, or have valid interests in part of Kokatha Nation territory. (The exact criteria that [*sic*] used will be up to the Elders to decide)'—emphasis in original.

These paragraphs of the KNC application, which are of significance to the decision, are referred to below as 'paragraphs 4 to 6 of Attachment A'.

The court noted that:

- in written submissions, Mr Reid was said to be able 'to add thousands to the claim group' and have the ability to make the native title claim group 'representative of all Kokatha people';
- Mr Thomas and Mr Starkey, both of whom were acknowledged by Mr Reid in the Spear Creek agreement to be 'representatives of the Kokatha people', were not included in the native title claim group for the KNC application—at [8] to [9].

During the hearing of the state's application, Finn J asked Mr Reid's legal representative whether Mr Reid was asserting he was the only person who had native title rights or interests in the claim area. The court was told by the legal representative that it could properly proceed on the assumption there were other people who had native title rights or interests in the area covered by the KNC—at [11].

Subsequent to the hearing, Mr Reid's legal representative sought leave to file further submissions on authorisation on the basis that

he had 'mistakenly and un-intentionally [sic] conceded points' when answering his Honour's questions. Mr Reid then filed an affidavit in which he claimed to 'hold all the native title rights or interests of the Kokatha people'. Further, in submissions filed on the issue of costs, it was said that it was only when Finn J asked questions during the hearing that Mr Reid 'came to realise that he alone held all the common or group native title hence, his difficulty in settling his claim group'—at [12].

His Honour refused to grant leave:

> Apart from illustrating the continually evolving character of yet a further application, it would have served no useful purpose. I…also note that the claimed native title rights and interests described in the application clearly envisage their being held and enjoyed by a community or group and not entirely by a single individual—at [13].

While his Honour declined to draw a conclusion on the state's argument that the description of the native title claim group was 'descriptively' uncertain and so did not comply with s. 61(4)(b), he did make the comment that there was 'an arguable case of uncertainty' because of paragraphs 4 to 6 of Attachment A:

> Leaving to one side the arresting character of the stated criteria of cl 4 (prior attendance and participation in KPC meetings etc), there is nothing to suggest that the discretions given are a product of, and are to be informed by, the traditional laws acknowledged and the traditional customs observed by the aboriginal [sic] peoples holding the native title rights and interests in question. The clauses may well be vulnerable at this point for this reason—at [32].

His Honour decided to strike out the application pursuant to s. 84C because paragraphs 4 to 6 of Attachment A revealed that the native title claim group did not contain all of the persons who were said to be the actual holders of native title as required by s. 61(1). In the court's view:

> The metes and bounds of the claim group membership – who must comprise all the actual holders of the native title rights and interests – are fundamentally uncertain on the material before me and made the more so by the acknowledged "capacity" to enlarge the group membership under...[paragraphs] 4 to 6 of Attachment A. What is clear is that the presently listed members of the claim ground [sic, read group] are not perceived to be all the persons who actually hold native title. The best that can be said is that they are part of such a group. Neither the application nor the evidence provide certain guidance to permit ascertainment of who are the other actual native title holders who, together with the listed members, are said to be all of the holders of native title rights and interests in the claim area.
>
> I would add that it is unsurprising that the definition of the group itself suffers the above vices. Mr Reid's claim seeks to replace the Kokatha...claim. The claim group itself reflects a house divided. The consequences of this becomes the more apparent when one turns to the authorisation requirement—at [34] to [35].

For these reasons, and for the purposes of s. 84C, it was found that the application did not comply with the requirements of s. 61 of the NTA—[36].

Application not properly authorised

The state also argued that the application was not properly authorised. In the application, Mr Reid's entitlement to make the application was put on the following three bases:

- as custodian of 'native title over the Kokatha Nation', he was given 'by each preceding head lawman', authority to 'take-over' their custodianship in a series of 'once off decisions' that were 'traditional (like a Futures Act)' [sic] which 'all descendents who acknowledge traditional law and custom' would also 'adhere to' and, as 'head lawman' (*Buddoo*) with 'highest ceremonial status' (*Wilyura*), he had the authority 'to make decisions for the Kokatha people, so automatically he can make himself applicant on their behalf' (self-authorisation);
- if there were any doubt about the above, the elders of the surrounding Western Desert tribes, in accordance with tradition, 'have testified to his ability to do this, and recently expressly authorized him to deal with Native Title matters before the court', (authorisation by surrounding Western Desert elders);

- the claim group 'are also members of the KPC… and the KPC has authorized the bringing of this claim by' Mr Reid in March 2007 'at [a meeting of KPC held at] Yorkeys Crossing Pt Augusta' (authorisation by KPC)—at [14].

