NATIVE TITLE HOT SPOTS

NATIONAL NATIVE TITLE TRIBUNAL LEGAL NEWSLETTER MAY 2008, ISSUE 27

Contents

National Native Title Tribunal

Rubibi appeal — Broome

Western Australia v Sebastian [2008] FCAFC 65 (Full Court)

Branson, North and Mansfield JJ, 2 May 2008

Issue

The main issues in these appeal proceedings were:

- whether native title to the Broome area in Western Australia was communal in nature and held by the Yawuru community; and
- whether some of the findings at first instance in relation to extinguishment were correct.

The Full Court of the Federal Court upheld the finding of communal native title but overturned some of the findings in relation to extinguishment.

Background

At first instance, his Honour Justice Merkel heard and determined two competing claims under ss. 13 and 61 of the *Native Title Act 1993* (Cwlth) (NTA) for a determination of native title over and around the town of Broome, which were:

- the Yawuru claim, made by 12 people on behalf of the Yawuru community, for communal native title rights and interests;
- the Walman Yawuru claim, made by three people on behalf of the Walman Yawuru clan, for a determination in favour of that clan (rather than the Yawuru community) over parts of the area covered by the Yawuru claim.

The State of Western Australia, the Commonwealth of Australia and the Western Australian Fishing Industry Council Inc (WAFIC) opposed both claims. Submissions on extinguishment were made by the parties.

In July 2005, Merkel J published his findings in relation to the competing claims in *Rubibi Community (No 5) v Western Australia* [2005] FCA 1025 (*Rubibi No 5*, summarised in *Native Title Hot Spots* Issue 16). His Honour concluded that the native title rights and interests possessed in the area covered by the Yawuru application:

- were communal native title rights and interests possessed by members of the Yawuru community;
- were not the group native title rights and interests claimed to be possessed by members of the Walman Yawuru clan.

In February 2006, Merkel J made findings on the following issues:

- the identification of the native title determination area;
- the criteria for membership of the native title holding community; and
- the nature and extent of the native title rights and interests possessed by the native title holding community—see *Rubibi Community v Western Australia (No. 6)* [2006] FCA 82 (*Rubibi No 6*, summarised in *Native Title Hot Spots* Issue 19).

His Honour found that:

- the Yawuru community possessed communal native title rights and interests in the whole of the Yawuru claim area;
- the evidence supported the inference that the Yawuru community was entitled to exclusive possession and occupation of the Yawuru claim area (excluding the intertidal zone) where there has been no extinguishment.

Among others, in *Rubibi No* 6, his Honour also dealt with the issue of whether:

- the Djugan people were a clan of the Yawuru community or a native title holding community in their own right;
- if they were a separate community, whether the northern parts of the Yawuru claim area were in fact part of the country of the Djugan community.

Merkel J found that the Djugan were a subset, or subgroup, of the Yawuru community and, therefore, that the determination of native title should extend over both the northern and southern parts of the Yawuru claim area.

In April 2006, in *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 (*Rubibi No 7*, summarised in *Native Title Hot Spots* Issue 19), Merkel J published reasons for judgment determining the areas within the Yawuru claim area where the native title rights and interests of the Yawuru community had been wholly or partially extinguished and also dealt with certain other issues raised after the publication of *Rubibi No 6*.

Merkel J also found (among other things) that, while the members of the Walman Yawuru clan held special attachments to, and responsibilities for, areas or sites with which the clan was associated, those special attachments and responsibilities did not constitute native rights or interests. Thus, the Walman Yawuru claim failed, although the Walman Yawuru people were found to hold communal native title rights and interests in their capacity as members of the Yawuru community.

His Honour had earlier made a determination in favour of the Yawuru community over a law ground on the outskirts of Broome—see *Rubibi Community v Western Australia* (2001) 112 FCR 409 (*Rubibi No 1*) and *Rubibi Community v Western Australia (No 2)* (2001) 114 FCR 523.

Summary of the issues on appeal

The state appealed against:

- the finding that native title exists in the Yawuru claim area, particularly in its northern portion which it said was traditionally owned by a separate society i.e. the Djugan people;
- Merkel J's orders, on the basis that it was not open to his Honour to hold that a change in descent rules from a patrilineal to an ambilineal, or cognatic, system was permitted under the traditional laws and customs of the Yawuru community;
- the findings concerning the validity of certain reserves and the applicability of s. 47B of the NTA to parts of the Broome townsite.

The Yawuru claimants' cross-appeal challenged certain findings in relation to extinguishment of native title. The Walman Yawuru claimants appealed against the

dismissal of their application for a determination of group (or clan-based) native title over the Walman Yawuru clan area and the Minyirr clan area.

Broadly speaking, the appeal proceedings concerned:

- the native title rights and interests of the Yawuru community;
- the native title rights and interests of the Walman Yawuru clan;
- certain extinguishment issues, including whether s. 47B applied to areas within the Broome townsite so that any extinguishment over those area had to be disregarded.

On the question of the native title rights and interests of the Yawuru community, the issues were whether:

- by approving, and adopting, the concept of 'communal native title', Merkel J assumed, rather than found, that native title existed;
- the finding that the whole of the Yawuru claim area was possessed by the one society, both at sovereignty and presently, was open to his Honour despite the fact that there were two legal 'traditions' practised in the Yawuru claim area at sovereignty (northern and southern);
- the finding that rights and interests held by the Djugan people at sovereignty had become those of the Yawuru by a process of succession was open to Merkel J;
- the finding that the change from a patrilineal clan-based community to an ambilineal-based community was not fatal to the claim was open to Merkel J;
- his Honour was correct in determining that a non-Yawuru person could be incorporated into the Yawuru community.

On the question of the native title rights and interests of the Walman Yawuru clan, the issues were whether:

- Merkel J was correct in dismissing the Walman Yawuru claim on the basis that native title in the determination area is communal, rather than clan based;
- the Walman Yawuru claimants held some non-exclusive or exclusive native title rights in their claim area;
- the 'special attachments and responsibilities' of the Walman Yawuru people had been appropriately dealt with by Merkel J;
- the Walman Yawuru people acquired native title rights and interests in an area known as Minyirr by a process of succession.

Nature of native title under the NTA

Their Honours Justices Branson, North and Mansfield, in joint reasons for judgment, identified the characteristics of native title 'as provided for' in s. 223(1) of the NTA, noting that:

- it is to the terms of the NTA that the court must turn its mind in determining whether native title exists over a particular area, with the key provisions being ss. 223 (which defines 'native title') and 225 (which sets out the requirements of a determination of native title);
- traditional laws acknowledged and traditional customs observed, within the meaning of s. 223(1)(a), are central to the definition of native title;
- the laws and customs of which s. 223(1) speaks must have a normative quality, so that the body of traditional laws and customs may equally be described as a 'body of norms' or a 'normative system';

- to be 'traditional', those laws and customs must be passed from generation to generation, their content must originate in pre-sovereignty rules and they must have had a continuous existence and vitality since sovereignty;
- under s. 223(1)(b), those laws and customs must provide a 'connection' between Aboriginal peoples and the claimed land and waters;
- only traditional laws and customs having those characteristics give rise to native title rights and interests;
- 'inextricably linked' to the concept of traditional laws and customs is the body of Aboriginal peoples which acknowledges and observes them;
- the word 'society' is a descriptor of the Aboriginal peoples who may possess native title rights under traditional laws and traditional customs in accordance with the definition in s. 223(1);
- laws and customs arise out of and, in important respects, go to define a particular society, with 'society' being understood as a body of persons united in, and by, its acknowledgment and observance of a body of laws and customs;
- 'society', rather than 'community', was chosen to emphasise 'this close relationship between' the identification of the group and the identification of the laws and customs of that group;
- under s. 223(1), the native title rights and interests possessed under traditional laws and customs may be communal, group or individual in nature—at [27] to [31], referring in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3), *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*, summarised in *Native Title Hot Spots* Issue 1), *Commonwealth v Yarmirr* (2001) 208 CLR 1 (*Yarmirr*).

The court then noted observations made regarding the nature of native title rights and interests under the NTA in later Full Court decisions, including *De Rose v South Australia (No 2)* (2005) 145 FCR 290 (*De Rose No 2,* summarised in *Native Title Hot Spots* Issue 16) and *Northern Territory of Australia v Alyawarr, Kayteye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 (*Alyawarr*, summarised in *Native Title Hot Spots* Issue 16).

In this case, both the state and the Commonwealth submitted that the Full Court had, in the *De Rose* and *Alyawarr* decisions, introduced 'analyses and concepts that are not in accordance with the key principles' in *Yorta Yorta.*

The Djugan and the Yawuru

The state challenged Merkel J's findings that:

- the Djugan people were a subset, or subgroup, of the Yawuru community at sovereignty and presently; and
- consequently, the Yawuru community held native title rights and interests over the northern portion of the Yawuru claim area (the portion traditionally associated with the Djugan).

The state argued that:

- by focussing on the Yawuru 'community', and characterising the claim as one for 'communal native title', Merkel J failed to identify the relevant native title holding society at sovereignty;

- as a result of that erroneous approach, Merkel J also erred in not finding that the Djugan and the Yawuru, in fact, formed two discrete societies at sovereignty.

The court canvassed the relevant parts of Merkel J's reasons for judgment and noted his findings that (among other things) the evidence established, notwithstanding cultural differences, there were extensive traditional connections and commonalities between the Djugan and the Yawuru, the common source of which was the *Bugarrigarra*. In reaching that conclusion, Merkel J relied upon the observations made in *Alyawarr* that members of a 'community' may possess 'communal native title rights and interests', notwithstanding that those rights and interests were 'intramurally allocated' to different groups or subsets of the community i.e. his Honour adopted the approach that the state and Commonwealth criticised.

There was a finding of communal native title

On the appeal, it was argued that Merkel J assumed, rather than determined, that native title existed in relation to the Yawuru claim area, with the assumption being that native title was held by the Yawuru community. The court noted that:

- it was necessary 'to analyse the totality' of Merkel J's reasons for judgment;
- Merkel J reviewed the relevant provisions of the NTA and the case law touching on its proper construction;
- importantly, Merkel J acknowledged the requirements of proof to be drawn from earlier authorities and noted that the critical question was whether, under the traditional laws and customs of the Yawuru community, the claimant community, or the claimant group, possessed the native title rights and interests claimed in respect of the respective claim areas—at [71].

The court was of the view that the critical question posed by Merkel J was not whether 'assumed native title rights and interests' were possessed by the 'claimant community' on the one hand or the 'claimant group' on the other:

> The question posed is whether, applying the principles earlier identified by his Honour, including the requirement that native title rights and interests are possessed under a normative system that has had a continuous existence and vitality since sovereignty, under the traditional laws and customs of the Yawuru community the community as a whole, or alternatively clans within the community, possess the native title rights and interests in the claim area—at [72].

It was noted that Merkel J was aware that he had to consider whether the Yawuru community was a 'recognisable body of persons united in and by' traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests in issue were claimed. The court was satisfied that the language used by Merkel J suggested he had the majority judgment in *Yorta Yorta* 'at the forefront of his mind'—at [73].

On the issue of continuity, the court noted that Merkel J:

- knew that the continuing acknowledgement and observance of traditional law and custom by the Yawuru community was contested;
- considered the evidence of indicia of continuity of Yawuru traditional law and custom;
- knew that the term 'community' was not the critical issue;

- identified and applied the correct legal test to the facts properly found by him—at [74].

The court concluded that, if Merkel J's reasons for judgment were 'read fairly in their entirety', it could be seen that he was conscious of what was said *Yorta Yorta*, particularly that the rights and interests possessed under an identified body of laws and customs are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs—at [75].

Therefore:

- it was apparent that Merkel J did determine in *Rubibi No 5* that native title rights and interests existed in the Yawuru claim area and his reference in *Rubibi No 6* must be read as a reference to that finding;
- Merkel J was aware that the precise nature and extent of those native title rights and interests remained to be determined;
- this understanding of Merkel J's remarks in *Rubibi No 6* was also consistent with his identification of the issues he proposed to address in that judgment;
- in *Rubibi No 6*, the remaining issues to be addressed were identified by Merkel J with no reference to determining whether the Yawuru claimants had native title rights and interests in the Yawuru claim area but that did not demonstrate that Merkel J did not address that issue at all and simply assumed affirmatively that such rights and interests existed;
- on the contrary, the detailed consideration of that issue in the judgment in *Rubibi No 5* made it clear that the issue had already been addressed and determined by his Honour—at [76].

Both the state and the Commonwealth argued that Merkel J's approach to fact-finding necessarily involved an error because the existence of a society (or community) holding native title rights and interests could not be resolved until the status of the Djugan had been addressed. However, the court noted that Merkel J:

- correctly identified the task he was to undertake as explained in *Yorta Yorta* and did not lose sight of that task;
- the 'sequence of a series of complex factual findings' did not demonstrate to the contrary and may well have been informed by an expectation that the parties may have been able to resolve matters as to the precise extent and geographical scope of the native title by agreement following *Rubibi No 5*—at [77].

It was noted that:

> The consideration then given to the evidence concerning the Djugan, and how their position related to and affected the general findings made in *Rubibi No 5*, indicates that his Honour did carefully consider the evidence to identify, and then made findings about, the society or community which held native title rights and interests over or in relation to the Yawuru claim area. He has ultimately integrated the general findings made in *Rubibi No 5* with those made in the later judgment. In our view, when his Honour's reasons are considered overall, the contention that his Honour erroneously assumed the existence of native title rights and interests in the northern part of the Yawuru claim area should be rejected—at [78].

No error in finding Djugan a subset of Yawuru

The Yawuru were 'typically associated with' the southern part of the claim area and the Djugan with the northern part of the claim area. Merkel J recognised that when determining the existence of the Yawuru's native title rights in *Rubibi No 5*. The state argued that Merkel J was wrong because:

- he focussed on 'communal native title' when he should have more closely addressed the question of who held native title rights in the northern part of the Yawuru claim area;
- he focussed on the term 'community' rather than 'society' in relation to the Yawuru, which was not consistent with *Yorta Yorta*;
- he made no 'proper' finding of a relevant society at the time of sovereignty and so was wrong in finding there was a continuation of such a society to the present time.

The court found that Merkel J did make a finding in *Rubibi No 6* that the Djugan and Yawuru formed one 'native title holding community...now and at sovereignty' and that the Djugan were a subset of the Yawuru—at [81].

Their Honours went on to note that:

> Partly, the State's contentions involve the proposition that the terms "society" and "community" are not interchangeable in the light of *Yorta Yorta*. We have already considered and rejected that proposition as indicating error on the part of the primary judge in finding that native title rights and interests exist in the claim area—at [82].

The state and the Commonwealth contended that:

- there was no finding in conformity with *Yorta Yorta* that the society be united by common observance of traditional laws and customs within the same normative system i.e. there was no finding that the Djugan's northern and the Yawuru's southern traditions were part of the same observed normative system;
- the finding of *substantially* similar laws and customs observed by each of those clans was insufficient to found the existence of their unified observance by the Yawuru claimants as required by *Yorta Yorta;*
- Merkel J's 'communal title' approach in *Rubibi (No 6)* reasoned wrongly that, because substantially similar customs were observed between two clans, those clans constituted one group having native title rights over the claim area.

The court held that Merkel J did find that there was a common normative system of the two clans over the claim area:

> Such a finding appears...in *Rubibi (No 6)*. His Honour there explains the basis upon which he found in *Rubibi (No 5)* as the normative system of the Yawuru as having been "prescribed by the Bugarrigarra", with the southern tradition as part of both the normative system and the traditional customs and laws observed and acknowledged in relation to the claim area…[H]is Honour concluded, as he did in *Rubibi (No 5)*, that the Bugarrigarra and the many other commonalities in traditions (despite the differences) formed the content of one normative system. There does not appear to be any prescription in *Yorta Yorta* ...that *all the same traditions and customs* of each clan be observed and acknowledged by the two clans for them to operate under the one normative system. *Yorta Yorta* consistently refers to "a body of law and customs" rather than "the identical body and law and customs"...The body of laws and customs under which native title rights and interests are possessed by a group of persons does not require that each member of the group has precisely the same knowledge of those laws and customs or that each member of the

> group fully comprehends in precisely the same way as each other member of the group how those laws and customs operate. The existence of native title rights and interests…is a question of fact to be determined upon the evidence in each case. We consider that is what the primary judge did in this case, and that the conclusion he reached was one available to him and which should not be disturbed on appeal—at [84], emphasis in original.

The court also rejected criticism of the general approach to the determination that native title was held by the Yawuru group as a communal or group title because:

- each case must be decided on its own facts and there was nothing in *Yorta Yorta* which 'prescriptively indicates' that the use of the term 'communal rights' to describe the rights held by a particular group of persons was not appropriate;
- the state's submission sought to elevate the language used by Merkel J 'beyond what he clearly meant in an endeavour to show the approach was inconsistent with *Yorta Yorta*';
- properly understood, his Honour's approach accorded with that decision and, indeed, Merkel J showed a careful analysis of it so as to properly follow it—at [86].

The state's argument that Merkel J failed to properly consider certain evidence was rejected, with the court noting (among other things) that: 'Such litigation as the present...attracts the observations that the...conclusions in question can be seen as made with the advantage of hearing the evidence in its entirety'—at [87].

It was found that Merkel J:

- was mindful of the nature of the fact finding task and of the material relating to it following his conclusion in *Rubibi No 5*;
- said in *Rubibi No 6* that his task was essentially to determine whether the Djugan fell into the group of persons entitled to native title rights and interests;
- noted in *Rubibi No 6* that he had difficulty in defining the Yawuru community on the early anthropological evidence but attributed particular weight to evidence given by Aboriginal elders prior to the commencement of the present claims;
- at the outset of the judgment in *Rubibi No 6*, said that the genealogy charts in evidence were a basis for an inference of continuity of the Yawuru community from the time of sovereignty through to the present time because they evidenced ambilineal or cognatic descent which was consistent with traditional Yawuru laws and customs, with the court noting that this followed a finding made in *Rubibi (No 5)*—at [88].

Therefore, it was held that:

- the path to the conclusion that the Djugan continued as part of the Yawuru society was the commonalities found between the Djugan and the Yawuru clans;
- the evidence was that there were 'extensive traditional connections and commonalities' between them (including the common source of *Bugarrigarra*) that were in existence at, and since, sovereignty;
- the connections and commonalities of most significance included the substantial similarities between the languages spoken by Djugan and Yawuru, their skin section systems and their kinship, in addition to 'the identical source of law and tradition in the *Bugarrigara*';
- the oral evidence supported those findings;

- the evidence Merkel J relied on pointed firmly against the state's contention that there were separate societies at sovereignty and a lack of continuity —at [89] to [90].

The state's challenge on the alternative basis that there was a contradiction between the finding that the Djugan and Yawuru had cultural differences but their commonalities bound them as one, and the finding of the disintegration of the Djugan, was rejected because the reference to 'disintegration' did not, in context, amount to a finding that the Djugan became extinct—at [92].

Succession of rights

The state took issue with Merkel J's 'alternative finding' that, if the Djugan were not a subset or subgroup of the Yawuru, whatever rights and interests they had in the northern area had passed to the Yawuru community in accordance with its traditional laws and customs.

After noting that the joint judgment in *Yorta Yorta* provided some support for the recognition of native title rights and interests transmitted by a process of succession, the court looked to Merkel J's consideration of the relevant evidence, commenting that (among other things):

- it appeared that none of the anthropologists expressed a view as to whether succession of rights from the Djugan to the Yawuru had been contemplated by their traditional laws and customs or had in fact occurred;
- there was a 1992 ethnographic survey that recorded the views of Yawuru elders that 'succession to the Broome area was secured under general principles of Yawuru land tenure';
- Merkel J concluded that the information provided by those elders was consistent with the anthropological view that principles of succession formed part of the northern and southern traditions practiced in the Yawuru claim area and, therefore, that succession had in fact occurred—at [97].

The court noted that:

- Merkel J's alternative finding must have been based on the premise that the Djugan people held native title rights and interests in the northern area under a separate normative system;
- there was an issue as to whether his Honour should have made specific findings about whether the traditional laws and customs of the Yawuru community included principles of succession
- recent Full Court cases indicated that the comments in *Yorta Yorta* on transmission of native title were 'probably directed to intergenerational transmission of rights and interests under traditional laws within the society possessing rights and interests in the land under traditional laws and customs at the time of sovereignty';
- in circumstances where the finding of the primary judge was that succession to rights and interests did not arise because there was always only one society, it was 'perhaps unsurprising that there appears to be little evidence on the point and the primary judge's reasoning is brief';
- on the 'fairly scanty' evidence available, the question remained whether Merkel J's finding should be sustained but, because the attack on Merkel J's primary finding failed, it was not necessary to answer that question;
- had it been necessary to do so, the court was inclined to think Merkel J could draw the conclusion that succession in accordance with the traditional laws and customs of

the two clans had occurred on the available evidence—at [98] to [104], referring to *Dale v Moses* [2007] FCAFC 82, summarised in *Native Title Hot Spots* Issue 25.

Descent system of the Yawuru community

The state argued (among other things) that Merkel J:

- was wrong to find that, at sovereignty, a principle of choice existed that allowed the evolution of traditional laws and customs to take account of cognatic or ambilineal descent;
- *Yorta Yorta* required a determination of the content of the laws and customs relating to the descent system followed by the Yawuru 'society' at sovereignty and the relevant descent system in this case was a patrilineal clan-based system;
- there was no basis for finding that a change to an ambilineal based community was contemplated under the 'contingency provisions' of the traditional laws and customs;
- the 'contingency' of ambilineal descent was available 'under a traditional patriclan society only in order to cope with a small percentage of the population' and the application of such a contingency provision to the whole of the Yawuru society created a new and different society in which the contingency had become the norm.

The court found no error in his Honour's approach because:

- it could be seen from the reasons in *Rubibi No 5* and *Rubibi No 6* that Merkel J carefully considered whether the existence of an ambilineal or a cognatic descent system reflected an unacceptable change from the traditional laws and customs at sovereignty such that the rights and interests now asserted are no longer possessed under the traditional laws acknowledged and the traditional customs observed by the Yawuru group that existed at sovereignty;
- his Honour decided it did not reflect such a change, made findings that the rights and interests now claimed through an ambilineal descent system are possessed by the Yawuru people under traditional laws and customs and identified evidence which 'amply supported' his findings—at [121] to [122].

Adoption/incorporation into the Yawuru community

The Walman Yawuru argued that there was no, or insufficient, evidence to support the finding that, under the traditional laws acknowledged and traditional customs observed by members of the Yawuru community, there was a principle of incorporation into the Yawuru community of adult non-Yawuru persons having high cultural knowledge and responsibilities. The court rejected this argument, noting that:

- Merkel J carefully analysed the evidence and, having reviewed the evidence Walman Yawuru referred to, it was not inconsistent with Merkel J's conclusion;
- there was evidence upon which the challenged finding could be made;
- the relative infrequency of activation of membership of the Yawuru did not tend to indicate that membership in that way is not according to traditional laws and customs;
- the suggestion by Walman Yawuru that the determination more clearly defined the actual persons who may become members of the Yawuru by incorporation by reason of their high cultural knowledge and responsibilities was wrong because that degree of precision was not imposed by s. 225;
- the determination made accurately reflected the findings based on the evidence and satisfied the requirements of s. 225—at [135] to [141].

Native title rights of the Walman Yawuru clan

The Walman Yawuru challenged Merkel J's finding that the Walman Yawuru clan was a subgroup of the Yawuru community and that the members of that clan did not hold any native title rights and interests in their capacity as clan members, arguing that:

- their 'special attachments to and responsibilities for clan country' constituted native title rights and interests and a 'connection' to that country;
- their clan had a normative system of beliefs and rules which ascribed their relationship to, and connected them to, clan country;
- Merkel J misunderstood the nature of their claim to native title in the Walman Yawuru claim area which, in their submissions on the cross appeal, was described as a 'competing communal native title claim' and not a group claim;
- their native title rights and interests area were communally held and there was no 'umbrella communal system' that gave other clans rights or interests in each other's lands.

It was noted that, although at first instance the Walman Yawuru claimed to hold exclusive native title in the Walman Yawuru claim area, the focus of their argument had shifted i.e. on appeal, they primarily claimed that their special attachments to, and responsibilities for, their clan country should be recognised as constituting *non-exclusive* rights in that area.

The court noted that it was difficult to identify the particular errors said to have been made by the primary judge in relation to the Walman Yawuru claim, with the main contentions apparently being that Merkel J:

- made 'a mistake of fact arising in unfairness' in finding that the Walman Yawuru were a sub-group of the Yawuru community;
- failed to appreciate the 'marked differences' between the evidence of the Yawuru witnesses and the Walman Yawuru witnesses regarding laws and customs relating to land; and
- failed to properly assess the evidence of the Walman Yawuru witnesses, particularly regarding the existence of a rule of trespass in the Walman Yawuru claim area.

After considering the evidence and Merkel J's reasons, the court dismissed the cross appeal, finding (among other things) that:

- Merkel J did not misunderstand the nature of the native title rights and interests claimed by the Walman Yawuru people but, rather, well understood their case and addressed it;
- in oral submissions, senior counsel for the Walman Yawuru claimants acknowledged that his Honour's reasons did not contain any words in which the error which the argument contended that he committed could be seen;
- there were inconsistencies apparent on the face of the rights claimed by the Walman Yawuru and the added difficulty of reconciling the claim on the cross-appeal with Merkel J's reasoning because, although they did not seek to overturn the whole of the decision at first instance, they maintained on appeal that their claimed native title rights were possessed under an independent normative system i.e. independent from the Yawuru community's normative system—at [156] and [164].

As was noted, this could not be anything other than a fundamental attack on Merkel J's conclusion that native title rights and interests are communally held throughout the Yawuru claim area:

> [U]nder a body of traditional laws and customs comprising an ambilineal or cognatic system of social organisation which is *not* concerned with defining the membership of any clan of that community and which does *not* give rise to rights and interests held by members of the community in their capacity as clan members...That is not to say that there could never be two complimentary normative systems within the one claim area. But that possibility was rejected by the primary judge, as reflected in the *determination*. The Walman Yawuru claimants have not shown that the findings made inconsistent with their contention were erroneous—at [164], emphasis in original.

More fundamentally, the Walman Yawuru failed to demonstrate that the primary judge was wrong—at [165] to [169].

The second ground of the Walman Yawuru cross appeal was that:

- there should have been a determination that there was a rule of 'trespass and permission underpinning the requirement of courtesy and respect from Yawuru non-clan members in acknowledgment of the special attachments and responsibilities held by clan members towards clan country'; and
- this 'rule' gave rise to a native title right and interest held by the Walman Yawuru clan in respect of their traditional land and waters.

It was explained to the court that the Walman Yawuru's claim to exclusive native title rights and interests was an alternative claim that was pressed in case the Yawuru claimants were held on appeal not to have native title rights or interests over Walman Yawuru traditional lands and waters.

The 'short answer' to the Walman Yawuru's alternative contentions was that:

> [T]heir claims were understood by the primary judge, and rejected by him. They were rejected because, on the findings of fact made by his Honour in the light of the evidence, the necessary factual foundation for…them was not made out. That, in turn, depended upon his Honour's assessment of the reliability of competing witnesses for the Yawuru and the Walman Yawuru. There is no reason to disturb those findings...
>
> It is difficult to identify precisely what the primary judge is said by the Walman Yawuru claimants to have done wrong; or why the Full Court is being asked to review so many pages of transcript from the hearing at first instance. Nevertheless, after consideration of the material referred to, we have the view that the conclusions of the primary judge were readily available to him, and his reasons for preferring certain evidence over other evidence is cogent and persuasive—at [174] and [176].

The court also upheld Merkel J's finding that:

- the only rights and interests that the Walman Yawuru possess in relation to the claim area are interests or rights held in any capacity they may have as members of the Yawuru community;
- the special attachments and responsibilities they had as clan members did not fall under the s. 253 definition of 'interest' and were accordingly not included in the determination under s 225(c) of the NTA—at [178] to [186].

It was noted that:

> There is much to be said for the view that s 225(c) does not refer to particular intra-mural "interests" of members of the native title claim group, but to third party interests which must be accommodated in parallel with the native title rights and interests—at [186].

It was not necessary to come to any conclusion on the submission that Merkel J should have determined that the Walman Yawuru clan succeeded to the traditional lands of the Minyirr clan because the court had rejected the premise upon which Walman Yawuru's claim was based—at [191].

The Walman Yawuru's submission that there was an implicit finding in *Rubibi No 5* that they held some non-exclusive native title rights and interests in their clan areas in their capacity as clan members was rejected because his Honour 'made no such finding'—at [153].

Conclusion on native title rights and interests

For the reasons summarised above, the appeals of the State and the Walman Yawuru were dismissed 'so far as they concern native title' (i.e. and not extinguishment) issues—at [191].

Extinguishment — police station and goal reserves

In relation to two unvested reserves, one for the purpose of a gaol and the other for a police station, Merkel J determined that native title was only wholly extinguished in the areas on which the goal and the police station had been built. Over the remainder of each reserve, his Honour found that non-exclusive native title survived. (His Honour had visited both reserves before making his decision). After reviewing the evidence, the court agreed with this finding (albeit on slightly different grounds), holding that:

> [H]is Honour's conclusions are to be understood as conclusions that the Crown has not, by the mere construction and use of the gaol and police station, asserted rights over that vacant land that are inconsistent with all native title rights and interests…So understood we agree with his Honour's conclusions. In our view, native title has been [wholly] extinguished in respect of the land on which the gaol and the police station have respectively been constructed, the immediate curtilage of the works constituting the gaol and the police station, and areas adjacent thereto enclosed by walls or fencing. Otherwise...native title in respect of the reserves has not been [wholly] extinguished—at [208].

Application of s. 47B to the town site

The state argued that:

- section 47B did not apply to any area within the town site because it was subject to a proclamation originally made pursuant to Land Regulations 1882 (WA) in November 1883 'under which the whole or a part of the land or waters in the area is to be used for public purposes, or for a particular purpose' within the meaning of s. 47B(1)(b)(ii);
- the court should not follow *Alyawarr* as to the construction of s. 47B(1)(b)(ii).

It was held that this ground failed because (among other things):

- the construction of s. 47B adopted in *Alyawarr* should be accepted as correct unless and until a judgment of the High Court establishes that it is erroneous;
- the classification of Crown lands as town and suburban lands to form the township of Broome under the Land Regulations 1882 (and subsequently under the Land Act

1898) embraced a variety of potential subsequent uses, none of which was defined at the point of proclamation;
- any intention to use the land for requisite purpose or purposes was to be gleaned from the terms of the proclamation and its constating legislation as an intention to be fixed for the duration of the proclamation, and not as a matter of fact at the time of the application for a native title determination;
- given that the critical time to determining the requisite purpose was to be gleaned from the terms of the relevant instrument and its constating legislation, no relevance attaches to the time, if any, at which the township of Broome was established—at [220], [222] and [226], referring *Moses* and *Griffiths v Northern Territory* (2007) ALR 72, summarised in this issue of *Native Title Hot Spots*.

Occupation for the purpose of ss. 47A or 47B

The Yawuru said Merkel J was wrong in his approach to the issue of whether or not the requirement in ss. 47A(1)(c) or 47B(1)(c) for occupation was met. They contended Merkel J made three errors:
- in finding that the use of the area had to be a traditional use;
- in considering that general public use of the area was a relevant, if not determinative, factor;
- in incorrectly finding, as a matter of fact, that the requisite occupation was not established.

As to the first, the court said that:
- Merkel J did not impose such a requirement but, rather, correctly held that there was no proper basis for reading a requirement of traditional occupation into the sections;
- by 'traditional use', the Merkel J clearly meant 'use in accordance with the way of life, habits, customs and usages of the group' and, so understood, 'this was a helpful elaboration of the concept';
- the extent to which an area must be inhabited or used by one or more claimants in order to satisfy that requirement is not easily described and cannot be reduced to a simple formula - it is 'a matter of fact and degree'—at [286] to [289], referring to *Moses* and *Hayes v Northern Territory* (1999) 97 FCR 32.

As to the second, it was found that:
- Merkel J's approach had to be seen in context i.e. he was dealing with an argument that use by the Yawuru claimants which was indistinguishable from use by the public did not amount to occupation;
- his Honour rejected that 'extreme position' but held that public use may be a relevant factor and, importantly, went on to say that the question was, ultimately, whether occupation by a claim group member at the relevant time had been established;
- the suggestion that public use might be determinative was 'perhaps overstating the position' but it was clear from his reasons that Merkel J did not treat this as determinative but, rather, took it into account with a variety of factors and had regard to all the circumstances of the case;
- while general public use was 'a weak signifier against occupation', there was no reason to think that Merkel J placed 'more than appropriate reliance on it'—at [290] to [291].

As to the third challenge, the court noted that the difficulty faced by a party alleging such an error was formidable:

> [T]he primary judge not only visited the areas in question and observed the terrain…, he also had the benefit of many days of hearing evidence from a large number of members of the native title claim group and had the opportunity to assess their activities on the land. All of these advantages are unavailable to the appeal court, and are likely to have helped the primary judge assess the evidence in relation to occupation. This Court is confined to the bare words on the pages of transcript—at [293] to [294], referring to *Moses*.

That said, in relation to areas at a place called Kennedy Hill in the Broome town site, the court overturned Merkel J, finding that the evidence established that the Yawuru claimants did occupy those areas within the meaning of s. 47B(1)(c)—at [305].

Vesting of inter-tidal zone wholly extinguished native title

The court upheld Merkel J's finding that any native title rights or interests in so much of the intertidal zone of the determination area that was vested in the Minister for Transport pursuant to s. 9 of the *Marine and Harbours Act 1981* (WA) (MHA) were extinguished when the seabed in that area was vested in the minister. This was because, (among other things):

- the MHA created a body corporate with perpetual succession under the name 'The Minister for Transport', s. 9 of the MHA authorised the Governor by proclamation to vest in that minister any real or personal property of any kind or interest in any such property and, in February 1982, the Governor vested in the minister the area of seabed identified in the proclamation as the Broome port area;
- section 12 of the MHA revealed a legislative intention that the proclamation vested a legal estate in fee simple in the seabed and the space above the seabed in the minister;
- there was no necessary inconsistency between the vesting of fee simple in the intertidal zone and the continuation, until abrogated, of the public right of fishing and navigation;
- on its face, the MHA did not single out native title rights and interests for different treatment (questions of compensation to one side) and, therefore, the vesting was valid but s. 10(1) of the *Racial Discrimination Act* 1975 (Cwlth) would supply to native title holders a right of compensation for their loss;
- because the vesting was not invalid, it was not a 'past act' within the meaning of Div 2 Part 2 of the NTA;
- the effect of Division 2B of Part 2 of the NTA (the confirmation of extinguishment provisions), when read together with s. 12I of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (TVA) was that native title was taken to have been wholly extinguished in the Broome port area upon the publication of the proclamation vesting the area in the minister—at [228] to [241], referring to *Ward*, *Yarmirr* and *Gumana v Northern Territory* (2007) 158 FCR 349, summarised in *Native Title Hot Spots* Issue 24.

McMahon Oval Reserve

Merkel J's findings that earthworks undertaken by the local authority in 1989 for the construction of the McMahon oval had the effect of extinguishing native title were upheld. About 40% of the reserve in question was an uncompleted sports oval. There was uncontested evidence that the local shire carried out earthworks and installed drainage ditches and paths and that the whole of the reserve was traversed and disturbed by heavy

earthmoving equipment in the course of creating the oval. Merkel J visited the reserve before making the finding that 'the oval was a major earthwork the construction of which involved usage of the whole of the reserve'. The court noted that:

- the public work relied upon by the shire was not the uncompleted oval but the completed 'major earthworks';
- therefore, as the completed earthworks were 'major earthworks' as defined in s. 253 of the NTA, they result in extinguishment under the provisions of the TVA analogous to ss. 15(1)(b)(i) and 23C(2) of the NTA, notwithstanding that not all of the works planned for the area were complete;
- 'major earthworks' do not need to constitute part of a completed project in order to fall within the definition of a 'public work'—at [270] to [279].