In three affidavits before the court from members of the Kokatha claim's management committee, it was stated that the deponents did not authorise Mr Reid to make the KNC application and that Mr Reid needed authority from the general Kokatha community. Two of the deponents (including Mr Starkey) said they were unaware of the March meeting of the KPC that Mr Reid relied upon.

In relation to self-authorisation, it was noted (among other things) that:

- there was no evidence provided by Mr Reid that 'the enumerated claim group acknowledge his power of self-authorisation';
- his attempt to secure the signatures of some of the 103 people listed in the claim group description both to a copy of the list and to an attached claim map were both 'unnecessary steps if Mr Reid could self-authorise';
- Mr Reid's legal representative submitted that, while the person who 'fundamentally holds the common or group rights of all Kokatha people is the Custodian himself (*wadi miri wadi*)', counsel's opinion was needed 'as to the extent to which this means Mr Reid can self-authorise' which, at best, betrayed 'considerable uncertainty on Mr Reid's part as to his right to self-authorise'—at [37].

In the light of these, and other matters, the court was satisfied that 'it cannot arguably be said to satisfy the requirements of s 61(1) of the Act as it relates to the amended application of present concern'—at [42].

As to the second pathway to authorisation, his Honour found that:

- the evidence put on by elders of the Western Desert region could not, of itself, constitute authorisation of Mr Reid for the purposes of s 61 of the Act, which required authorisation by 'all the persons...who...hold the common or group rights';
- while that elders' evidence may provide some support for Mr Reid's assertion that he possessed the authority he claimed, it did not assist in determining this case because it was not addressed to 'the deficiencies and contradictions in the application itself, in the affidavit evidence and in the supporting submissions' and, importantly but 'understandably', did not address the requirements of ss. 61(1) and 251B(a)—at [43].

In relation to the third 'pathway' to authorisation, Finn J reviewed the KPC and its objects of association, which included the bringing of claims and as a forum for decision- making for the benefit of the members of the KPC. Membership was open to Kokatha people and others who (among other things) were 'recognised and accepted by the Traditional Cultural Leader' and Mr Reid was, among other things, the cultural leader—[16].

Finn J found (among other things) that:

- the newspaper advertisement for the meeting held in March 2007 upon which Mr Reid relied simply stated that there was to be an annual general meeting of the KPC;
- the minutes of that meeting indicated fewer than 20 people attended, albeit that those present voted unanimously to give Mr Reid authority to make the KNC application;
- there was no evidence that all 103 people named in the application authorised the making of the application—at [17] .

It was noted that:

- Attachment A to the application indicated that the 103 listed members of the claim group were KPC members and the KPC constitution tied membership to acceptance by Mr Reid;
- the KPC was not a holder of native title rights and interests and could not authorise a native title claim;
- pursuant to s. 251B(b), a native title claim group whose members are the members of an incorporated association may, where there is no relevant and mandatory traditional decision making process applicable to authorisation, agree to and adopt a process for authorisation of the claim;
- however, that process 'must be able to be traced to a decision of the native title group who adopt that process'—at [46].

It was at the point of 'tracing back' that the ineffectiveness of the third pathway to authorisation's became 'apparent':

> While there is evidence that the less than 20 of the 103 members of the claim group who were present at the meeting voted unanimously for the application to be made, there is no evidence at all that such notice of the meeting as was given, advertised other than that an AGM was to be held. There is nothing to suggest that the group members were being asked to agree to and adopt a non-traditional process for authorising a claimant application. This would, of itself, be enough to reject the legitimacy of the claimed authorisation process. Further… there is no reasonably arguable basis on which one could infer that the meeting was fairly representative of the claim group…There is not…any arguable basis for contending that the meeting was in the circumstances adequate to satisfy the requirements of s 251B(b)—at [47].

For the reasons noted above, Finn J found that none of the three means of authorisation described in the KNC application (i.e. self-authorisation, authorisation by the elders of surrounding Western Desert tribes and authorisation by KPC members) satisfied the requirements of s. 61(1).

Costs

The state and the representative body sought orders that Mr Reid pay their costs of the proceeding or else of the strike-out motion.

His Honour referred to the applicable principles to the awarding of costs under s. 85A NTA set out in his earlier decision in *McKenzie* at [8], observing that it is not appropriate to award costs to either punish a party or to act as a deterrent to other would-be applicants— at [51] to [54] and [63].