Reserve not validly created under state legislation

The court overturned Merkel J's finding that Reserve 631 was validly created pursuant to reg. 29 of the Land Regulations 1882 because:

- on the proper construction of reg. 29, it did not authorise the Governor to reserve lands for a purpose as general as 'public purposes, adjoining Broome, Roebuck Bay';
- the Governor was required to identify the object or purpose of every reserve created under the regulations;
- the notice by which Reserve 631 was purportedly created did not comply with the requirements of reg. 29 of the Land Regulations 1882—at [242] to [253].

Broome cemetery reserve did not wholly extinguish as no evidence of vesting

The court overturned Merkel J's finding that:

- the legal estate in Broome cemetery reserve was vested in trustees;
- the rights flowing from the vesting were inconsistent with any native title rights and so native title was wholly extinguished over the whole area of the reserve.

Their Honours were of the view (among other things) that:

- had there been evidence of the appointment of trustees, together with the vesting of the cemetery land in the trustees under the *Cemeteries Act 1897*(WA) (Cemeteries Act), that 'may well have extinguished native title';
- however, the evidence did not show that there was any such vesting despite the fact that the investigation of land tenure and the materials produced were extremely extensive and detailed in this case;
- therefore, the state, as the party asserting extinguishment, had not discharged the evidentiary onus of proving the nature and content of the act said to extinguish native title;
- Merkel J was wrong in his view that the trustees had rights to use the cemetery for burials, digging graves and laying tombstones under the Cemeteries Act because the state had not established, on the evidence, that the trustees had those rights i.e. those rights and powers depended on their being a vesting in the trustees;
- neither the mere passing of the legislation nor the appointment of trustees extinguished native title;
- the reserve was not vested in the trustees under s. 212 of the *Municipal Corporations Act 1906* (WA) either because that section only applies where property is 'granted or held on trust', which the reserve was not—at [257] to [258] and [265] to [269].

Conclusions on extinguishment issues
The court concluded that Merkel J erred in concluding that:

- Reserve 631 was validly created;
- native title was wholly extinguished over the Broome Cemetery reserve;
- the Yawuru claimants did not occupy the areas at Kennedy Hill at the time their claimant application was made.

All the other challenges to his Honour's findings on the extinguishment issues failed—at [306].

Decision
It was decided that the parties should have the opportunity to consider the appropriate orders to be made in the light of the reasons for judgment. They were ordered to provide an agreed minute of orders (or, if there is not agreement, a minute of the orders each party sought and a brief outline of submissions in support of those orders) by 20 May 2008.

Single Noongar appeal – Perth

Bodney v Bennell [2008] FCAFC 63 (Full Court)

Finn, Sundberg and Mansfield JJ, 23 April 2008

Issue
This case concerns four appeals against the judgement of his Honour Justice Wilcox in *Bennell v Western Australia* [2006] FCA 1243 (*Bennell*), summarised in *Native Title Hot Spots* Issue 21.

The main issue before the Full Court was whether the trial judge correctly applied ss. 223(1)(a) and 223(1)(b) of the *Native Title Act 1993* (Cwlth) (NTA). In joint reasons for judgment, the Full Court found, among other things, that the trial judge had incorrectly applied those provisions and so set aside the relevant orders made at first instance. The separate question dealt with in *Bennell* was then remitted to the docket judge to determine the future progress of the matter.

Background
In *Bennell*, pursuant to Order 29, rule 2 of the Federal Court Rules, Wilcox J dealt with a separate question in a separate proceeding (Part A, which is part of the area covered by the Single Noongar claim). Six claimant applications in the south-west of Western Australia were involved. In paraphrase (and putting questions of extinguishment to one side), the separate question was in three parts:

- whether native title existed in the area covered by the separate proceedings (which encompassed parts of the Perth metropolitan area and some surrounding non-urban areas);
- if so, whether native title to Part A was held by the Noongar people as a single communal title;
- what were the nature and extent of the native title rights and interests in relation to Part A?

Wilcox J answered the first two in the affirmative. In relation to the third, his Honour found that certain native title rights and interests exist but left open the question of whether they were held to the exclusion of all others. His Honour also dismissed the five overlapping applications, all made by Christopher (Corrie) Bodney. For further background, see the summary of *Bennell* in *Native Title Hot Spots* Issue 21 and the reasons for judgment in this case at [1] to [38].

The State of Western Australia and the Commonwealth of Australia sought leave to appeal against the judgment in *Bennell*. The Western Australian Fishing Industry Council (WAFIC) sought leave on limited grounds. Mr Bodney sought leave to appeal against the dismissal of his applications and the decision in favour of the Noongar people. The court granted leave to all four appellants.

Issues on the state and Commonwealth appeals

The major issues the state and commonwealth raised on appeal were whether:

- there had been continuity in the acknowledgment of the traditional laws and observance of the traditional customs of the single Noongar society from sovereignty until recent times, as required under s. 223(1)(a) of the NTA;
- a finding of one Noongar society, or community, entailed a finding of one communal native title;
- Wilcox J was wrong in his approach to the issue of connection between the Noongar people and the area covered by Part A under s. 223(1)(b) of the NTA.

In dealing with these grounds of appeal, their Honours Justices Finn, Sundberg and Mansfield assumed, without deciding, that there existed at sovereignty a single Noongar society in the area covered by the Single Noongar claim (as Wilcox J had found)—at [43].

Meaning of traditional under s. 223(1)

The court noted that:

- in relation to s. 223(1)(a), there are three separate, but related, concepts - 'society', 'laws and customs', and 'rights and interests';
- the first, while not mentioned in s. 223(1), is drawn from *Yorta Yorta,* while the second and third are 'related in the manner first explained' in *Mabo (No 2)*;
- laws and customs arise out of and, in important respects, go to define a particular society, with 'society' being understood as a body of persons united in, and by, its acknowledgment and observance of a body of law and customs;
- to speak of rights and interests possessed under an identified body of laws and customs is to speak of rights and interests that are the creatures of the laws and customs of the particular society that acknowledges and observes those laws and customs;
- traditional laws and customs must constitute a normative system with normative rules that give rise to rights and interests in relation to land and water—at [46], referring to, and quoting from, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3) at [49] to [50] and *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo No 2)* at 58.

The court was of the view that:

> Because it is the normative system that is the source of the rights and interests, it is necessary in order to prove native title that the normative system has had a continuous existence and vitality since sovereignty...It is therefore necessary for native title claimants to show that the normative system that existed at sovereignty is substantially the same as the one that exists today. If it is not, then any rights and interests are not "possessed under the traditional laws acknowledged and traditional customs observed"—at [47].

It was noted that, while the 'connection inquiry' found in s. 223(1)(b) was an 'additional element', it could be proven by demonstrating that, in fact, there had been continued acknowledgment of the relevant traditional laws and observance of the relevant traditional customs—at [48], referring to *Northern Territory v Alyawarr* (2005) 145 FCR 442 (*Alyawarr*, summarised in *Native Title Hot Spots* Issue 16) at [92] and *Western Australia v Ward* (2000) 99 FCR 316 at [243] (Full Court in *Ward*).

Continuity at first instance

The court canvassed Wilcox's J's findings in relation to substantial continuity of acknowledgment of traditional laws and observance of traditional customs, noting that the questions posed by the primary judge were:

- whether the single Noongar community that existed in 1829 continued to exist over subsequent years, up until recent times, with its members continuing to acknowledge and observe at least some of the traditional laws and customs relating to land that were acknowledged and observed in 1829;
- whether that community continued to exist today, with members, including at least some of those who made the native title application, who continued to acknowledge and observe at least some of those laws and customs.

Among other things, the court was critical of the fact that Wilcox J made no express findings and (on many topics) 'no concluded or even tentative view' in relation to proof of continuity of acknowledgment and observance of marriage laws and customs, noting that:

- Wilcox J had glossed over evidence that showed there was 'a large degree of inconsistency between the [Aboriginal] witnesses as to the extent to which cousins could marry' and the 'the rules are not followed today'; and
- the fact that the traditional punishment of spearing those who transgressed marriage rules was not still practiced was a 'significant change'—at [54] and [57].

On laws and customs relating to burial practices, the court noted that Wilcox J had found that there were 'significant discrepancies' in the evidence—at [59].

Laws and customs concerning land were of particular significance on the appeals. The evidence indicated that the traditional Noongar land-ownership system (i.e. at sovereignty) consisted of two elements:

- the estate, which was the basic unit of landholding, with an 'estate group' being comprised several nuclear families, ownership rights being determined by birth and membership of an estate group conferring rights to occupy and use particular areas of land. (It was common ground that estate groups 'have long disappeared');
- the 'run', which was an area in which a person felt at home and had certain rights derived from, for example, marriage.

The evidence showed that the contemporary 'land-ownership rights' recognised by the claimants consisted of areas known as '*boodja*', or 'country', which was an area in which a person felt at home and could move about freely without asking permission.

Continuity under s. 223(1)(a) – wrong question asked

The court accepted that the correct way to approach the issue of continuity was:

- to ask whether acknowledgement of traditional laws and observance of traditional customs had continued substantially uninterrupted since sovereignty;
- to answer that question by ascertaining whether, for each generation of the relevant society since sovereignty, those laws and customs both constituted a normative system giving rise to rights and interests in land and, in fact, regulated and defined the rights and interests which those people had, and could exercise, in relation to the land and waters—at [70] to [72], referring to *Yorta Yorta*, *Risk v Northern Territory* [2006] FCA 404 (summarised in *Native Title Hot Spots* Issue 19) and *Risk v Northern Territory* (2007) 240 ALR 75 (summarised in *Native Title Hot Spots* Issue 24).

Their Honours found that Wilcox J 'did not pose the continuity question in the form propounded' by *Yorta Yorta*:

> Instead of enquiring whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty, he asked whether the *community* that existed at sovereignty continued to exist over subsequent years with its members continuing to acknowledge and observe at least some of the traditional 1829 laws and customs relating to land—at [73], emphasis in original.

According to the court:

- the *Yorta Yorta* formulation concentrates on continued acknowledgment and observance of laws and customs because the rights and interests the subject of a determination of native title are the product of the laws and customs of the relevant society;
- proof of the continuity of a society does not necessarily establish that the rights and interests which are the product of the society's normative system are those that existed at sovereignty because those laws and customs may change and adapt;
- change and adaptation will not necessarily be fatal because, so long as the changed or adapted laws and customs continue to sustain the same rights and interests that existed at sovereignty, they will remain traditional;
- an enquiry into continuity of society, divorced from an inquiry into continuity of the pre-sovereignty normative system, may mask unacceptable change, with the consequence that the current rights and interests are no longer those that existed at sovereignty and so are not traditional;
- Wilcox J's conclusion in the question of continuity was cast in terms of *continuation of a society* rather than continued acknowledgement and observance of laws and customs—at [74].

The court illustrated the approach taken by Wilcox J by referring to (among other things), the way he dealt with the breakdown of the estate system—at [77].

Wilcox J had noted that 'home areas' (occupied by estate groups) seemed to have 'effectively disappeared' and that today's *boodjas* (or country) were 'similar in concept' to the 'runs' of pre-settlement times, which was a significant but 'readily understandable' change because it was 'forced upon the Aboriginal people by white settlement'. While the 'bands' or 'tribes', comprised of several related families, were broken up as a result of being forced off their home areas: 'Surprisingly, the social links between those families seem to have survived, but the related families ceased to be residence groups, together occupying a relatively small area of land'—*Bennell* at [784] to [785].

The court was of the view that Wilcox J took the wrong approach because he:

- failed to consider, as required by *Yorta Yorta*, whether a post-sovereignty *boodja* was 'an acceptable adaptation of the old runs or home areas or an unacceptable change';
- seemed to have rested on the fact that the social links between the several related families survived, which suggested he was again asking whether the community survived, rather than whether the laws and customs in relation to land continued from sovereignty through to the present—at [79] to [80].

According to the court:

- in the absence of any finding of permissible adaptation or change, the 'significant change' brought about by the disappearance of home areas and, apparently, the runs of pre-settlement times was conclusive of discontinuity;
- boodjas are a post-sovereignty phenomenon and the fact that they were 'similar in concept' to the pre-settlement runs did not constitute a finding that a boodja was a permissible adaptation of either a home area or a run;
- in order to have found boodjas were traditional, evidence of the 'continuity of a normative system of land-holding' was required but Wilcox J referred to no such evidence and, indeed, the available evidence pointed 'against continuity with pre-sovereignty runs or home areas';
- any finding of 'conceptual similarity' between a contemporary boodja and a traditional run was not relevant because the question was whether the contemporary boodja system was traditional in the sense understood in Yorta Yorta;
- it was not possible for the appellate court to reach any conclusion in the absence of factual findings by Wilcox J as to the content of the run system—at [80] and [82] to [83].

Disregard of continuity evidence

It was found that Wilcox J's failure to address continued acknowledgment and observance of traditional law and custom between sovereignty and the present was 'underlined, and perhaps explained' by his 'disregard' of opinions expressed by the anthropologists who gave evidence in *Bennell* based on the writings of 19th and 20th century anthropologists and observers. The court was careful to note that:

> We use the word "disregard" because, while his Honour said he obtained no benefit or little assistance from this material, he did not positively disallow it, so that it was not part of the evidence before him. It is nevertheless clear that his Honour said he would not take it into account and that he did not do so—at [84].

There were three problems with this aspect of Wilcox J's reasons:

- assuming the basis rule has survived the Evidence Act 1995 (Cwlth) (the court found this was not the case), its application to the relevant material should have led to it being disallowed altogether;
- the evidence that was put aside, or accorded no weight, by Wilcox J was clearly relevant to whether the claimants had established the continued acknowledgment and observance of their law and customs generation by generation between sovereignty and the present time;
- the common law basis rule was not incorporated in s. 79 of the Evidence Act, which meant that, at the stage of admissibility, the fact that an expert anthropologist's opinion was based, in whole or in part, on a fact supported by hearsay was not a ground upon which the opinion must be rejected—at [88] to [91], referring to *Neowarra v Western Australia* (No 1)(2003) 134 FCR 208 (Neowarra), *Sampi v Western Australia* [2005] FCA 777 (Sampi) and *Jango v Northern Territory* (No 4) (2004) 214 ALR 608, summarised respectively in *Native Title Hot Spots* Issue 8, Issue 15 and Issue 13.

The court also noted (among other things) that:

- nothing in the Evidence Act displaced the body of law that allowed experts to rely on reputable articles, publications and material produced by others (e.g. earlier anthropologists) in the area in which they have expertise as a basis for their opinions, with the weight to be accorded to such evidence being a matter for the court;
- expert evidence was not necessarily opinion evidence and, in the case of anthropologists, it would often be direct evidence of the anthropologist's observations and thus admissible in the ordinary course—at [91] to [94], referring to *Gumana v Northern Territory* (2005) 141 FCR 457 (summarised in *Native Title Hot Spots* Issue 14) and other authorities on point.

Therefore, it was found that:

- Wilcox J committed a 'serious error' by failing to have regard, or attach weight, to expert anthropological evidence on the observance of the laws and customs in the period between sovereignty and the present;
- the finding that this evidence should be rejected because it did not satisfy the basis rule was also wrong;
- these errors led the primary judge to deprive himself of the very evidence he should have used to determine (as he was required to do, following Yorta Yorta) whether, for each generation since sovereignty, acknowledgment and observance of the Noongar laws and customs had continued substantially uninterrupted—at [95].

Patrilineal/matrilineal shift

The evidence was that, at sovereignty, rights to country were acquired principally through patrilineal descent but, in the present day, Noongar people could obtain rights through matrilineal descent, birth or marriage. The state argued, essentially, that this was a 'radical departure' from the situation at sovereignty and could not be regarded as traditional. It also submitted that Wilcox J had found there was agreement between the expert anthropologists on this issue when there was not.

The court found that Wilcox J was entitled to find that this did not mean that the descent rules were no longer traditional, noting (among other things) that:

- Wilcox J described the pre-settlement position as 'a general rule of patrilineal descent, subject to exceptions', with a 'widening of the exception' coming as a result of colonisation and a 'move away from a relatively strict patrilineal system to a mixed patrilineal/matrilineal or cognative system';
- his Honour's belief that the anthropologists called to give expert evidence were in agreement on 'a general rule of patrilineal descent, subject to exceptions' was based on 'what was common ground between the experts' rather than any 'positive accord' between the parties;
- based on this understanding of the expert evidence, Wilcox J found that the instances in which rights were obtained by matrilineal affiliation, rather than patriliny, had increased i.e. there was merely an expansion of reliance upon the exceptions to the general rule, not a change from patriliny to patriliny/matriliny or cognation;
- on the expert evidence alone, it was open for Wilcox J to come to the conclusion he did—at [106] and [114] to [116], referring to *Griffiths v Northern Territory* (2007) 243 ALR 72 (summarised in this issue of *Native Title Hot Spots*).

Reasons for change are irrelevant

At several points, Wilcox J referred to changes in law and custom being 'inevitable' or 'readily understandable' because those changes were forced on Aboriginal people by white settlement. The court pointed out that it was clear from *Yorta Yorta* that the reasons for such 'important' changes are irrelevant—at [81] and [82].

Later in the reasons for judgement, the court elaborated on this point:

> There could not be a more important law or custom for the identification of rights and interests in land than that by which Aboriginal people are related to tracts of land. At settlement the tracts were the home areas and the runs. They ceased to exist after settlement and Aboriginal people instead claimed boodjas or country. Understandably, the primary judge treated the change as significant. However his Honour thought the effects of change could be mitigated by reference to white settlement. That is not a process contemplated by *Yorta Yorta*…European settlement is what justifies the expression "substantially uninterrupted" rather than "uninterrupted". It explains why it is that the common law will recognise traditional laws and customs that are not exactly the same as they were at settlement. But if, as would appear to be the case here, there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of *why* acknowledgment and observance stopped. If this were not the case, a great many Aboriginal societies would be entitled to claim native title rights even though their current laws and customs are in no meaningful way traditional. *Yorta Yorta*…would have been decided differently, since the primary judge in that case found that it was European settlement that had caused the forebears of the claimants to leave their traditional lands and cease acknowledgement and observance of their traditional laws and customs. What we have said about the primary judge's treatment of European settlement is applicable also to his observation…that changes to the descent rules "must have been inevitable" if the Noongar community was to survive white settlement. It follows that in reaching his conclusion that Noongar laws and customs of today are traditional, his Honour's reasoning was infected by an erroneous belief that the effects of European settlement were to be taken in account – in the claimants' favour – by way of mitigating the effect of change—at [97], emphasis in original.