Finn J was satisfied that there should be no order as to costs for (among others) the following reasons:

- Mr Reid brought the application in good faith and acted reasonably despite his application being misconceived in relation to the requirements of the NTA;
- the timing of the application was not informed by any improper motive including disrupting other proceedings relating to overlapping claims;
- Mr Reid, an unrepresented person with only spasmodic legal and other assistance, erred by not capitulating in the face of the flaws in the application pointed out to him by the state but did not do so unreasonably in all the circumstances—at [56] to [61].

Decision

Finn J held that:

- there were fundamental deficiencies in the KNC and it should be struck out pursuant to s. 84C of the NTA;
- the order of 17 August 2007 suspending the above order be vacated;
- there should be no order as to costs—at [62].

Amendment to change claim group and replace applicant – Njamal claim

***PC (name withheld for cultural reasons) v Western Australia* [2007] FCA 1054**

Bennett J, 17 August 2007

Issue

The main issue before the court was whether to grant leave to amend the claim group description and to alter the composition of 'the applicant' in a claimant application made under s. 13(1) of the *Native Title Act 1993* (Cwlth) (NTA). A procedural question also arose as to whether the current applicant could move the court for orders to amend the application.

Background

At a meeting on 25 October 2006 (the October meeting), the Njamal community resolved to:

- amend the description of the native title claim group in a claimant application ostensibly brought on its behalf (the first resolution);
- remove 11 of the 17 persons who comprised the 'current' applicant and then include three new persons in the 'replacement' applicant (the second resolution)—at [1].

Two notices of motion were subsequently filed, along with an application under s. 66B to replace the applicant.

Amend claim group description

The first notice of motion, which was filed by the current applicant, sought leave to amend the

description of the native title claim group in the claimant application and make other amendments to address certain technical requirements of the NTA.

Leave to amend the claim group description was sought because, although the current applicant brought the proceedings 'on behalf of the Njamal people', the claim group description in the application only included the same 17 people who were named as the applicant. There was no explanation before the court why this was so.

The anthropological evidence was to the effect that 'the Njamal people' were not limited to those 17 people and that meetings of the Njamal people to consider the native title claim had never been so restricted:

> The unchallenged evidence is that the Njamal people…have always understood that the correct [native title] claim group was to be the larger group of Njamal people. It is that larger group that has consistently attended community meetings and made decisions relevant to the application—at [5].

The proposed amendment would extend the native title claim group to 'properly and more accurately to identify' its members by way of descent from Njamal apical ancestors. The order to so amend the application was unopposed—at [6].

The court found the amendment was consistent with the scheme of the NTA: 'The proper identification of the claim group is a matter of fundamental importance to the claim'—at [9].

The other proposed amendments did not affect the substantive rights and interests claimed and were supported by the State of Western Australia. While there was no evidence that they were approved by the replacement claim group, subject to certain procedural matters, the court found that it was appropriate that the application be so amended—at [11].

Replacement of the applicant

In the second notice of motion, filed by the 'replacement' applicant, orders were sought to remove 11 of the people named as the current applicant (three of whom were deceased and seven of whom consented to being removed) and then to add three new persons to the remaining six to form the 'replacement' applicant. This involved an application under s. 66B.

There was no opposition to the removal of the deceased members or the addition of the three new members. However, one of those who was to be removed, Eddie McPhee, opposed the order seeking his removal. No-one else opposed the making of the order.

Section 66B provides for a procedure for the replacement of the applicant. Her Honour Justice Bennett noted that the application made in this case met the requirements of s. 66B(1)(a)(i) because:

- there was a claimant application;
- on the making of the orders sought in the first notice of motion, all of the members of the replacement applicant would be members of the replacement claim group and all but three were also members of the current applicant;
- the persons to be replaced were no longer authorised by the claim group to make the application and to deal with matters arising in relation to it;
- the persons making the application under s. 66B were authorised by the claim group to make the application and deal with matters arising in relation to it—at [14], referring to *Daniel v Western Australia* (2002) 194 ALR 278; [2002] FCA 1147, summarised in *Native Title Hot Spots* Issue 2.

In relation to the last two criteria, it was said that:

> [Section]...251B...governs when a person...is authorised by all of the persons in the claim group and applies in determining when a person is authorised for the purposes of s 66B... Authorisation may be in accordance with a process of decision-making according to traditional laws and customs (s 251B(a) of the Act). Where there is no such process, it may be in accordance with a process agreed and adopted by the claim group (s 251B(b) of the Act)—at [16].

The evidence was that there was no process under Njamal traditional law and custom that had to be followed for making decisions as to the authorisation or removal of the applicant in a native title claim so the Njamal people had agreed to and adopted a process, relying upon s. 251B(b).

According to the evidence, under the agreed process:

- decisions were made by resolution or consensus at community meetings organised by Pilbara Native Title Services (PNTS);
- all known Njamal people were included on a mailing list and invited by letter to attend;
- notices were sent to communities where Njamal people resided;
- meetings were called and held where families were represented and individuals or families with a particular interest or authority in relation to the decisions being contemplated were present;
- if it was not possible for every member of the claim group to attend a meeting, then the group regarded itself as bound by the decisions of those who were present;
- in the past, decisions had been made to form working groups to deal with day to day business and participate in surveys in Njamal country;
- if there was not a reasonably representative group of people at a meeting or insufficient attendees, then the persons present could decide it was inappropriate for a decision to be made at that meeting.

This was the process used to pass the second resolution at the October meeting. The sole agenda items were 'claim group description' and 'replacement of the applicants'.

Following discussion and, in this order, the members present unanimously resolved to:

- amend the claim group description;
- no longer to authorise the current applicant 'as a group';
- remove 11 of the 17 persons who comprised the applicant and include three new persons as part of the replacement applicant;
- authorise the replacement applicant to be the applicant and deal with matters related to the application in accordance with decisions of the Njamal native title claim group through community meetings;
- authorise the replacement applicant to bring an application under s. 66B to replace the current applicant and instruct PNTS to act for them, or to organise or appoint legal representatives to act for them, in relation to that application.

Her Honour noted that the adoption of a process of decision-making pursuant to s. 251B(b) did not require all members of the claim group to be involved in making the decision or a unanimous vote. The members of the claim group should be given every reasonable opportunity to participate in the decision-making process but:

> It cannot not, logically, be the case that all, in the sense of each and every member of the claim group[,] must be involved in and agree to the proposed decision. That would… include persons who are unable to participate by reason of age, mental capacity or unknown whereabouts and would permit an individual to prevent the progress of a claim. To cancel a meeting merely because one member was unable to attend would also constitute a waste of limited resources—at [22].

In the court's view:

- subsection 251B reflected the communal character of native title;
- the authorisation process for the purposes of s. 251B(b) must be able to be traced to a decision of the native title claim group who adopt that process;
- a meeting that purported to authorise the replacement of the applicant should be attended by persons 'fairly representative of the native title claim [group] concerned';
- there was no suggestion that this was not the case here—at [23].

Bennett J concluded that the resolutions were made by a group of Njamal people who were sufficiently representative of the replacement claim group and who made the resolutions in accordance with an agreed process. It followed that the decision-making processes required by s. 66B had been proved. Also, each of the replacement applicants had sworn and filed an affidavit in compliance with s. 64(5)—at [24] to [25]. Note that s. 64(5) was repealed by the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth).

Mr McPhee's complaint

Mr McPhee did not attend the October meeting. He was the only person who opposed the s. 66B application to replace the applicant. The main reasons given for seeking his removal were his alleged failure to attend meetings and to sign documents relevant to the claim.

Mr McPhee's counsel submitted that the October meeting was 'flawed' because the members in attendance were not properly informed of matters relevant to their decision, including:

- the reasons why he had not signed, or had delayed signing certain agreements, was not put to the meeting e.g. he had genuine concerns as to the appropriateness of those agreements and the information given to the claim group about them;
- the Njamal members could not have been in a position properly to exercise their rights and obligations as voting members in Mr McPhee's absence without being provided with complete and accurate information relevant to the agenda items;
- when PNTS accepted the responsibility for organising the meeting, it was incumbent on it to convey Mr McPhee's concerns.

PNTS submitted (among other things) that:

- members of Mr McPhee's family were present at the meeting, including the primary acknowledged family elder, his uncle Johnson Taylor, who was a member of both the current applicant and replacement applicant;
- Mr McPhee was aware of the meeting and the fact that his removal would be discussed;
- because there was a long history of Mr McPhee raising his concerns with the Njamal people, including members of both the current and the replacement claim group, there was no reason for those concerns to be recited again at the meeting.

Counsel for Mr McPhee asked the court to draw an inference that, had the meeting been properly called and those who attended informed of Mr McPhee's concerns, they might not have passed the resolution or agreed to remove him as a member of the applicant.