No new rights

The state's argument that there had been an unacceptable shift post-sovereignty away from patrilineal descent was also used to support its argument that 'a new right is never permissible under *Yorta Yorta*' on the basis that (among other things):

- any change in the distribution of rights (e.g. to a wider class of people or over an expanded geographical area) was a change in the rights themselves;
- *Yorta Yorta* intended not only to preclude the creation of any new *class* of rights but also any new right, including the extension of an old right to a new class of persons.

The court noted (among other things) that:

- the proper way to determine whether rights and interests are traditional is to ask whether they *find their origin in* pre-sovereignty law and custom, not whether they are *the same as* those that existed at sovereignty;
- 'clearly', laws and customs could change and develop post-sovereignty, 'perhaps significantly', and still be traditional and, since rights and interests are the product of those laws and customs, they may also change without necessarily losing the capacity to be recognised as native title rights and interests;
- it may be that what cannot be created post-sovereignty are rights that impose a greater burden on the Crown's radical title—at [120] to [121].

However, because the state's submission that pre-sovereignty descent was exclusively patrilineal was not made out, the court did not need pursue this issue.

Appeals upheld in relation to continuity errors

The court held that the Commonwealth succeeded in proving the 'continuity' errors it alleged on its appeal and that the state succeeded on the ground that Wilcox J applied the wrong test in determining whether the claimants had continued to acknowledge and observe traditional laws and customs from sovereignty to the present.

Communal title

According to the court, the issues raised on appeal in relation to Wilcox J's use of the notion of communal native title were:

- what is the character of communal native title rights and interests;
- what is the relationship, if any, of group and individual rights and interests to communal rights and interests?

In their Honour's view, these questions brought into play factors drawn from the case law, including:

- the so-called 'fundamental principle' that native title rights and interests are ordinarily communal in character;
- that communal native title holders do not necessarily possess, or need to possess, rights and interests uniformly over the entire native title determination area;
- if communal native title is established, the intramural (or intra-communal) allocation of special rights to particular areas is a matter for the community itself to determine in accordance with its traditional laws and customs;
- 'relatedly', in a communal native title claim, the level of intersection both at which common law recognition of native title rights and interests is to occur (if at all) and at

which a s. 225 determination is to be made, is at that of communal rights and interests;
- group and individual rights and interests are dependent upon, and are 'carved out of', the communal native title—at [147], referring to the Full Court in *Ward*, *De Rose v South Australia (No 2)* (2005) 145 FCR 209 (*De Rose No 2*, summarised in *Native Title Hot Spots* Issue 16), *Neowarra*, *Mabo (No 2)*, *Sampi* and *Alyawarr*.

Before dealing with these factors, it was noted that:

> With all depending upon the content of...[the traditional laws and customs of the community in question]...there is...reason for pause in the too ready embrace of a priori generalisations both as to the ordinary character and locus of native title rights and interests and as to the nature of the interconnectedness of communal rights and interests on the one hand and group or individual rights on the other. While we acknowledge that such generalisations have been made in High Court decisions and, notably, in *Mabo (No 2)*, we are conscious that they may lead in a given case to assumptions being made about that which, in fact, is required to be demonstrated under the NTA...
>
> A claim by a community to all of the native title in a particular area can properly be described as a communal *claim*. But is it for that reason properly to be characterised as a claim for communal rights and interests (ie communal native title) irrespective of whether group or individual rights are held under that community's traditional laws and customs? Or is to describe it as a communal claim to do no more than state that, as between themselves, the members of the claimant community hold all of the rights in the claim area albeit they may hold them differentially, ie [as was said in *Mabo (No 2)*] "there is no other proprietor", so that (absent dispute over those rights) it is superfluous and unnecessary to differentiate them?
>
> It is clear that in *Mabo (No 2)*, Brennan J...[and]...Deane and Gaudron JJ..., characterised native title "as communal title" that enured for the benefit of the community as a whole and for the groups and individuals within it who have particular rights and interests in the land. While the text and structure of s 223(1), with its typology of "native titles" [i.e. 'communal, group or individual'], would not necessarily suggest that the NTA regime reflected such a characterisation, recent decisions of this Court at trial and appellate level have construed s 223(1) under the shadow of *Mabo (No 2)*...
>
> Communal native title claims, we would note, have been made with some regularity...
>
> This Court, though, has refrained from turning the "fundamental principle" of *Mabo (No 2)* into an inveterate rule, acknowledging in this that each case will depend on its own facts—at [148] to [151], emphasis in original.

In relation to the notion of communal native title, the court was of the view that:
- the evidence must be capable of supporting an inference of communal ownership of native title derived from the community's laws and customs, with the approach taken in *Neowarra* illustrating the application of this approach;
- while Wilcox J accepted that the *claim* as made in this matter was for a communal title, it was not apparent that he considered whether the evidence was capable of supporting an inference of communal ownership of native title derived from the community's laws and customs;
- if his Honour had not merely considered the question of 'what was the society?' but also asked whether those laws and customs supported an inference of communal

title, or only group titles, 'a potentially different inquiry may well have been set in train' which would have required a closer analysis of:
    - the coherence of the 'Noongar society' (having regard to the area it occupied and the dispersal of its members);
    - the character of its laws and customs; and
    - how those laws and customs allocated rights, interests and responsibilities across the lands and waters the subject of the claim;
- a determination of communal native title does not necessarily result in the communal rights and interests themselves being held *in common* by the members of the community;
- if there is no fundamental controversy in a communal title claim as to alleged group rights and interests, but there is serious controversy as to whether there is a community having communal title, and that controversy is decided favourably to the claimant community, it is 'understandable' that the native title determination would recognise communal rights and interests;
- but where (as in this case) the existence of group rights is put in issue in a communal native title claim, 'somewhat different considerations may well obtain'—at [152] to [156], referring to *Neowarra*, the Full Court in *Ward*, *Alyawarr*, *De Rose (No 2)* and *Harrington-Smith v Western Australia (No 9)* (2007) 238 ALR 1, summarised in *Native Title Hot Spots* Issue 24.

The court went on to say that:

> Unless…[the relevant] society has, and acknowledges and observes, laws and customs under which native title rights and interests are possessed, there can be no native title rights whether communal, group or individual…What...is not so obvious is that such rights ordinarily are dependent as well on, and are carved out of, the society's (or communal) title. Acceptance of that proposition has had the effect in what have been called "multiple group" cases...that where the question is whether what are discernible groups in fact constitute a "society" which acknowledges traditional laws and observes traditional customs under which communal title is possessed, the issue of whether there is communal title collapses into the issue of whether there is a society. The judgment under appeal is a very obvious illustration of this—at [157].

Their Honours were of the view that:

> Given the course of authority in this Court to which we have referred and which we are not prepared to say is clearly wrong (notwithstanding the reservations we have expressed), we consider we are obliged to adhere to the approach taken to communal title in *Ward* FC and *Alyawarr* FC and in the cases which have followed them...If the "fundamental principle" that, ordinarily, native title is communal is to be called into question, it will be in another place. We would, though, comment that, notwithstanding common law principles relied upon...in *Mabo (No 2)*, the terms and tenor of the NTA may well be capable of implementation without resort either to a "fundamental principle" of community title or to some degree of approximation of native title rights and interests with concepts drawn from Anglo-Australian property law—at [158].

Therefore, the state and the Commonwealth challenges to Wilcox J's reliance upon 'communal title' were rejected. The issue of proof of communal native title is also discussed in *Western Australia v Sebastian* [2008] FCAFC 65, summarised in this issue of *Native Title Hot Spots*.

Connection — s. 223(1)(b)

The court found that Wilcox J was wrong to 'simply subsume the connection issue in relation to [the Perth metropolitan area] within a finding of connection to the whole [Single Noongar] claim area' i.e. there should have been an inquiry into the connection, by traditional laws and customs, of the claimants to Part A—at [181] and [190].

On this point, it was noted that:

- the term 'connection' found in s. 223(1)(b) had its genesis in *Mabo (No 2)*, which was relevant both because it highlighted the 'opaque' drafting of s. 223(1)(b) and it had influence in shaping aspects of the content of the connection requirement;
- the earlier decisions on point clearly demonstrated that the 'connection concept' was 'multifaceted, with differing aspects of it being emphasised in differing factual contexts'—at [163] and [164].

The court made five points in relation to the connection inquiry, firstly that:

- despite the occasional propensity 'both to fuse and to confuse' the inquiries raised by ss. 223(1)(a) and (b), it was indisputable that they were distinct;
- connection was not simply an incident of native title rights and interests as such because the required connection was not by the rights and interests claimed but by the traditional laws and customs of the claimants;
- in a communal title claim, it was no doubt a 'convenient shorthand' to observe that connection with the claim area had to be established at the communal level;
- if rights and interests can be regarded as being held by the community as a whole, proof of connection does not depend upon the precise locus, within that community, of native title rights and interests intramurally allocated;
- however, where (as in this case) it was contended that connection to a particular part of the claim area (i.e. the Perth metropolitan area) had not been substantially maintained, the connection inquiry itself must address that contention and, if it is established, its significance for the communal claim to that part of the area must also be assessed—at [165] and [167].

The second issue was (among other things) that:

- the laws and customs by which connection is asserted must be 'traditional' i.e. laws and customs that have been acknowledged and observed in a 'substantially uninterrupted' way from the time of sovereignty to the present;
- the connection itself must have been 'substantially maintained' over the same period;
- the requirements of continuity of observance and connection assume no little significance when one comes to consider whether observance and/or connection has been established sufficiently or at all in relation to the Perth metropolitan area—at [168].

The third issue was (among other things) that:

- the 'connection inquiry' requires both the identification of the content of the traditional laws and customs and the characterisation of the effect of those laws as constituting a connection of the people with the area concerned;
- Wilcox J did not undertake any inquiry into whether or not the evidence disclosed the requisite connection by traditional laws and customs, either at a communal or group level, as those laws and customs related to either the Single Noongar claim

area generally or the area covered by the separate proceeding i.e. the Perth metropolitan area—at [170].

The fourth issue was (among other things) that:

- the connection inquiry required demonstration that, by their actions and acknowledgement, the claimants had asserted the reality of the connection to their land or waters so made by their laws and customs;
- while absence of physical presence was not a matter of concern in this case, the authorities on 'presence' illuminated that the requisite connection must have 'a continuing reality' to the claimants and that the evidence of how this was manifest was of 'no little importance' in establishing present connection;
- it could properly be said that s. 223(1)(b) involved proof of the continuing internal and external assertion by the claimants of their traditional relationship to country defined by their laws and customs, which may be expressed by physical presence or otherwise—at [171] to [174].

Finally, their Honours noted (among other things) that:

- the connection inquiry can have a 'particular topographic focus' e.g. in cases where the question was whether claimants had lost, or maintained, their connection with particular parts of the claim area;
- the topographic focus of connection was critical to this appeal, given that the separate question related only to Part A i.e. the Perth metropolitan area;
- where what was in issue was whether connection had been maintained to a particular part of a claim area, it was critical that the traditional the laws and customs be examined 'as they relate to that area' and that the evidence demonstrated that connection to that area had, 'in reality', been substantially maintained since the time of sovereignty;
- Wilcox J adopted a quite different course in establishing connection to Part A i.e. he simply asserted that he was satisfied that the applicants had succeeded in demonstrating the necessary connection between themselves and the most of the Single Noongar claim area and so decided the claimants had established a connection with Part A—at [175] to [180].

Connection to the whole claim area did not establish connection with Part A

The court noted that, whether connection had been substantially maintained to all (or any other) parts of the claim area was not in issue on the appeals. Therefore, there was no need for any conclusions on that issue. However, their Honours did say (among other things) that:

- Wilcox J's reasons did not 'betray how, if at all, he undertook the separate inquiry posed by s 223(1)(b)' in circumstances where the issue of connection 'loomed large';
- Wilcox J did not use any of the evidence that may have been relevant to connection in relation to any area of the Single Noongar claim, let alone Part A but, rather, marshalled it to inform his findings on the continuity of the Noongar community and the continued observance of at least some traditional laws and customs;
- integral to the laws and customs, both at sovereignty and at present, were Wilcox J's findings that groups of Noongar people had their own particular country for which they could speak, of which they had spiritual knowledge, in relation to which permission to enter had to be obtained and over which rights were acquired by descent rules;

- what needed to be emphasised was that, if those persons whom the laws and customs connect to a particular part of the claim area have not continued to observe without substantial interruption the laws and customs in relation to their country, they could not succeed in a claim for native title rights and interests;
- this was so even if it had been shown (which it had not) that other Noongar peoples had continued to acknowledge and observe the traditional laws and customs of the Noongar;
- continuity of observance of laws that connect is itself a manifestation of connection and a substantial absence of any real acknowledgement of traditional law and observance of traditional custom, as these related to the Perth metropolitan area, would occasion a substantial failure to maintain connection with that area which could not later be revived for contemporary recognition;
- if native title was to be found to exist in relation to the Perth metropolitan area, it would have to be proved that the laws and customs that related to that area had continued to be acknowledged and observed without substantial interruption and that connection likewise had been substantially maintained;
- this would require a consideration and evaluation of the considerable body of evidence before Wilcox J (historical and contemporary) that related to that area from sovereignty to the present—at [181] to [187].

Connection via descent from Noongar people who lived in Part A at sovereignty
Wilcox J found that, while there was no evidence to demonstrate an irrefutable line of descent from a Noongar person living in Part A at sovereignty to any particular member of the claimant group (i.e. the claim group *as a whole*), it seemed 'most unlikely' that the present wider Noongar community contained no descendant of any of them. The court found that:

- even if this so called statistical probability was accepted, it would not provide any evidence of the descendant's present connection to Part A;
- Wilcox J inferred a connection from the descendant's membership of the single Noongar community, irrespective of whether that unknown person (or persons) claimed rights and interests in Part A or, indeed, presently observed and acknowledged that community's laws and customs;
- as the rights and interests in question related only to Part A, and as the acquisition of rights over land and interests in that area was tied, *by the community's laws and customs*, to descent rules, proof of continuing connection to that area would have to track the continuing operation and vitality of those descent rules as they related to that area—at [189].

Conclusion on connection — s. 223(1)(b)
It was found that Wilcox J misapplied s. 223(1)(b) of the NTA and, in so doing, he failed to answer a question necessary to be answered in deciding the separate question. Therefore, on this ground alone, the appeals of the state and the Commonwealth succeeded—at [190].

Rights and interests — WAFIC's appeal
WAFIC's grounds were that, because Wilcox J failed to give effect to a concession made by the claimants in their closing submissions which limited the rights and interests claimed in relation to the intertidal zone and (arguably) navigable, non-tidal waters, it had not addressed submissions to the wider rights in relation to waters that were claimed and so was denied procedural fairness. The court agreed—at [201].

WAFIC's interest was limited to areas where commercial fisheries existed i.e. in intertidal waters and navigable waters. Wilcox J's orders did not discriminate between rights in relation to land and rights relating to waters. The court considered that, while it was likely this was an oversight:

- the orders made were 'clearly open to an interpretation' that gave the claimants 'greater rights to the tidal waters than those actually sought' but this would depend on what was mandated by the relevant traditional laws and customs and their content was not before the court;
- WAFIC acted on the concession made and so was denied the important opportunity to make submissions 'both on the uncertain content and reach of...[the] orders and on the sufficiency of the evidence to establish the rights themselves';
- while the success of the other Bennell appeals had, in a sense, obviated the need for any order to be made, WAFIC's appeal did not depend on that fact and so it was appropriate to make orders reflecting its success;
- WAFIC's appeal should be allowed and the relevant part of the orders set aside and remitted to the docket judge, with it being noted that these orders were 'subordinate to the more comprehensive orders' made in the state and Commonwealth appeals—at [205] to [206].

Rights and interests - state and Commonwealth appeals

The state and Commonwealth took issue with Wilcox J's failure to finally determine the third part of the separate question i.e. what was the nature and extent of the native title rights and interests in relation to Part A. The court was of the view that it did not need to express any concluded view on this:

> [H]is Honour…left a significant but uncertain area of latitude to the docket judge…It is not at all clear to us whether it was envisaged that that process would involve the taking of further evidence and the making of further submissions... Short of this Court actually making the determination that the primary judge refrained from making – a course which it would be quite inappropriate for us to embark upon given the state of the evidence and the submissions before us – little purpose would be served by our entering into the debate about what the final terms of a determination should or should not include—at [207].

Conclusion on the appeals against the decision in Bennell

It was found that:

- As the Commonwealth, WAFIC and the state had all succeeded on their appeals, the relevant orders made by Wilcox J should be set aside;
- it was not appropriate for the appellate court to answer to question as to the existence of native title in Part A in the negative because of the inquiries it would entail and the manner in which both the trial and the appeal were conducted;
- because the separate question arose in what was 'part of a larger matter', the proper future management of the entire Single Noongar claim may be compromised by a requirement that the separate question remain on foot and be answered;
- therefore, the separate question should be remitted to the docket judge to determine whether, if at all, the separate question, or some other separate question, should be heard and determined and whether or not the separate proceeding (Part A) should be consolidated with the Part B of the Single Noongar claim;
- no order as to costs should be made, subject to any party making written submissions within 21 days from the publication of the reasons for judgment—at [209] to [214].

Bodney appeal

While their reasons for judgement were somewhat different to those of Wilcox J, the court was of the view that (among other things):

- his Honour made no error in concluding that, contrary to Mr Bodney's claims, there was no recognised community or group identified as 'Ballaruk' or 'Ballaruk and Didjarruk' which held rights and interests in relation to Part A;
- on the evidence, those terms described two of four 'semi-moiety' names in use over an area much larger than the Perth metropolitan area;
- this conclusion was sufficient to dispose of Mr Bodney's appeal—at [234] and [236].

Therefore, the court dismissed Mr Bodney's appeal, noting that:

> [I]nsofar as Mr Bodney's grounds of appeal relate to findings made in the single Noongar appeal,...it is unnecessary for us to deal with them in light of our conclusions in the...in the Bennell matter. In particular it is unnecessary for us to express a view on the correctness or otherwise of his Honour's finding that a single Noongar society existed at sovereignty—at [237] to [238].

Timber Creek appeal — exclusive native title

Griffiths v Northern Territory (2007) 243 ALR 7; [2007] FCAFC 178 (Full Court)

French, Branson and Sundberg JJ, 22 November 2007

Issues

The issues before the Full Court of the Federal Court in these appeal proceedings were whether:

- the finding at first instance that the Ngaliwurru and Nungali Peoples' native title did not amount to a right to possession, occupation, use and enjoyment to the exclusion of all others (exclusive possession) was correct;
- section 47B of the *Native Title Act 1993* (Cwlth) (NTA) applied to an area proclaimed pursuant to s. 111 of the Crown Lands Ordinance 1931-1972 (Cwlth) to be a town site;
- a shift under law and custom from patrilineal to cognatic descent meant that the laws and customs of the Ngaliwurru and Nungali Peoples were not traditional, in the sense that word is used in the NTA.

In a unanimous judgment, their Honours Justices French, Branson and Sundberg:

- upheld the appeal by the native title holders on the first issue and varied the determination of native title accordingly;
- dismissed the cross-appeal by the Northern Territory, which raised the last two issues noted above.

The case is significant because (among other things) the court explains what is and (more importantly, perhaps) what is not, required for proof of 'exclusive' native title.

Background
Judgment at first instance was delivered by his Honour Justice Weinberg in *Griffiths v Northern Territory* [2006] FCA 903, with a determination recognising the existence of native title subsequently made in *Griffiths v Northern Territory (No. 2)* [2006] FCA 1155 (both which are summarised in *Native Title Hot Spots* Issue 21). The area covered by the determination included certain lots in the town of Timber Creek in the Northern Territory. The area had previously been subject to a number of non-exclusive pastoral leases.

Weinberg J found that those who constituted the native title claim group had established they held native title rights and interests in relation to the claim area but that those native title rights and interests did not include the right to exclusive possession of the area. The applicants appealed against that aspect of the judgment. The territory cross appealed.

Grounds of appeal
The appellants argued that Weinberg J erred in considering that:

- the native title holders' right to be asked permission and to speak for country related to safeguarding country and protecting strangers and so the content and operation of those rights were limited to those purposes i.e. did not extend to the exclusion of all persons other than the native title holders;
- the native title holders' rights to be consulted about matters that might harm country, and to veto any activity that might be detrimental, neither fitted the 'template' of a right to possession to the exclusion of all others nor suggested a general right to control access in any relevantly proprietorial sense;
- it was necessary to establish that native title rights to control, or restrict access, to country had been exercised against strangers to country; and
- the rights and interests possessed under the traditional laws acknowledged and customs observed by the native title holders did not confer a native title right to possession, occupation, use and enjoyment of the determination area to the exclusion of all others.

In its first notice of contention, the territory argued that the finding of non-exclusive native title rights and interests was correct. However, in a notice of further contention filed at the hearing, the territory argued that the existence of a group of traditional owners known as the Kuwang defeated the appellants' claim to exclusive native title. The question of whether or not to entertain this contention was reserved. In the event, the court held it was too late in the proceedings for the territory to raise the further contention because, among other things, if it had been clearly raised at trial, the evidence relied upon by the appellants might well been different—at [108] to [124].

Grounds of territory's cross appeal
The territory cross-appealed on the grounds that:

- the finding at first instance should have been that the laws and customs under which native title was claimed were not traditional because those rights and interests devolved through a process of cognatic descent (i.e. through both father and mother) which represented a fundamental shift from the patrilineal descent 'rule' which had existed at the time of sovereignty;
- Weinberg J was wrong in finding that s. 47B applied within the proclaimed boundaries of the town of Timber Creek, an argument that relied upon

distinguishing *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 (*Alyawarr*, summarised in *Native Title Hot Spots* Issue 16); and

- there should have been a finding that an area previously the subject of a lease granted under the *Crown Lands Act 1931* (NT) was a previous exclusive possession act and thus expressly excluded from the area covered by the native title determination application.

Application of s. 86

The court considered Weinberg J's reasons for judgment, noting that the history of the claim area was 'uncontentious' and that the appellants had based their case 'in large measure upon findings made by various Aboriginal Land Commissioners' in land claim reports made under the *Aboriginal Land Rights (Northern Territory) 1976* (Cwlth)—at [12] to [54].

Weinberg J had noted that that s. 86(1)(a)(v) of the NTA rendered the land claim reports admissible as 'the transcript of evidence in any other proceedings before...any other person or body'. French, Branson and Sundberg JJ noted that s. 86(1)(c) empowered the court to adopt any recommendation, finding, decision or judgment of a body of the kind mentioned in s. 86(1)(a)(v), going on to note that:

> There is a distinction between the receipt into evidence of the transcript of proceedings before a person such as a Land Commissioner and the adoption of findings made by that person. The first process involves the receipt of evidence upon which the Court may base its own findings. In the second process…the Court may accept a finding of another person or body resulting from a consideration of evidence by that person or body. That does not require that the Court examine for itself the evidence upon which the adopted finding was made. On the other hand it would allow the Court to give some consideration to the evidence underpinning the findings to satisfy itself that the finding was reasonably based on the evidence—at [23].

While Weinberg J 'did not make clear' how he had applied s. 86, the court was of the view that the conclusions reached in the various reports appeared to have been treated as evidence of the facts found without being 'expressly' adopted. Therefore, to the extent that Weinberg J relied upon them 'we treat his reliance as an adoption of the findings'—at [24].

Error of principle - characterisation as usufructuary

The appellants submitted that the Weinberg J was wrong to approach the question of exclusivity by asking whether the rights and interests held by the native title holders under their traditional laws and customs:

- were 'akin to rights that are usufructuary in nature'; or
- rose 'significantly above the level of usufructuary rights'.

After reviewing the findings of the trial judge on the exclusivity issue, the court held that:

- the characterisation of native title as 'usufructuary' did not preclude the inclusion of a native title right of possession, occupation and use arising under traditional law and traditional custom;
- if native title rights are usufructuary (because they involve, at common law, the right to use the sovereign's land), then the usufruct may incorporate rights to exclude others from the land, albeit that the sovereign may, by lawful exercise of power, extinguish such rights;

- the question whether the evidence of native title rights rose above usufructuary rights posed by Weinberg J was, therefore, unnecessary and had the potential to lead into error;
- 'classificatory considerations' may have affected Weinberg J's characterisation the native title rights and interests in this case—at [67] and [71], referring to *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 3, *Mason v Tritton* (1994) 34 NSWLR 572 and *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

As the court noted:

> [T]he use of the common law taxonomy of usufructuary and proprietary rights in ascertaining the content of native title…involves a risk of confusion and distraction from the requirement to have regard to what the evidence says about the nature of the native title rights and interests in question…[T]he question whether the native title rights of a given native title claim group include the right to exclude others…does not depend upon any formal classification of such rights as usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom. It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71].

Error in fact on the evidence

The second limb of the appellants' argument was that Weinberg J erred in fact, having regard to the evidence which his Honour accepted. The court summarised the evidence at trial relevant to the question of exclusivity and Weinberg J's comments upon it—at [72] to [106].

It was found that:

> The evidence of the Aboriginal witnesses, being uncontradicted, together with the relevant elements of the anthropological report…required the conclusion that the appellants' possession, use and occupation of their country was exclusive—at [125].

While accepting that an appellate court should be cautious when relying upon 'sterile' transcript references in determining whether an error of fact was made, their Honours said they had undertaken a review of the evidence going to exclusivity i.e. this was an appeal by way of re-hearing—at [126] and [144].

Having done so, the court did not accept that the characterisation of native title in this case depended upon 'matters of demeanour or nuance'. Rather:

> The evidence…was clear and unequivocal. The question was whether, having been accepted, it required a finding that the relevant rights were exclusive. Our caution about interfering with his Honour's finding in this respect is mitigated by the evident influence on it of common law classifications of usufructuary and proprietary rights—at [126].

Their Honours were of the view that:

- it is not a necessary condition of exclusivity that the native title holders should, in their testimony, frame their claim as some sort of analogue of a proprietary right;
- nor is it necessary that the native title claim group should assert a right to bar entry on the basis that it is 'their country';
- if control of access to country flows from spiritual necessity, because of the harm that the country will inflict upon unauthorised entry, that control can nevertheless

support a characterisation of native title as exclusive, noting that the relationship to country is essentially a 'spiritual affair';
- it is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with Indigenous people;
- the question of exclusivity depends upon the ability of the native title holders to effectively exclude from their country people not of their community;
- if, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry, and if the native title holders are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have what the common law will recognise as an exclusive right of possession, use and occupation;
- the status of the native title holders as gatekeepers in this case was reiterated in the evidence of most of the Indigenous witnesses and by the anthropological report which was ultimately accepted at first instance;
- it is not necessary to exclusivity that the native title holders require permission for entry onto their country on every occasion that a stranger enters, provided that the stranger has been properly introduced to country by them in the first place;
- exclusivity is not negatived by a general practice of permitting access to properly introduced outsiders—at [127].

Therefore, it was held that:

> [A] proper characterisation of the effectively uncontested factual evidence of the indigenous witnesses and the opinion evidence of the anthropologists whom his Honour accepted, leads to one conclusion and one conclusion only and that is that the appellants, taken as a community, had exclusive possession, use and occupation of the application area. The appeal therefore succeeds on the question of exclusivity—at [128].

Shift from patrilineal to cognatic descent principles

The territory, in its cross appeal, submitted (among other things) that Weinberg J failed to inquire as to whether or not the change from patrilineal principles of descent to cognatic principles was a permissible adaptation of a 'traditional' rule, referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3).

The court noted that:

- the territory's argument on fundamental change in the normative system was founded on a false dichotomy and reflected a misunderstanding of Weinberg J's reasons for judgment, in which the conflict of expert anthropological opinion was resolved in favour of the appellants;
- despite a change in descent principles, Weinberg J accepted expert opinion that the normative system underpinning the acquisition of rights to land had not changed and, accordingly, was not satisfied that an increased reliance on matrilineal descent had so affected the relevant laws and customs that they could no longer be regarded as traditional;
- notwithstanding that this was an appeal by way of re-hearing, there were natural limitations that may render it inappropriate for an appellate court to proceed wholly, or substantially, on the record e.g. an appellate court may be disadvantaged in

comparison with the primary judge in respect of the evaluation of the credibility of witnesses, including expert witnesses, and the 'feeling' of the case;
- a trial judge has an advantage over an appeal court in assessing what is the most reliable evidence about the traditional laws and customs of the peoples of an area at the time of European settlement;
- having regard to the evidence before the primary judge, no error was identified that affected his Honour's consideration of whether the claimants no longer acknowledge and observe traditional laws and customs giving rise to rights and interests in land because they presently gain rights to country in part by descent through either the matrifilial or patrifilial line—at [45], [130], [140] to [145], referring to *Yorta Yorta* and *Fox v Percy* (2003) 214 CLR 118.

Vexed question not decided

Their Honours were of the view that, because no error in Weinberg J's approach had been identified:

> [T]his is not an appropriate case for consideration of what has become a vexed question in native title law. That question is whether a change from a law or custom at sovereignty of acquiring rights and interests…by patrilineal descent to a present-day law or custom of acquiring such rights and interests by cognative descent necessarily has the consequence that the rights and interests are not possessed under the traditional laws acknowledged, and the traditional customs observed, by the relevant Aboriginal peoples—at [146], referring to s. 223 of the NTA.

Section 47B

The whole of the claim area was previously subject to pastoral leases. Accordingly, unless s. 47B applied (which provides that all extinguishment brought about by the 'creation of any prior interest…must be disregarded' for all purposes under the NTA), native title was, at least to some extent, extinguished. Section 47B does not apply if the relevant area is covered by, among other things:

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

In this case, the town site of Timber Creek was proclaimed pursuant to s. 111 of the *Crown Lands Ordinance 1931-1972* (Cwlth) (the ordinance), which empowered the Governor-General, by proclamation, to constitute and define the boundaries of new towns in the Northern Territory. Subsection 111(3) of the ordinance empowered the Governor–General, by proclamation, to 'set apart as town lands any Crown land within the boundaries of a town'. At first instance, Weinberg J rejected the territory's submission that the area in question was covered by a proclamation under which the land was to be used for public purposes or for a particular purpose within the exception to s. 47B(1)(b)(ii).

Their Honours reviewed:

- the statutory framework of s. 47B;
- the evidence surrounding the proclamation of the townsite Timber Creek and the findings at first instance;
- the decision in *Alyawarr*—at [150] to [156].

The territory submitted that *Alyawarr* was distinguishable because:

- the town site in that case, Hatches Creek, had never become an established town whereas Timber Creek is such a town; and
- there was no holding in that case concerning the operation of a proclamation under s. 111(3) that set apart, as town lands, Crown land within the boundaries of a town.

The court rejected the first submission because:

- in *Alyawarr*, the court held that whether there is a use for 'public purposes' or 'a particular purpose' was to be determined at the date of the proclamation;
- there was no evidence that, at the date of the proclamation in June 1975, there was an established town of Timber Creek;
- even if a town was then in existence, that would not assist the territory because it would still be the case that the proclamation merely 'enlivened power to grant leases for a variety of purposes' and so *Alyawarr* could not be distinguished on this point—at [158].

The court was of the view that second attempt at distinguishing *Alyawarr* should also fail because (among other things) the structure of the proclamation in *Alyawarr* was the same as the proclamation under consideration in this case and the issue had been squarely addressed in that case—at [159] to [160].

However, because of a concession on the point by counsel for the appellants, the court proceeded on the basis that there was no binding decision in *Alyawarr* on the effect of a proclamation under s. 111(3) of the ordinance. The court did not accept the territory's submission that *Alyawarr* was distinguishable on this point because:

- while it had been said in *Alyawarr* that the power to grant various kinds of leases was not enlivened until a proclamation of the kind provided for in ss. 111(1)(a) 'or' 111(3) of the ordinance had been made, reading the relevant passage as a whole made it apparent that the 'or' was intended to be 'and';
- the second part of the proclamation, declaring that Crown lands be set apart as town lands, did not define 'public purposes' or 'a particular purpose' within s. 47B(1)(b)(ii);
- the reasoning applied in *Alyawarr* to the first part of the proclamation (i.e. that a townsite 'might comprise largely private property holdings by lease or otherwise') applied to the mere setting apart of Crown land as town lands;
- the mere setting aside of Crown land as town lands, so that it could thereafter be granted for various purposes and to various classes of person, did not define 'public purposes' or a 'particular purpose'—at [161] to [162].

Therefore, it was found that *Alyawarr* could not be distinguished from the present case and that the court was obliged to follow it unless persuaded that it was plainly wrong. In any event, although the territory initially invited the court not to follow *Alyawarr*, it emerged during the hearing that it merely wished to preserve its ability to later contend before the High Court that it was wrongly decided—at [163].

In oral submissions, counsel for the appellant made a new submission in relation to s. 47B and the *Crown Lands Act 1992* (NT), which had replaced the ordinance. The court decided it was 'undesirable to rule upon it' because (among other things):

- if it was 'sound', it merely provided a different reason for the application of s. 47B;
- if it was unsound, s. 47B applied in any case because of the findings noted above—at [164] to [170].

Previous exclusive possession act
This ground of the territory's cross appeal was contingent upon the success of its argument on s. 47B and so could not succeed once that ground failed—at [171] to [172].

Decision
For the reasons summarised above, the appeal was allowed and the cross-appeal dismissed. Orders were also made to vary the native title determination made at first instance to reflect a finding that the native title holders have a native title right to 'possession, occupation, use and enjoyment to the exclusion of all others' in relation to part of the determination area—at [7] and [173].

Having regard to the provisions of s. 85A of the NTA, it was decided that the parties should bear their own costs of the appeal and cross-appeal—at [8].

Special leave refused on s. 47B
The territory's application for special leave to appeal to the High Court against the findings in relation to s. 47B was refused with costs on 7 March 2007 because their Honours Justices Hayne and Crennan thought 'an appeal in this matter would enjoy insufficient prospects of success'—see *Northern Territory of Australia v Griffiths & Anor* [2008] HCATrans 123.

Claimant application required for recognition of native title

Commonwealth v Clifton (2007) 164 FCR 355; [2007] FCAFC 190 (Full Court)

Branson, Sundberg and Dowsett JJ, 6 December 2007

Issue
The issue in these appeal proceedings was whether the Federal Court could make a determination of native title in favour of a person:

- who did not have a claimant application made under the *Native Title Act 1993* (Cwlth) (NTA) on foot in relation to the area in question; and
- who was a respondent to a claimant application brought on behalf of another group over that area.

The Full Court dismissed the appeal, finding that those who want a determination of native title to be made in their favour must have a claimant application on foot.

Background

Mark McKenzie sought a determination of native title on his and the Kuyani People's behalf, notwithstanding that they had no claimant application on foot. For further background to this matter, see *Kokatha People v South Australia* [2007] FCA 1057, summarised in *Native Title Hot Spots* Issue 25. At first instance, his Honour Justice Finn held that a determination of native title could not be made in these circumstances. The Commonwealth obtained leave to appeal against that judgment.

Commonwealth's submissions

The Commonwealth submitted (among other things) that:

- the content of a 'determination of native title' is controlled by s. 225, which directs the court to consider the content of all native title and non-native title rights and interests in the area in question and the relationship between them;
- the basic rule against reading the court's jurisdiction as limited, combined with the objects, text and structure of the NTA, did not favour the fettering of the court's jurisdiction in the manner found at first instance;
- the possibility that the court might be able to make a determination of native title that did not conform with a group identified in an application should not be excluded peremptorily or on procedural grounds;
- if, on the evidence, the court was satisfied that native title rights and interests were held by a person who, or group that, was not an applicant, a determination to that effect was not proscribed by the NTA;
- the extrinsic aids to the interpretation of Native Title Amendment Bill 1997 (No 2) (Cwlth), which (when enacted) became the *Native Title Amendment Act 1998* (Cwlth), demonstrated that the rationale for the 1998 amendments was not to limit the people in favour of whom a native title determination could be made but, rather, to limit the number of people and groups with whom non-indigenous parties were required to negotiate under the future act regime found in the NTA.