Bennett J declined to do so because:

- members of the replacement claim group who were present at the meeting included members of Mr McPhee's family and they had voted to remove Mr McPhee and filed affidavits in support of the proposed replacement;
- Mr McPhee had ample opportunity to notify members of the replacement claim group of his concerns and the reasons why he did not attend the meeting;
- Mr McPhee accepted that at least some members of the replacement claim group were aware of his position and the matters and concerns that he raised with PNTS;
- none of the members of the replacement claim group supported Mr McPhee's opposition to the second motion;
- Mr McPhee remained a member of the replacement claim group;
- Mr McPhee had been previously removed as a member of a Njamal working party;
- steps to remove Mr McPhee as one of those constituting 'the applicant' were first taken in 2003—at [35].

The court went on to note that the replacement applicant had established that:

- there had been a meeting of the Njamal community which had formally agreed to remove certain members of the current applicant and to add certain additional members to form the replacement applicant;
- the persons in attendance at the meeting were reasonably representative of the replacement claim group;
- some of the members of the current applicant were deceased;
- the proposed new members had each consented to become members of the replacement applicant;
- the claimants at the meeting agreed unanimously to the amendments—at [38].

Her Honour was of the view that:

> The withdrawal and conferring of authority for the purposes of a s 66B application must be shown to flow from the claim group...Once this is established, the actions of the claim group and the means by which it makes decisions is a matter for it. It is not for the Court to interfere

with decisions reached in accordance with the Act—at [39].

Procedural matters

A procedural question arose as to whether the current applicant could move the court for orders to amend the application. The court noted that s. 62A provides that the applicant in a claimant application may deal with all matters arising under the NTA in relation to the application, including the amendment of the application—at [40].

As Bennett J saw it:

- on one view, until the making of orders to replace the current applicant, it remained the applicant in the proceedings and could deal with the application and bring the first motion;
- on the other hand, the unchallenged evidence was that the replacement claim group had withdrawn the current applicant's authority to deal with the application, which would, on its face, include a revocation of authority to file and prosecute a notice of motion to amend the application;
- the current applicant consisted of the named persons on behalf of the Njamal people;
- section 66B provided that one or more members of the claim group could apply for an order that a member, or members jointly, of the claim group replace the current applicant;
- one of the bases of such an application was that the current applicant was no longer authorised by the claim group to make the application and to deal with matters arising in relation to it, which meant that, at the time of the application for leave to amend, that lack of authorisation had already occurred—at [42] and [45].

Bennett J was satisfied that:

> The moving party in the application to replace the current applicant is the replacement applicant. Until the replacement occurs, the replacement applicant consists of a group of members of the native title claim group, some of whom are members of the current applicant. That is, one or more members of the claim group are making the application to replace the current applicant…
>
> Until such time as the order for replacement is made, the current applicant remains the applicant in the proceedings. The fact that its authorisation has been withdrawn does not affect its status so far the as the proceedings are concerned, until such time as it is removed as a party to the proceedings. Indeed, the fact that authorisation of an applicant may have been withdrawn is envisaged by s 66B...It is not suggested in that section or in the Act that such withdrawal of authorisation affects the status of the applicant as a party in the proceedings prior to an order being made by the Court. It is not itself a condition of continuation as an applicant nor is it a statutory element of the right to apply to amend claims. The right to bring an application under s 66B is expressly given to the members of the claim group—at [46] and [48].

The evidence was that:

- it was the intention of the Njamal members voting at the meeting to correct the description of the claim group to reflect properly the Njamal people;
- it was not the intention of those voting at the meeting to 'de-authorise' the current applicant until the order for replacement took effect.

In the circumstances, the court was satisfied that the current applicant could move the court for orders to amend the application. It was appropriate to make the orders sought—at [49].

Service on the respondents

There are in excess of 100 respondents to these proceedings, many of whom do not attend directions hearings or otherwise take an active role in the proceedings. The court was satisfied that requiring service of the two notices of motion and supporting documentation on all of respondents would 'involve significant and unnecessary expense' and so ordered that the applicant:

- serve a copy of the orders on the respondents within 28 days in lieu of notice;
- provide a copy of the amended application to any respondent who requested one;
- provide the respondent parties with a reference to the court's reasons—at [50] to [51].

Conclusion
The court ordered that application be amended as sought and that the current applicant be replaced—at [52].

Comment
As part of the recent suite of amendments to the NTA, s. 64(5) was repealed and s. 66B was amended so that it now provides for an application to replace the current applicant where one or more of those constituting that entity, as defined by ss. 61(2) and 253, consents to being replaced or removed or has died or become incapacitated.