Key provisions are ss. 13 and 213

Their Honours Justices Branson, Sundberg and Dowsett, in a joint judgment, stated that:

> [Subsection]…13(1), rather than s. 61(1), is the primary source of the right to make an application for a determination of native title with s. 61(1), as s. 60A recognises, being one of a number of provisions containing rules that govern such an application—at [19].

The court was also of the view that s. 213 was of 'central importance to this appeal'. It provides that any determination of native title must be made in accordance with the procedures of the NTA and, subject to the NTA, the court has jurisdiction in relation to matters arising under the NTA—at [30].

Their Honours:

- acknowledged the potential tension between the restrictions inherent in s. 61(1), concerning the person or persons who may make an application under s. 13(1), and the requirements of s. 94A that any order making a determination of native title set out details of the matters mentioned in s. 225;
- noted this was most apparent where, as in this case, a person who had (or a group that had) no s. 13(1) application on foot asserted native title rights in relation to an area the subject of a s. 13(1) application made on behalf of others—at [35].

Limits on jurisdiction under the NTA

The Commonwealth and Mr McKenzie contended that, provided a valid s. 13(1) application was on foot, the court could make a determination that another group of persons, that had not authorised the making of a claimant application, held native title in relation to the area covered by the application. It was noted this contention was 'quite different' to where the court was required to determine disputes which are 'an inherent aspect of the determination of an application' under s. 13(1) e.g. the 'true' membership of a native title claim group, the boundaries of the claim area or the nature and extent of the native title rights and interests—at [37].

Their Honours accepted (as had been contended) that s. 225(a) did not limit the range of persons or groups who were eligible to be identified as the native title claim group that had authorised a s. 13(1) application. However, this was said to be of 'limited significance for present purposes' because:

> Section 225 is concerned with the content of a determination of native title; it is not directly concerned with the jurisdiction or power of the Court to make an order in favour of a group which has not authorised the making of a claim on its behalf for a determination of native title. Nor is it concerned with who has standing to make an application for a determination of native title—at [38].

In the court's view (among other things):

- section 213, which is 'critical' to a determination of the extent of the court's jurisdiction under the NTA, demonstrates an intention to limit both the general jurisdiction conferred by the *Judiciary Act 1903* (Cwlth) and the jurisdiction conferred by s. 81 of the NTA;
- subsection 213(2) provides that the court's jurisdiction in relation to matters arising under the NTA is subject to the NTA and s. 213(1) provides that any determination of native title must be made in accordance with the procedures in the NTA;
- subsection 61(1) of the NTA was not concerned to vest, or limit, jurisdiction but to firstly identify the applications that may be made under Division 1, Part 3 and to secondly identify who has standing to make those applications;
- the requirement in s. 213(1) that a native title determination must be made in accordance with the procedures in the NTA made it necessary to identify the procedures that govern the making of such a determination;
- it may also make it necessary to determine which of those procedures the legislature intended to be critical to a valid exercise of the jurisdiction of the court—at [40] to [43], referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

Procedures for obtaining a determination of native title

The court noted that:

- Division 1, Part 3 of the NTA contains the rules governing the making of a native title determination, including who may make the application, the form of the application, the information it must include and how (and to whom) notice of the application must be given;
- Part 4 governs the way the court is to exercise its jurisdiction to hear and determine applications and, 'importantly', provides that every application under s. 61(1) must

be referred to the National Native Title Tribunal for mediation unless orders are made to the contrary;
- section 67 provides a procedure for dealing with a situation where two or more native title determination applications are made over the same area i.e. the applications must be dealt with in the one proceeding (at least to the extent of any overlap)—at [44] to [46].

It was found that:
- the NTA provides no other procedures other than those noted above whereby a person or group could obtain a determination of native title;
- the definition of 'approved determination of native title' in s. 13(3) is limited to those made on an application under s. 13(1) or, in accordance with s. 13(2), in relation to a compensation application under Division 5—at [47].

Mr McKenzie's submission that Order 5 rule 1 of the Federal Court Rules (FCR), which deals with cross-claims, provided a procedure that a 'non-applicant' party to a claimant application use to obtain a determination of native title was rejected:

> Order 5 rule 1 only authorises a respondent to cross-claim against an applicant for relief to which the respondent would be entitled against the applicant if the applicant were a respondent in a separate proceeding commenced in the Court by the respondent for that purpose. It does not authorise a respondent to cross-claim for relief which he or she could not claim as an applicant in a separate proceeding. S[ubs]ection 61(1) requires a native title determination application to be authorised by the relevant native title claim group. Order 5 rule 1 therefore requires a cross-claimant to be similarly authorised—at [48].

Legislative intent of 1998 amendments not limited to right to negotiate

The court accepted that the second reading speech and Explanatory Memorandum for the *Native Title Amendment Bill 1997 (No 2)* (Cwlth) (which became the *Native Title Amendment Act 1998*), demonstrated that one rational behind the amendments was to limit the number of people and groups non-indigenous parties were required to negotiate with. However, the court did not accept that this was the only rationale:

> [N]othing in the second reading speech or the Explanatory Memorandum suggested that the proposed amendments to Division 1 of Part 3 of the Act were only intended to provide a foundation for the new registration test and were not intended to place any real restraint on the ability of individuals and groups of individuals to claim determinations of native title—at [50].

In the court's view:

> [I]t is unlikely almost to the point of being fanciful that the legislature intended that standing to institute a proceeding claiming a determination of native title should be strictly limited to persons authorised by the relevant native title claim group but that standing effectively to counter-claim for identical relief should be unlimited by any requirement for authorisation. This unlikelihood is the more apparent when one considers the numerous obligations placed on the Native Title Registrar to give notice of a native title determination application. Assuming the submissions of the Commonwealth and Mr McKenzie to be correct, other parties to the proceeding could advance comparable claims without any requirement arising for these statutory requirements and obligations to be met—at [52].

Therefore, their Honours rejected the submission that s. 61 was merely intended to 'discipline applicants as to the content and form of primary applications' and that the incentive to comply with s. 61 was the right to negotiate—at [54].

Individual native title rights and interests

Mr McKenzie made a submission that the NTA may provide for an individual to be recognised as holding native title. After noting that this was not 'an appropriate occasion for consideration of the nature of an individual native title right', the court went on to observe that:

> [T]he sole survivor of a class or group of persons who once held the common or group rights comprising the native title in an area would need no additional authority to make a claim under s 13(1). By contrast, an individual who claimed that according to the traditional laws and customs of his or her society, he or she alone had the right to enjoy some element of the common or group rights comprising the native title would need to be authorised as required by s 61 to make a claim under s 13(1)—at [56].

Conclusions

It was found that:

- subsection 213(1) disclosed a legislative intent that a determination of native title should only be made in accordance with the procedures set out in the NTA;
- since the 1998 amendments, those procedures required, at a minimum, that a s. 13(1) application must be made under Part 3 of the NTA by a person or persons authorised by a native title claim group in the manner required by s. 61(1);
- where more than one native title claim group sought a determination of native title, each group must authorise a person or persons to make an application as mentioned in s. 13(1) under Part 3;
- where more than one native title determination application is made over an area, s. 67 requires that they be dealt with in the one proceeding (at least to the extent of any overlap);
- consequently, a determination of native title in respect of any one or more of the claim groups would be able to be made in accordance with the procedures of the NTA;
- alternatively, if after the Native Title Registrar has given notice under s. 66, only one application is filed in respect of the area, the court would be entitled to be satisfied that no other group or groups asserted a claim to hold native title to the area—at [57] to [59].

Note that the court indicated that these were not necessarily exhaustive findings as to the 'critical' requirements of Division 1 of Part 3—at [58].

Ward distinguished

While these views might not accord with what was said by their Honours Justices Beaumont and von Doussa in *Western Australia v Ward* (2000) 99 FCR 316 at [191] to [194], the court noted (among other things) that:

- that case was decided on the basis of the 'old Act' (i.e. the NTA as it stood before the 1998 amendments) which contained no provisions requiring an applicant to be authorised by the relevant native title claim group;

- a view consistent with that preferred in this case had more recently by been expressed by other judges—at [60] to [61], referring to *Moses v Western Australia* (2007) 160 FCR 148, summarised in *Native Title Hot Spots* Issue 25.

Decision
The appeal was dismissed—at [62].

Expedited procedure – site protection

Parker v Western Australia [2008] FCAFC 23 (Full Court)

Moore, Branson and Tamberlin JJ, 7 March 2008

Issue
This decision deals with an appeal to the Full Court of Federal Court against the judgment in *Parker v Western Australia* [2007] FCA 1027 (Parker No 1, summarised in *Native Title Hot Spots* Issue 26). The main issue was whether the primary judge was right to find that the National Native Title Tribunal's determination that the expedited procedure was attracted to the grant of an exploration licence over a site of particular significance was not affected by any error of law. In separate judgments, the Full Court concluded that the appeal should be dismissed with costs.

Background
Maitland Parker, on behalf of the Martu Idja Banyjima People (the MIB People), appealed against the judgment in *Parker No 1*, in which his Honour Justice Siopis upheld the Tribunal's decision in respect of s. 237(b) i.e. that the grant of a particular exploration licence under the *Mining Act 1978* (WA) was not likely to interfere with a site of particular significance called the Barimunya site. There was no dispute that the Barimunya site was of particular significance to the MIB People in accordance with their traditional laws and customs, as the Tribunal had found.

Issues raised on appeal
The first issue raised on appeal was whether the primary judge made an error of law in holding that the Tribunal had made a finding as to whether or not there was a real risk of interference with the Barimunya site, pursuant to s. 237(b). This, in turn, raised two points, according to his Honour Justice Tamberlin:

- whether the Tribunal failed to consider the particular significance of the Barimunya site and what might comprise interference with it in accordance with the MIB People's traditional laws and customs;
- assuming the Tribunal did take into account the particular significance of that site, whether its determination was so unreasonable as to warrant the conclusion that the determination should be set aside—at [64].

The second issue was whether the primary judge should have found the Tribunal had failed to fulfil its obligation under s. 162(2) to state in its reasons the findings of fact upon which it's determination was based—at [65].

Decision

In three separate judgments, the Full Court held that there was no error of law in the primary judge's findings and so the appeal should be dismissed with costs—at [19], [55] and [79].

His Honour Justice Moore held (among other things) that:

- subsection 162(2) refers to 'any findings of fact' upon which the Tribunal's determination is based, which is language 'of wide import';
- the Tribunal was obliged to set out any findings of fact it made which led to its determination of the matters covered by the inquiry (in this instance, whether or not the expedited procedure was attracted to the future act in question);
- a statutory obligation 'to reveal fully the found facts upon which the decision is based is understandable given the significance of a decision that a future act attracts the expedited procedure';
- the Tribunal's ultimate finding had to be whether the act 'was not likely to interfere' in one of the ways identified in s. 237, which involved (among other things) 'determining what is likely to occur in the future' and was 'a matter of speculative though informed appraisal and not fact finding';
- a finding for the purposes of s. 237(b) that there was not a real risk of interference is not a finding of fact and is not a matter to which the obligation created by s. 162(2) applies;
- the inference drawn by the primary judge that the Tribunal made a finding about what would constitute interference with the Barimunya site was an inference that was available from the material before the Tribunal and from its reasons;
- while it was equally possible that such an inference might not have been drawn, an appellate court should not interfere if the primary judge drew one of two equally available inferences;
- as the inference drawn was an 'equally available inference', there was no error of law in the primary judge's conclusion—at [6] to [8], [14] and [17] to [18], referring to *Sidhu v Holmes* [2000] FCA 1653.

Her Honour Justice Branson (among other things) found that:

- it was clear that the Tribunal appreciated it was bound to take into account whether there was a real risk of interference with the Barimunya site 'otherwise' than by conduct that breached the *Aboriginal Heritage Act 1972* (WA) (AHA);
- it was also clear that the Tribunal appreciated the significance of s. 18 of the AHA, pursuant to which application can be made for permission to damage or destroy a site;
- it was not shown that the Tribunal misunderstood the law;
- the appellant's 'real complaint' was that the Tribunal gave too much, or too little, weight to the relevant AHA provisions;
- it is for the Tribunal to determine the weight to be given to matters such as the regime found in the AHA in making necessary findings of fact;
- therefore, it was not open to the appellant to ask the court to 'exercise afresh' the power given to the Tribunal to make the necessary factual findings;
- the Tribunal's reasons revealed that it was concerned not to publish information that was 'confidential to the native title party';

- the Tribunal recorded its finding that the Barimunya site was a site of particular significance to the native title party before identifying nine factors it took into account in finding that that is was unlikely that there would be interference with that site;
- the factors identified by the Tribunal supported the inference that it did not overlook confidential evidence that presumably made it plain that merely walking on the site could constitute interference with it;
- subsection 162(2) does not require the Tribunal to record every aspect of the evidence and other material before it upon which it placed reliance in making its determination;
- the distinction between facts in issue, particulars and evidence is more difficult in Tribunal proceedings than other proceedings;
- the likely intention of the legislature in enacting s. 162(2) was to require the Tribunal to set out findings of fact that were critical to its determination because this would enable a dissatisfied party to understand that decision and form a view on its lawfulness and also facilitate review by the court pursuant to s. 169 of the NTA;
- by identifying the uncontested evidence upon which it found that the site was of particular significance to the native title party, the Tribunal enabled the parties and the court to know the factual basis of it finding;
- it was to be inferred that the Tribunal was satisfied that the nine factors identified in its reasons 'rendered it unlikely that the grant of the exploration licence would result in any person walking on the Barimunya site without being accompanied by an elder'—at [35] to [39], [48] to [50] and [53] to [54], referring to *Little v Western Australia* [2001] FCA 1706, *Minister for Immigration and Multicultural Affairs v Yusuf* (2000) 206 CLR 323 and *Curragh Queensland Mining Limited v Daniel* (1994) 34 FCR 212.

His Honour Justice Tamberlin held (among other things) that:

- the Tribunal's reasons made it apparent that it was aware of the 'great sensitivity and importance' of the Barimunya site;
- it was important to bear in mind that the primary question for the Tribunal, essentially one of fact and degree, was whether the requisite extent of likely interference to the site by the proposed future act existed;
- on a fair reading of the Tribunal's reasons, it was apparent its conclusion was that, while weight would be given to the existence of the regime found in the AHA, its mandate was to determine whether interference was likely to occur within the meaning of s. 237(b);
- as the significance of the Barimunya site was not contested, the Tribunal did not consider there was a need to furnish further details of the site;
- the Tribunal gave weight to 'the not unreasonable premise that the parties would…abide by legal and contractual obligations...and...would attempt to avoid disturbance to important sites';
- the Tribunal correctly formulated the question for determination, surveyed the evidence before it, considered the AHA provisions and made the necessary findings of fact without any error of law;
- having taken this 'correct and comprehensive approach, the Tribunal cannot be said to have failed to deal properly with this matter' and the proposition that the finding of the Tribunal was 'so unreasonable as to amount to an error of law' was 'untenable' because the determination made by the Tribunal was 'clearly open to it';

- the relevant express finding of fact on which the Tribunal based its ultimate determination that the expedited procedure was attracted to the grant of the exploration licence was that it was 'unlikely that there would be interference with the Barimunya site;
- it was clear that the Tribunal made this finding of fact having regard to the detailed evidence given by the native title party, which explained the sensitivity of the Barimunya site and outlined the range of activities which were considered likely to interfere with the site;
- as a result, the primary judge made no error in concluding that the Tribunal had properly made a finding as to whether there was a real risk of interference with the Barimunya site, as required by s. 237(b);
- while the Tribunal did not spell out some evidence in detail because of its 'highly confidential nature', its reasons for decision sufficiently demonstrated that the evidence was taken into account and so the 'essential' findings of fact were 'sufficiently stated' for the purposes of s. 162(2)—at [66] to [73] and [75].

His Honour was of the view that:

> In giving reasons, it may be appropriate for the Tribunal to refrain from reciting or even referring specifically to detailed evidence disclosed in confidence. It is a question of striking a reasonable balance...While a more detailed discussion of the evidence and findings could arguably have been engaged in by the Tribunal in this case, it cannot be said that the approach taken amounts to an error of law because, given that the specific detailed evidence was accepted without contradiction and was referred to expressly in the reasoning of the Tribunal, the factual basis for the finding was made known to the parties who had access to the relevant evidentiary material, albeit on a confidential basis—at [76].

Comment

There is some discussion in the reasons for judgment as to the nature of an appeal under s. 169 of the NTA which is not summarised here—see [9] to [12] and [23] to [31].

Replacing the applicant under s. 66B

Foster v Que Noy [2008] FCAFC 56 (Full Court)

Finn, North and Reeves JJ, 11 April 2008

Issue

The issues before the Full Court of the Federal Court in this case were:

- whether to grant leave to appeal against orders made on 22 November 2007 removing Marjorie Foster from the group constituting 'the applicant' on the Douglas North and Fish River claimant applications; and
- if leave was granted, whether the trial judge had erred in concluding that Ms Foster had been properly removed pursuant to s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA)—at [2] and [5].

Leave to appeal was granted, both appeals were dismissed and Ms Foster was ordered to pay the respondents' costs of the appeals.

Background

For the background to these appeal proceedings, see *Parry v Northern Territory* [2007] FCA 1889 and *Que Noy v Northern Territory* [2007] FCA 1888, summarised in this issue of *Native Title Hot Spots*. Applications by Ms Foster for leave to appeal against those decisions were heard together. In both cases, Ms Foster sought to be reinstated as one of the people who are jointly the applicant (see s. 61(2)(d) of the NTA) on each claimant application.

The question as to whether or not Ms Foster's membership of the applicant group for each claim had been properly terminated revolved around a meeting of the Kamu People held on 9 February 2007 (the Kamu meeting). Specifically, the issue was whether or not the critical decision (i.e. to remove Ms Foster) was made in accordance with the traditional laws and customs of the Kamu people. It was common ground that Ms Foster had not been given notice of the purpose of the Kamu meeting.

All parties accepted that the process of decision making that had to be followed by the native title claim groups was one that accorded with the Kamu people's traditional laws and customs for making decisions of that kind, as required by s. 251B(a) of the NTA.

At first instance, his Honour Justice Mansfield found (among other things) that:

- the Kamu people traditionally made decisions by a process of comprehensive consultations, with emphasis on senior persons (being the upper two generations) who have been actively involved in Kamu matters;
- the decision to withdraw Ms Foster's authority was made by the Kamu people at the Kamu meeting; and
- at the same meeting, a decision was made to replace her with her daughter, Margaret Foster, as a member of the group that constituted the 'applicant' on each claim.