According to the Explanatory Memorandum to the Native Title Amendment (Technical Amendments) Bill, the intent of the amendment was that s. 66B would:

> [E]xpand the circumstances in which the Court may hear and determine an application to replace the applicant. To clarify the operation of the provisions, item 79 would repeal subsection 64(5). This would mean that all amendments to an application to replace an applicant would be made following an application under section 66B. The Registrar would not be required to reapply the registration test to applications amended to replace the applicant.
>
> Accordingly, proposed section 66B would be the only mechanism through which any changes to the applicant could be made—at [1.249] and [1.266].

Party status – person claiming native title seeks respondent status

Worimi Local Aboriginal Land Council v Minister for Lands (NSW) [2007] FCA 1357

Bennett J, 11 September 2007

Issue
The issue in this case was whether the court should exercise its discretion to join a person claiming to hold native title as a respondent to a non-claimant application made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (NTA).

Background
The Worimi Local Aboriginal Land Council (WLALC) made a non-claimant application under s. 61(1) seeking a declaration that no native title existed over certain land at Port Stephens in New South Wales. Gary Dates, also known as Worimi, had previously filed two claimant applications for a determination that native title existed over the same area. Each of those claimant applications was struck out pursuant to s. 84C for failure to comply with s. 61—see *Hillig v Minister for Lands (NSW) (No 2)* [2006] FCA 1115 (*Hillig*); *Worimi v Minister for Lands (NSW)* [2006] FCA 1770 (*Worimi*), summarised in *Native Title Hot Spots* Issue 21 and Issue 23 respectively.

WLALC's non-claimant application was filed in December 2004. Public notice, given pursuant to s. 66(3)(a) in March 2005, included a statement that persons wishing to be party to the proceedings should inform the Federal Court of their intention to do so by 8 June 2005. Mr Dates failed to do so.

By notice of motion filed in August 2005 (as amended in March 2007), Mr Dates sought to be joined as a respondent to WLALC's non-claimant application pursuant to s. 84(5). His application for joinder was opposed by WLALC. Pursuant to s. 66(10)(c), Mr Dates required leave of the court to be joined.

As a preliminary matter, her Honour Justice Bennett noted that the application for joinder was made before the commencement of the *Native Title Amendment Act* 2007, which amended s. 84(5) by inserting the words 'and it is in the interests of justice to do so' i.e. to give leave to join. As the amendment only applied to applications made after it commencement, it was not taken into consideration in this matter—at [3].

Bennett J identified the three matters for consideration:

- whether Mr Dates had an interest within the meaning of s. 84(5);
- whether that interest may be affected by a determination in the proceedings;
- in any event, whether the court should exercise its discretion to join Mr Dates as a respondent—at [4].

Whether Mr Dates had requisite interests
Her Honour applied the 'Byron test' (found in *Byron Environment Centre Incorporated v Arakwal*

People (1997) 78 FCR 1) to s. 84(5) i.e. the asserted interests must not be 'indirect, remote or lacking substance' and must be 'capable of clear definition'. It was noted that the nature and content of the right to become a party to proceedings for a determination of native title suggested the interests must be such that they may be affected in a 'demonstrable' way by a determination in the proceedings—at [10].

Bennett J found that Mr Dates satisfied the Byron test because his interest was that of a person who claimed that native title existed over the area in question:

> That interest is not indirect, remote or lacking in substance. It is not advanced as an interest of an emotional kind. It is clearly directly affected by a declaration that there is no native title. It is not remote or insubstantial. The…[WLALC] submits that it can be no more than a belief. However…[t]here was no evidence on this application for joinder to contradict Worimi's [Mr Dates'] evidence or to demonstrate that it fails to satisfy the Byron test…It has not yet been determined whether...[his] belief is or is not well-founded—at [16].

Was the striking-out of earlier claimant applications relevant?

WLALC submitted that:

- the scheme of the NTA was such any person or group wishing to assert native title must do so as a claimant and meet the tests imposed by the NTA;
- Mr Dates attempted to do so on two previous occasions but both applications were summarily dismissed;
- Mr Dates could not identify a claim group capable of meeting the requirements of s. 61.

While agreeing that a person seeking a determination of native title in their favour (i.e. a 'positive' determination) must make an application that complied with ss. 61, 61A, 62 and 251B, Bennett J noted:

> [T]hat does not mean that a person is unable to use claimed native title rights and interests defensively to combat a non-claimant application for a declaration that no native title exists. The assertion of such rights and interests may lead to a more informed decision in the non-claimant application—at [30], referring to *Kokatha People v South Australia* [2007] FCA 1057, summarised in *Native Title Hot Spots* Issue 25.

Discretion

Her Honour noted (among other things) that:

- although the court had discretion under s. 84(5) whether or not to join a person whose interests may be affected by a determination in the proceedings, that discretion was not 'at large';
- where the interest concerned was a 'positive' claim to native title, the fact that no such determination could be made absent a properly brought application under s. 61(1) was relevant;
- if WALAC's non-claimant application succeeded, a determination that native title did not exist, which would operate *in rem*, would be made;
- to prevent the making of the declaration sought by the WLALC, Mr Dates needed to advance a case that either established that native title did exist or cast doubt on WLALC's evidence—at [31], [32] and [35].

It was also noted that, during the course of the various proceedings:

- Mr Dates changed the description of the claim group and the basis of his own participation, from being the representative of the Worimi/Garuahgal women who claim the women's site on the land to claiming for himself and his immediate family and as guardian of the land;
- Mr Dates changed the description of the location of the women's site from being wholly on the Land to only partly on the Land;
- no Worimi woman had given evidence to support the existence of that site;
- there had been delay, adjournments and applications struck out in relation to Mr Dates during the course of the matter;
- the delay attributable to the various applications brought by Mr Dates, based on his assertion of native title, was in the order of 22 months—at [33], [34] and [39].

Her Honour observed:

> It is not suggested by Worimi [Mr Dates] that the community of Worimi people recognises the asserted native title. Worimi claims that the traditional laws and customs observed by him and, through him, his immediate family, are laws and customs that should be but are not observed by the Worimi people and, in particular, the Worimi/Garuahgal women. He may not be able to establish that native title does exist but his evidence if accepted, may cast doubt on the Land Council's case. Worimi has no present s 61 application and there is no reason to believe that he intends to file a further application or that, if he did, it would survive an application to strike it out for failure to establish authorisation under s 251B of the Act. The Land Council has not filed any evidence in this application—at [36].

Bennett J saw no evidence of prejudice to the Land Council if Mr Dates was joined, other than that occasioned by delay, which could be mitigated by an appropriate direction—at [37] to [38].

Decision

Bennett J was satisfied that the court should exercise its discretion to join Mr Dates to the non-claimant application, subject to a condition that he file and serve any further evidence within 14 weeks—at [39] to [40].

Expedited procedure – appeal against Tribunal's decision on site protection

Parker v Western Australia **[2007] FCA 1027**

Siopis J, 6 July 2007

Issues

This decision deals with an appeal to the Federal Court under s. 169 of the *Native Title Act 1993* (Cwlth) (NTA) against a decision of the National Native Title Tribunal (Tribunal) that a future act attracted the expedited procedure. The issue in this case relates solely to the Tribunal's decision in respect of s. 237(b) i.e. that the future act in question was not likely to interfere with areas or sites of particular significance to the native title party.

Background

The future act in question was the grant of an exploration licence in north-west Western Australia near BHP Billiton's Yandi mine. The Martu Idja Banyjima People (the native title party) had a registered native title claim which, to some extent, overlapped the area of the proposed exploration licence.

As noted earlier, the issue in this appeal related only to the Tribunal's decision in respect of s. 237(b) i.e. in this case, that the grant of the licence was not likely to interfere with a site of particular significance to the native title party called the *Barimunya* site.

The evidence relied upon by the native title party before the Tribunal consisted of:

- two affidavits sworn by members of the native title party, both of which annexed a witness statement setting out the reasons why the *Barimunya* site has special significance to the native title party;
- a letter from an anthropologist dealing with the cultural heritage significance of the *Barimunya* site;
- a copy of BHP Billiton's 'Aboriginal Heritage Induction Handbook' (BHP Billiton's handbook), which referred to the *Barimunya* site.

His Honour Justice Siopis noted that the Tribunal:

- made a direction under s. 155 that the affidavits and anthropologist's letter, as well as the statement of contentions of the native title parties, were not to be disclosed;
- explained in its reasons that it only referred to those documents to the extent necessary to explain the decision and did not include material which should, according to customary laws and traditions, remain confidential—at [6] to [8].

The native title party said that:

- the potential interference with the *Barimunya* site was a major concern when BHP Billiton developed the nearby Yandi mine;
- members of the claim group conducted heritage surveys with BHP Billiton to map a boundary

for the *Barimunya* site and it was agreed with BHP Billiton that none of their employees or contractors would go onto the site i.e. it would be a 'no go' area—at [7].