Full court's consideration

In joint reasons for judgment, their Honours Justices Finn, North and Reeves noted that:

- most of the relevant evidence was in the form of affidavits from two experienced anthropologists, both of whom agreed that the Kamu people's traditional decision-making process was followed at the Kamu meeting;
- it was significant that Ms Foster was represented at trial by senior counsel and had been granted the opportunity to challenge that evidence and to call her own contradictory evidence but did neither;
- as the anthropologists were not cross examined, they were deprived of the opportunity to explain whether there was any ambiguity or inconsistency in their respective opinions as to the need for 'comprehensive consultations' within the Kamu people's traditional decision making process;
- Ms Foster's submission that 'comprehensive consultations' necessarily required that she be given notice of the purpose of the Kamu meeting was inconsistent with the evidence of one of the anthropologist (with which the other agreed) that the meeting had been conducted in accordance with the Kamu's traditional decision making process and, moreover, Ms Foster's counsel accepted that this construction was not raised at trial;
- the trial judge conducted a thorough review of the relevant evidence—at [13] and [18] to [20].

Decision
The court concluded that:

- the trial judge's decision was firmly founded on the evidence and the arguments the parties chose to place before him;
- the appellant had failed to establish in each of the appeals the requisite error in the trial judge's decision that would allow an appellate court to interfere with that decision;
- leave to appeal should be granted and the appeals dismissed;
- the appellant should pay the respondents' costs of the appeals—at [20] to [22].

Que Noy v Northern Territory [2007] FCA 1888 (Douglas North claim)

Mansfield J, 29 November 2007

Issue
The main issue before the Federal Court in this case was whether to make an order to replace the applicant on a claimant application pursuant to s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA) in circumstances where the decision to seek those orders was made by three different sub-groups of the native title claim group at three separate meetings. The court decided that this 'aggregated' decision-making process was permissible and made the order sought.

Background
A proposed pipeline to transport gas, if approved, would cross land in the Northern Territory which included the area covered by the Fish River and Douglas North claimant applications. The Douglas North application was made in March 2001 by representatives of three subgroups:

- the Kamu people, represented by Arthur Que Noy and Marjorie Foster;
- the Warai people, represented by Gabriel Hazelbane; and
- the Wagiman people, represented by Paddy Huddleston.

Mr Hazelbane and Mr Huddleston had agreed to the proposed terms of access for the pipeline but Ms Foster refused join in that agreement. This gave rise to the application under s. 66B(2) to replace the current applicant dealt with in this decision. In relation to the Fish River application, see *Parry v Northern Territory* [2007] FCA 1889, summarised in this issue of *Native Title Hot Spots*.

The s. 66B application
The notice of motion was filed by Arthur Que Noy, Gabriel Hazelbane, Paddy Huddleston, Margaret Foster and 10 other members of the Douglas North native title claim group. It sought, effectively, orders to remove Marjorie Foster as one of the people jointly constituting the applicant (see s. 61(2)(d) of the NTA) and to instate her daughter (Margaret Foster) instead, along with Arthur Que Noy, Gabriel Hazelbane and Paddy Huddleston, as the 'new' applicant.

Technical matters
His Honour Justice Mansfield noted that s. 66B refers to replacing 'the applicant', a term which is defined in s. 253 by reference to s. 61(2) to include, jointly, all of the persons

authorised to make the application. Thus, the motion under s. 66B should be to replace all of the named persons who jointly comprise the applicant, despite the fact it proposed that some of them were to retain their status. In the court's view, that was 'a practical, but not a substantive, issue'. The terms of the motion intended, and would practically operate, to remove only Ms Foster as a named applicant and to replace her with another Kamu person—at [8].

The second preliminary matter was whether the appropriate persons had brought the motion under s. 66B(1). His Honour noted the NTA contemplated an application under s. 66B being brought by the members of the claim group who proposed to replace the current applicant. That was made clear by the words of s. 66B (see the chapeau to s. 66B(1) and s. 66B(1)(b) and the consistent use of the phrase 'the member or the members')—at [9].

In this case, the s. 66B application was brought not only by those persons proposed to be the 'new' applicant but also by 10 other members of the native title claim group. In Mansfield J's view:

- the application should not have been brought by the extra 10 people unless they were to be part of the proposed new applicant;
- however, as the intent of the application was clear, the motion should be treated as not including the extra 10 names—at [9].

Section 66B

His Honour noted that the cumulative grounds upon which a s. 66B motion may be brought, i.e. one of the two alternatives in ss. 66B(1)(a)(i) or (ii) and the ground in s. 66B(1)(b), refer to the application for the determination of native title under ss. 13 and 61 of the NTA. The cumulative grounds were said to:

> [F]ocus upon the status of the current applicant to make the application or that applicant's conduct in relation to that application, and upon the putative applicant's authorisation to make and deal with matter arising in relation to that primary application. The status of the proposed new applicant to pursue the motion under s. 66B require those cumulative conditions to be satisfied, but not necessarily an explicit separate authorisation by the claim group to seek an order under s. 66B. That status already exists if there is an authorisation of the claim group under s. 251B to make the claimant application itself and to deal with the matters arising in relation to it—at [11].

It was common ground that there was a relevant claimant application. The motion was only contested by Marjorie Foster. The applicants submitted that Ms Foster either:

- had exceeded the authority given to her and should be replaced pursuant to s. 66B(1)(a)(ii); or
- was no longer authorised and should be replaced pursuant to s. 66B(1)(a)(i).

It was, his Honour noted, 'of course, necessary' for them to also show that they were authorised by the native title claim group to make the application for determination of native title and to deal with matters in relation to it—at [12] to [14].

To satisfy the condition in s. 66B(1)(a)(ii), the applicants had to show the extent of the authority originally given to Ms Foster by the claim group and the conduct that showed she

had exceeded that authority. However, there was no requirement for a decision to be made revoking such authority—at [15].

Affidavit evidence was provided in support of the motion including affidavits of anthropologists Lesley Mearns and Kim Barber.

The dispute chiefly involved the Kamu people. The decisions of the Wagiman and Warai people to remove Ms Foster's authority and to authorise her replacement as part of the applicant were said to be made at separate, subsequent meetings.

The Kamu people

In relation to the Kamu People, Marjorie Foster asserted from September 2006 that she was the only rightful elder of the Kamu people and the sole traditional owner of Kamu country. She claimed to hold power to arbitrarily exclude persons from the Kamu group, to consult exclusively on behalf of the Kamu people and to appoint alternative legal representation without consultation with the other persons comprising the applicant or other Kamu people—at [19].

Ms Mearns gave evidence, not put in issue by evidence from or on behalf of Marjorie Foster, that:

- such status and power were not vested in Ms Foster either through a traditional or any agreed process;
- disputes among the Kamu people were resolved by 'a process of comprehensive consultations with emphasis on senior persons, being Marjorie Foster, those of her children who have been actively involved in Kamu matters, and Arthur Que Noy'—at [19] to [20].

While the evidence did not precisely delineated the authority vested in Ms Foster by the native title claim group, Mansfield J did not consider that it was fatal to a conclusion that Ms Foster had exceeded the authority given to 'the applicant', including herself, to deal with matters relating to the application. His Honour noted that:

- regard must be had to the whole of the evidence; and
- the facts in this case were sufficient to demonstrate that the current applicant (the four persons named as the applicant), by reason of Marjorie Foster's conduct, had exceeded the authority given by the claim group—at [21] to [22].

His Honour expressed his conclusion in this way because he was of the view that 'the applicant' under the NTA was all the persons authorised by a claim group to make and deal with a claimant application. The court's conclusion, in reality, concerned the conduct of Marjorie Foster ostensibly on behalf of 'the applicant' and Mansfield J held that she did not have the authority of the claim group to:

- unilaterally decide that the solicitors acting for the claim group should not be permitted to have access to the claim area for the purpose of addressing issues arising out of the proposed pipeline;
- take steps to negotiate regarding the terms of access to the claim area to the exclusion of others—at [22].

The fact that the other persons comprising the 'applicant', Arthur Que Noy, Gabriel Hazelbane and Paddy Huddleston, supported the making of the order under s. 66B(2) confirmed that to be the case—at [22].

It was not necessary for the court to decide whether Ms Foster had exceeded the authority given to her by the Kamu subset of the claim group because that was not a question that arose under s. 66B(1)(a)(ii). However, on the evidence, if it were necessary, his Honour would have concluded that Ms Foster had exceeded the authority given to her by the Kamu people—at [24] to [25].

It was also not necessary for the court to consider whether the alternative provided for in s. 66B(1)(a)(i) had been established. However, Mansfield J was of the view that the evidence was sufficient to show that Ms Foster (and 'the applicant' of which she was one member) was no longer authorised by the claim group to deal with matters in relation to the application—at [26].

It was noted that, from the perspective of the Kamu People, the meeting held on 9 February 2007 was the occasion where they resolved to remove Ms Foster and replace her with Margaret Foster and Arthur Que Noy. While there was a scarcity of information concerning the meeting and its arrangements, his Honour concluded (based on the evidence of Ms Mearns) that the Kamu people traditionally make a decision by a process of comprehensive consultations with emphasis on senior persons, being the upper two generations, who have been actively involved in Kamu matters. The evidence of the two anthropologists was that the Kamu people followed that process at their meeting.

While not without some hesitation, his Honour decided that the Kamu people:

- withdrew Marjorie Foster's authority to make decisions in relation to the application;
- replaced her with her daughter, Margaret Foster, as a member of the 'applicant'—at [31].

His Honour then considered whether those decisions, along with those of the Wagiman and Warai peoples, showed that the 'applicant' was no longer authorised by the claim group—at [31].

The Wagiman People

The Wagiman People's meeting was held on 21 June 2007 and was attended by Paddy Huddleston (one of the named applicants), George Huddleston, Joe Huddleston and Lenny Liddy, who were said to constitute the 'core' of the upper generation of Wagiman men. In the court's view, while the evidence was 'somewhat scanty', on balance, the 'Wagiman people did decide in accordance with their traditional decision-making process to support the decisions made by the Kamu people on 9 February 2007'—at [32].

The Warai People

His Honour was also concerned about the adequacy of the evidence in relation to the Warai people's meeting held on 27 June 2007. The only people who attended were Gabriel Hazelbane (a named applicant) and George Yates. Mr Barber described them as 'the most senior of the Warai people' and gave evidence that the decision taken at the meeting was made in accordance with the Warai people's decision-making process. There was no other

evidence that they could make binding decisions on behalf of the Warai people. Nor was there any evidence that other Warai people had been consulted or notified that such a decision was being considered. Marjorie Foster submitted that there was insufficient evidence to conclude that the Warai people had supported the decision of the Kamu people. However, after considering the available evidence, Mansfield J concluded it was sufficient to allow the court to conclude that the Warai people supported the decision of the Kamu people—at [35].

'Accumulated' decision making

The applicants asserted that the decision of the claim group could be made by accumulating the separate decisions of the Kamu, Wagiman and Warai peoples within it. His Honour noted the evidence of Mr Barber that:

- the three sub-groups have a part of the society which covers the Douglas North claim area and have dreamings and kinship which interconnect them;
- in relation to those areas which belong to areas within that application area, the claimants are of the view that they are able to discuss those particular parts of their country in separation from the others but in understanding of the decision made by the other groups about their common interest over the whole;
- this is, in part, because they want to make very clear their decision-making process and the basis on which they also cooperate;
- based on his experience in multi-group situations, it was preferable for consultations to take place by going from group to group, whilst being mindful of the common nature of the project;
- he was not aware of any occasions where the groups concerned with the pipeline had come together
- there was no requirement under Aboriginal tradition that the Kamu, Warai and Wagiman groups could only make a decision such as the one considered in this case by actually meeting in person 'collectively and together'—at [37].

Decision

His Honour found that:

- the traditional decision-making process of the Kamu, Wagiman and Warai people collectively involves each group undergoing its own traditional decision-making process, in light of decisions of the other groups, and a consensus being drawn from those group decisions;
- therefore, an aggregated decision making process could be used;
- the decision of each group supported the s. 66B application and resolved to remove the authority of Marjorie Foster and replace her as part of the 'applicant' with Margaret Foster;
- accordingly, the elements of ss. 66B(1)(a)(i) and (ii) and 66B(1)(b) were satisfied—at [38].

Orders were made to:

- remove the current applicant and replace it with Arthur Que Noy, Gabriel Hazelbane, Paddy Huddleston and Margaret Foster;
- extend time for any application for leave to appeal until the parties received the reasons for those orders—at [43].

Appeal proceedings
Marjorie Foster's appeal against Mansfield J's judgment was dismissed—see *Foster v Que Noy* [2008] FCAFC 56, summarised in this issue of *Native Title Hot Spots.*

Parry v Northern Territory [2007] FCA 1889 (Fish River claim)

Mansfield J, 29 November 2007

Issue
As in *Que Noy v Northern Territory* [2007] FCA 1888 (*Que Noy*, summarised in this issue of *Native Title Hot Spots*), the issue was whether to make orders under s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA) to replace one of the persons comprising the current 'applicant' on the Fish River claim.

Background
The current 'applicant' comprised:

- Kathleen Parry (on behalf of the Ngangiwumeri people),
- Albert Myoung (on behalf of the Malak Malak people),
- Paddy Huddleston (on behalf of the Wagiman people) and
- Ms Foster (on behalf of the Kamu people).

The motion sought to replace Ms Foster with her daughter, Margaret Foster, and Arthur Que Noy as representatives of the Kamu people and was brought by Kathleen Parry, Albert Myoung, Paddy Huddleston, Arthur Que Noy, Margaret Foster and 10 other members of the Kamu people.

The meeting of the Kamu people on 9 February 2007 concerned both the Douglas North and Fish River claims. Decisions were made concurrently with regard to both claims. The same applied to the decision of the Wagiman representatives on 21 June 2007.

An anthropologist, Kim Barber, gave evidence that the meetings held on 25 June 2007 were attended by the majority of the upper generation of Malak Malak persons and the most senior Ngangiwumeri persons.

Decision
In his Honour Justice Mansfield's view:

- although there was no direct evidence of how many people there were in the upper generation of each group and not much evidence as to their traditional or agreed decision-making processes, the anthropological evidence was that the decisions of each of them to remove the authority of Marjorie Foster and to appoint Margaret Foster and Arthur Que Noy as part of the applicant were decisions of each of those peoples;
- Mr Barber's evidence was that their decisions were made in accordance with their respective decision-making processes, which he regarded as traditional or, to the extent that traditional processes have been altered by the effects of colonisation, agreed—at [7].

His Honour accepted his evidence and reasons in the Douglas North claim (see *Que Noy*) otherwise applied directly to this claim—at [8].

Appeal proceedings
Marjorie Foster's appeal against Mansfield J's judgment was dismissed—see *Foster v Que Noy* [2008] FCAFC 56, summarised in this issue of *Native Title Hot Spots.*

Turrbal People v Queensland [2008] FCA 316

Spender J, 11 March 2008.

Issue
The issue in this case was whether orders to replace the current applicant on a claimant application should be made pursuant to s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA) in circumstances where the authority of the current applicant to make the claimant application in the first place was under challenge. The court decided to make the order to replace the applicant.

Background
The intention of the application under s. 66B(1) was to have two people constitute 'the applicant' (see s. 61(2)(d) of the NTA) on a claimant application brought on behalf of the Turrbal People because the current and sole applicant, Connie Isaacs, was frail.
A number of affidavits were filed in the s. 66B proceeding by people deposing that they were Turrbal People who had not been included in any discussions about the authorisation of the current applicant to make the Turrbal claim and who disputed that Ms Isaacs had authority to make decisions for the Turrbal People with respect to a native title claim. There was other evidence going to who should be included (or not) in any application for a determination of native title made on behalf of the Turrbal People. His Honour Justice Spender noted that the material before the court indicated there was 'a serious factual dispute' as to 'who would need to be included in a properly constituted Turrbal claim group'—at [11].

It was noted that those who raised this 'serious factual issue' were respondents to the claimant application and were 'entitled to be heard' in those proceedings—at [18].

Decision
After considering the authorities on point and noting that 'a curious feature' of the s. 66B application was that it was contended there were alternative basis for the authorisation to change the composition of the current applicant, Spender J found that:

> The hearing of a s 66B motion is not the proper occasion to explore the broader issue as to whether or not a native title determination application was properly authorised in the first place...Such an issue can be explored either in the course of a strike-out application under s 84C...or at the trial of the application—at [26].

On the assumption that Ms Isaacs had authority as 'Elder' to make the original application, his Honour found she therefore had authority as Elder to decide on an 'altered composition of the applicant' and so made the orders sought—at [29] to [30], relying on *Williams v Grant* [2004] FCAFC 178.

Anderson v Western Australia [2007] FCA 1733 (Ballardong claim)

French J, 13 November 2007

Issue

The issue in this case was whether orders to replace the applicant for a claimant application should be made pursuant to s. 66B of the *Native Title Act 1993* (Cwlth) (NTA). The court decided to make the orders.

Background

The Ballardong claimant application was made in 1997 and later (in July 2000) amended to combine it with five other claimant applications. There were 16 people who jointly constituted 'the applicant' for the combined claim (see s. 61(2)(d) of the NTA).

Several earlier attempts to, among other things, replace the applicant had failed, largely due to the fact that his Honour Justice French was not satisfied that these changes were authorised by the native title claim group—see *Anderson v Western Australia* [2002] FCA 1558, *Anderson v Western Australia* (2003) 134 FCR 1 and *Bolton v Western Australia* [2004] FCA 760 (*Bolton*), summarised in *Native Title Hots Spots* Issue 3, Issue 8 and Issue 10 respectively. Note that, in *Bolton*, orders were made to remove two of the 16 people who constituted the applicant. Both were deceased.

In July 2007, an application was made by 12 members of the native title claim group under s. 66B seeking orders for the replacement of the applicant. By the time of the hearing of that application, two of the 14 who constituted the 'current' applicant were deceased.