Tribunal's decision

The court summarised Tribunal's findings as being that:

- the *Barimunya* site was a site of particular significance to the native title party in accordance with the traditions of the native title claim group it represented;
- it was necessary to apply a predictive assessment to whether the proposed future act was likely to give rise to the proscribed interference, which involved taking into account the grantee party's intention in relation to the protection of Aboriginal sites;
- section 17 of the *Aboriginal Heritage Act 1972* (WA) (the AHA) provided that specified conduct in respect of an Aboriginal site, such as damaging or in any way altering it, was an offence;
- section 18 of the AHA provided a means to obtain an exemption from the provisions of s. 17 in prescribed circumstances;
- the grantee party said that it would comply with its legal obligations under the AHA and would attempt to avoid Aboriginal sites but, in the event there was a need to disturb a site, it would make an application pursuant to s. 18 of the AHA;
- the existence of the statutory protective regime found in the AHA, and the expressed intention on the part of the grantee party to operate within that regime, was not decisive of the question of whether it was not likely there would be a proscribed interference under s. 237(b) of the NTA because each case must be considered on its particular facts;
- that said, the Tribunal was entitled to have regard, and give considerable weight, to the government party's site protection regime under the AHA—at [9] to [13].

It was also noted that the Tribunal had regard to the following factors in deciding that interference with the *Barimunya* site was unlikely:

- the existence of the site was well known and it had been the subject of earlier site surveys (including some conducted for BHP Billiton);
- parts of the buffer zone (and possibly the actual site) were currently the subject of a heritage survey;
- the most important part of the delineated site area was also within the area covered by the Innawonga and Bunjima Peoples' registered claim and any exploration would be the subject of a site survey conducted by them pursuant to a Regional Standard Heritage Agreement (RSHA);
- while the grantee party had made application for a mining lease, which appeared to be at least partially over the delineated site and suggested the possibility of future mining in the area, the future act with which the Tribunal was concerned was an exploration licence only;
- any proposal to mine would involve a separate future act that would be subject to the right to negotiate provisions of the NTA and would not involve the expedited procedure;
- before any decision would be made to grant the exploration licence, the views of the traditional owners, including members of the native title party and Innawonga and Bunjima claim groups, would be known;
- the evidence showed that the agreement of the traditional owners with BHP Billiton, which preceded the development of the Yandi mine, recognised the significance of this area and restricted access to it by employees of BHP Billiton;
- the native title party was not opposed to exploration *per se* but was not satisfied with the type and cost of a proposed site survey;
- the government party's conditions on the licence would provide the option for the native title party to enter into a RSHA;

- the grantee party was currently carrying out surveys with the native title party and other native title claimants, with other groups having indicated that work programs will not interfere with sites—at [15].

The appeal

The native title party appealed pursuant to s. 169 on the grounds that the Tribunal failed to consider whether the grant of the exploration licence was not likely to interfere with the *Barimunya* site or area.

It was submitted that the Tribunal failed to consider:

- whether there was a real risk of interference with the site or area otherwise than by conduct in breach of s. 17 of the AHA and/or conduct approved under s. 18 of the AHA;
- whether low impact exploration, as defined in the RSHA, would constitute interference with the *Barimunya* site or area;
- the particular significance of the *Barimunya* site or area to the native title party and what might comprise interference with that site in accordance with relevant traditional laws and customs in assessing whether or not there was a real risk of interference with that site or area—at [17].

His Honour dismissed the first ground, saying the Tribunal:

- distinguished between the protection that might be afforded to an Aboriginal site by the statutory protective regime under the AHA and the application of the predictive assessment required under s. 237(b) of the NTA; and
- noted that neither the existence of the statutory protective regime nor the expressed intention of a grantee party to give effect to that regime was conclusive of the question under s. 237(b) as to whether the grant of the exploration licence was not likely to interfere with the *Barimunya* site—at [18].

Siopis J dismissed the remaining two grounds, finding that:

- in its application of the requisite predictive assessment, the Tribunal took into account that even walking on the site in the absence of appropriate senior Aboriginal people would constitute interference with the site;
- even though the Tribunal did not refer to the confidential evidence, there were sufficient indicia in its reasoning to show it had recognised the requisite degree of exclusion necessary to prevent 'interference' and satisfied itself that such interference was not likely— at [20] to [25].

Decision

The appeal was dismissed with costs—at [27].