Statutory framework

Paragraph 66B(1)(a), as amended by the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth), provides (among other things) that one or more members of native title claim group may apply to the court for an order that the member (or the members jointly) replace the current applicant where one or more of the persons jointly constituting the current applicant:

- consents to being replaced or removed;
- has died or become incapacitated;
- is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it;
- has exceeded the authority given to him or her by the claim group to make the application and to deal with matters arising in relation to it.

The member or members seeking to replace the current applicant must be authorised by the claim group to make the application and to deal with matters arising in relation to it—s. 66(1)(b).

The court may make the order if it is satisfied that the grounds in s. 66B(1) are established. If the order is made, then the Native Title Registrar must be notified of the change and, if the relevant application is registered, the Register of Native Title Claims must be amended to reflect the order—ss. 66B(2) to 66B(4).

Evidence

Substantial affidavit evidence was provided deposing to the efforts made to secure authorisation for the replacement of the applicant in this matter, which included:

- sending a notice of an authorisation meeting, to be held in Northam on 9 December 2006, to 298 people for whom the South West Aboriginal Land and Sea Council (SWALSC, the legal representative of the claimants) had addresses and who SWALSC had established as being descendants of the named ancestors in the application;
- sending a second version of the notice, along with family history forms, to an additional 107 members of SWALSC who had self-identified as Ballardong on their membership forms but for whom SWALSC had not been able to establish a link to the named ancestors on the application;
- placing notices of the meeting in five consecutive editions of *The West Australian* newspaper and in a single edition of three major regional newspapers circulating within the area covered by the application.

The evidence was that the notices (among other things):

- gave the date, time and place of a meeting 'for the members of the native title group for the Ballardong native title claim WAD 6181 in the Federal Court of Australia';
- indicated that all members of the native title claim group were invited to attend;
- indicated that the meeting was being called to consider authorising a new set of persons to be the applicant and to allow SWALSC to take instructions in relation to certain other matters.

'Importantly', the newspaper advertisement qualified its invitation to 'all members of the native title claim group for the Ballardong native title claim' by defining the members of the claim group 'by reference to the biological and adopted descendants of the…apical ancestors whose names were set out in the advertisement'—at [15].

The attendance register kept at the 9 December 2006 meeting, in which people were listed (on the advice of anthropologists working for SWALSC) as either participants or observers, with only the former being given voting cards, was in evidence.

SWALSC's principal legal officer (PLO) gave evidence that (among other things), resolutions were put to the meeting that:

- the native title claim group adopt a decision-making process whereby members of the native title claim group were authorised to make and to deal with matters arising in relation to the application by a majority of those members of the native title claim group present and voting;
- three of the 16 people constituting the current applicant were no longer authorised to make, or to deal with matters arising in relation to, the Ballardong application;
- that 13 members of the claim group or 'such of them as are willing and able to act' were authorised to make the application and deal with matters arising in relation to it. (One of the people who was authorised, 'RR', subsequently died. Nine of the remainder were part of group constituting the current applicant.)

The first resolution was recorded as being passed by a majority of 55 to 22, the second as being passed unanimously and the third as passing by a majority of 43 to 16. According to

the PLO's affidavit evidence, there was considerable discussion at the meeting preceding each of the resolutions and some people left the room between resolutions, which explained the slight differences in the numbers voting on them. Other evidence went to (among other things) the willingness of the 12 people who were to constitute the 'replacement' applicant to fulfil that role and the use of a genealogical database to identify the people who should be notified of the authorisation meeting.

Decision

His Honour Justice French was satisfied that:

- two of those who constituted the current applicant were deceased, another consented to being removed and two others acquiesced in their removal;
- the current set of people who constituted the applicant were no longer authorised by the native title claim group to make the application and deal with matters relating to it;
- the members of the claim group who made the s. 66B application (other than one person who had subsequently died) were authorised in their place;
- there was no process of decision making that, under the traditional laws and customs of the native title claim group that must be complied with in relation to authorisation (see s. 251B);
- the process of decision-making followed in this case was agreed to and adopted by 'a sufficiently representative section of the native title claim group for the purpose of dealing with matters arising in relation to the application', having regard (among other things) to the wide-ranging notification of the authorisation meeting—at [1] and [35] to [38].

Orders were made that:

- those who made the s. 66B application (other than one person who had subsequently died) jointly replace the current applicant;
- the 'reconstituted' applicant had leave to amend the application by filing a Form 19 (which is the form in the Federal Court Rules that may be used to make minor amendments);
- there be liberty to apply for further orders.

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].

Registration test review

Wiri People v Native Title Registrar [2008] FCA 574 (authorisation)

Collier J, 29 April 2008.

Issue
In this review of a registration test decision, the main issue before the Federal Court was whether the claimant application referred to here as Wiri People #2 application met the authorisation condition found in s. 190C(4)(b) of the *Native Title Act 1993* (Cwlth) (NTA).

Background
The original Wiri People # 2 application covered an area in central Queensland and was first entered on the Register of Native Title Claims (the register) in April 1998. In 1999 and 2000, it was amended to decrease the area it covered. Both amended applications passed the registration test found in s. 190A to 190C of the NTA and so the application remained on the register.

In November 2006, the application was again amended, this time to increase the application area back to almost the area covered by the original Wiri People # 2 application, change the description of the native title claim group and replace the applicant. The expansion of the application area resulted in an overlap with the area covered by a claimant application referred to here as the Wiri Core Country Claim, which had been certified by the Central Queensland Land Council (the CQLC) under ss. 190C(4)(a) and 203BE of the NTA. The Wiri People #2 application was not certified by the CQLC.

Delegate's decision
The Native Title Registrar's delegate found that the Wiri People #2 application did not satisfy the requirements of s. 190C(4)(b) (i.e. that the applicant was authorised to make the application and deal with matter arising in relation to it by all the persons in the native title claim group), essentially because:

- the evidence relating to the proper composition of the claim group was 'conflicting and contentious';
- the delegate could not be satisfied that the group described in the application was the whole of the native title claim group.

In making this finding, the delegate referred to *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60] (*Risk*).

The applicant sought review of the delegate's decision under s. 190D(2) of the NTA.

Applicant's submissions
The applicant submitted (among other things) that the delegate:

- had misconstrued *Risk* by erroneously considering she was required to make a factual determination as to the 'correct' description of the native title claim group;
- had failed to appreciate that an assessment of the composition of the claim group is a function of the duty found in s. 190C(2), not s. 190C(4)(b);

- did not limit her assessment under s. 190C(4)(b) to the description of the claim group as it appeared in the application and accompanying material; and
- having been satisfied that s. 190C(2) was met, should have confined her inquiries in relation to s. 190C(4)(b) to whether the claimant group, as described in application, had authorised the making of the application.

Registrar's submissions
The Registrar submitted (among other things) that:

- paragraph 190C(4)(b) required the delegate to be satisfied that the applicant was authorised to make the application by all the other persons in the 'native title claim group', which involved consideration of the composition of that group;
- the delegate's role went beyond merely accepting the correctness of an applicant's assertion that the persons who, according to their traditional laws and customs, hold communal rights and interests comprising the particular native title claimed are confined to those named or described in the application.

Reasoning
The court rejected the submission that the delegate had misconstrued the principles in *Risk*, essentially because:

- it was open to the delegate to take into account the existence the Wiri Core Country Claim, an overlapping and competing application, which contained a broader native title claim group description and which had been certified the CQLC;
- it was clear from the delegate's reasons that she had carefully avoided both adjudicating between the two claim group descriptions and making a factual determination as to the 'correct' description—at [24] to [25].

As to the applicant's second submission, the court found that an assessment of the composition of the claim group was a function of the delegate's duty s. 190C(4)(b), not s. 190C(2) because:

- clause 29.24 of the Explanatory Memorandum to the Native Title Amendment Bill 1997 stated that s. 190C(4): '[R]elates to the identity of the claimants and is designed to ascertain whether they are the appropriate persons';
- the applicant misrepresented the plain meaning of s. 190C(4)(b) by giving it a more restricted meaning;
- the applicant's argument confused the terms of ss. 190C(2) and 190C(4)(b) - while there was an obvious intersection between those two provisions, the matters of which the delegate must be satisfied are different;
- under s. 190C(2), the delegate must be satisfied that the application contains the information required by ss. 61 and 62 whereas under s. 190C(4), the delegate must be satisfied as to the identity of the claimed native title holders, including the applicant—at [26] to [29].

As to the applicant's third submission, Collier J held that:

- paragraph 190C(4)(b) does not confine the delegate to the information in the application or statements in the affidavit;
- the existence and nature of the information in the Wiri Core Country Claim was available and relevant to the delegate's consideration of whether the applicant in the

Wiri People #2 application was authorised to make the application on behalf of all the other persons in the native title claim group;
- while the delegate was not required to look beyond the terms of the application for the purposes of s. 190C(2), it did not necessarily follow that the same principle applies to s. 190C(4)(b)—at [23], [25], [28] and [31].

The applicant's fourth submission was also rejected i.e. once the delegate was satisfied of those matters under s. 190C(2), in the case of an uncertified application, the requirements of s. 190C(4)(b) are not met simply if the delegate is satisfied that the claim group as described in the application authorised the making of the application—at [27], [29] and [33], referring to *Northern Territory v Doepel* (2003) 133 FCR 112, *Western Australia v Strickland* (2000) 99 FCR 33 and *Wakaman People No 2 v Native Title Registrar* (2006) 155 FCR 107.

Her Honour concluded that:
- the delegate had not misconstrued the decision in *Risk*;
- the delegate's approach to the different requirements of ss. 190C(2) and 190C(4)(b), and her conclusion that the claim made in the application did not meet the condition found in s. 190C(4)(b) in relation to authorisation, were correct—at [32] and [36].

Decision
Collier J was of the view that the applicant had not made out any ground of review and so dismissed the application—at [22] and [37] to [40].

Glasshouse Mountains Gubbi Gubbi People v Registrar [2008] FCA 529 (2007 Amendment Act)

Spender J, 21 April 2008

Issue
This case concerned an application for review under s. 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (AD(JR) Act). The main issues were whether:
- the Native Title Registrar (the Registrar) breached the rules of procedural fairness in refusing to extend the time for making a registration test decision;
- Item 90 of Schedule 2 of the Native Title Amendment Act 2007 (Cwlth) (2007 Amendment Act) required the Registrar to apply the registration test to a claimant application that had been continuously registered since it was made in 1996 and had not been subjected to the test previously;
- having applied the registration test under Item 90 and decided the claim did not meet the conditions of the test, the Registrar was empowered to remove a claim from the Register of Native Title Claims (the Register) in the absence of any express power to do so.

The Federal Court concluded that none of the grounds raised had been made out and so dismissed the application. Of note is the court's finding that the Registrar is not obliged to advise an applicant of what amendments may be required to ensure compliance with the requirements of the registration test.

Background

The relevant claimant application was lodged by Eve Fesl and others on behalf of the Glasshouse Mountains Gubbi Gubbi People (the Gubbi Gubbi application) on 26 June 1996 under the original *Native Title Act 1993* (Cwlth) (NTA). Details of the application were entered on the Register when the application was received, as required by ss. 63, 66 and 190(1)(a) of the original NTA and in accordance with the decision in *Northern Territory v Lane* (1995) 59 FCR 332.

The registration test, found in ss. 190A to 190C, was inserted into the NTA when the relevant provisions of the *Native Title Amendment Act 1998* (Cwlth) (1998 Amendment Act) commenced on 30 September 1998. The Gubbi Gubbi application did not have to be tested at that time because Item 11 of Schedule 5 to the 1998 Amendment Act did not apply. Nor was there any other reason to apply the test to the claim made in that application prior to the commencement of the relevant provisions of the 2007 Amendment Act on 15 April 2007.

The Registrar wrote to the applicant on 24 April 2007 advising that Item 90 of Schedule 2 to the 2007 Amendment Act (the transitional provisions) applied to the Gubbi Gubbi application and it now had to be subjected to the registration test. On 14 May 2007, a further letter was sent on the Registrar's behalf which informed the applicant that:

- the test would be applied to the claim in September 2007;
- any amendments to the application should be made, and any additional materials should be provided, by 17 August 2007; and
- if nothing further was received, the Registrar's delegate would proceed to test the claim on the basis of the information currently available.

On 17 August 2007, the applicant sent an email stating that, while the claim group initially considered withdrawing the application, they now sought an extension of time to prepare the claim for the test. On 20 August 2007, the Registrar's delegate rejected the request for an extension of time for the making of the registration test decision but granted the applicant an extension until 24 August 2007 to provide any additional materials. The delegate pointed out there was no express statutory authority for delaying the application of the test and that requests for extensions were assessed on a case by case basis, taking into account all the relevant circumstances.

Nothing was received by 24 August 2007 and so the registration test was applied on 28 September 2007. The Registrar' delegate found that the claim made in the Gubbi Gubbi application did not meet all of the conditions of the test as required by s. 190A(6) and, as a consequence, it was removed from the Register. The applicant then sought review under the AD(JR) Act. The Commonwealth Attorney-General intervened in the proceedings pursuant to s. 18(1) of the AD(JR) Act.

Jurisdiction

His Honour Justice Spender was of the view that:

- the delegate's decision not to extend the time for the application of the test was neither required under the NTA nor 'a final determination of a substantive matter';
- therefore, it was not reviewable under s. 5 of the AD(JR) Act, although the delegate's conduct might have been reviewable under s. 6 of that Act;

- since the decision on registration was reviewable under s. 5 of the AD(JR) Act, which was 'sufficient for the present proceedings', there was no need to 'express a concluded view on the character' of the decision to refuse an extension of time—at [18].

The application for review was filed 10 days out of time but, because the delay was 'only very short and no prejudice is suggested to other interested parties', the court extended the time for making the review application—at [24].

Did the test have to be applied?
Item 90(1) of the transitional provisions sets out the circumstances in which Item 90 applies. It was not in dispute that the Gubbi Gubbi application satisfied all the elements of Item 90(1). Item 90(2) relevantly directs the Registrar to 'consider the claim under section 190A' and to use best endeavours to finish doing so by the end of 15 April 2008 or as soon as reasonable practicable thereafter. Subsection 190A(6) requires the Registrar to accept a claim for registration only if it meets all of the requirements of ss. 190B and 190C.

The applicant submitted (among other things) that:
- Item 90(2) required the Registrar to apply s. 190A only when the specific circumstances set out in s. 190A(1) arose i.e. when the Registrar received a copy of either a new, or an amended, claimant application from the Federal Court Registrar;
- as those circumstances did not apply to the Gubbi Gubbi application, the Registrar had no power to apply the test to it.

The Attorney-General argued (among other things) that Item 90(2):
- imposed a 'clear statutory duty' on the Registrar to consider claims that fell within Item 90(1), which was an extension of the scope of the operation of the duty found in s. 190A(1) of the NTA;
- expressly required the Registrar to consider a category or class of claim in addition to those that must be considered under s. 190A(1) i.e. the category or class of claim that fell with the scope of item 90(1).

His Honour accepted the Attorney-General's interpretation, finding that:
- the clear object of Item 90 was that certain registered claims that had not previously been examined against the criteria of the registration test must now be tested;
- Item 90(2) imposed upon the Registrar a requirement to examine any claim satisfying the conditions of Item 90(1) against the requirements of ss. 190, 190A, 190B and 190C of the NTA in order to decide whether that claim should be on the Register—at [32] and [34], referring to the Explanatory Memorandum to the 2007 Amendment Act.

Was the Registrar empowered to remove the claim from the Register?
The applicant submitted that:
- subsection 190(4) of the NTA comprehensively and exhaustively listed all of the Registrar's powers to deal with the Register;
- since none of the circumstances in s. 190(4) applied, the Registrar had no power to remove the entry in relation to the Gubbi Gubbi application from the Register.

The Attorney-General argued (among other things) that, while no express power existed to permit removal of the Gubbi Gubbi application from the Register, the 2007 Amendment Act had to be read to imply such a power.

His Honour held that:

- the NTA imposes particular duties on the Registrar to maintain the Register, keep it up to date and ensure that only claims that meet the requirements of the statute are entered on it;
- the Registrar was obliged to remove a claim from the Register if, after considering it under Item 90 of Schedule 2, the Registrar decided it did not meet the registration test criteria;
- although there was no express power to do so, the power existed by necessary implication—at [41] and [43].

Did the Registrar breach the rules of procedural fairness?

The applicant argued that the Registrar had breached the rules of procedural fairness by:

- requiring the applicant to prepare amendments in 'such a short time', especially as the claim had been registered for 11 years, when Item 90(2)(b) contemplated the Registrar taking up to a year to test claims;
- not informing the applicant of what they needed to do, or what amendments had to be made to the application, in circumstances where the Registrar was aware that the applicant was not legally represented.

Spender J held (among other things) that:

- the imposition of a nominal one year deadline within which the Registrar was to consider the relevant claims demonstrated that Item 90(2) was clearly aimed at having decisions made as quickly as the resources of the Tribunal, the applicant and relevant representative bodies would allow;
- it was in the interests of all parties that the intention of the legislature to be carried out soon as was reasonably practicable;
- the nominal one year time period was not relevant to any consideration of whether the applicant in this case had been given a reasonable opportunity to submit materials to the Registrar;
- it was not unreasonable for the Registrar to place the Gubbi Gubbi application among the first to be tested;
- there was no obligation on the Registrar to advise an applicant as to what amendments were required to be made to ensure compliance with the requirements of the registration test;
- the order sought by the applicant, namely that the Registrar re-consider the claim, subject to 'allowing the applicant not less than two months to make any amendments to the claim', was inconsistent with the applicant's submission that the three month period originally given by the Registrar constituted a breach of procedural fairness;
- it was not shown that, in this case, the Registrar's delegate 'unreasonably fettered or compromised' the right of the applicant to 'a fair hearing';
- the claim was one of the older claims that fell within Item 90 and had enjoyed the benefits of registration for many years 'without being subject to the requirements imposed on later claims seeking the same benefits';

- the applicant's failure to comply with the deadline set by the Registrar was not because that deadline was unreasonable but because the applicant did not perform the necessary tasks in the not unreasonable time given by the Registrar—at [64], [67] and [70] to [72].

Decision
The court ordered that the application for review be dismissed.

Hazelbane v Doepel [2008] FCA 290 (Town of Bachelor No 2)

Mansfield J, 7 March 2008

Issue
This case deals with an application under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (AD(JR) Act) for review of a decision by the Native Title Registrar (the Registrar) to accept a claimant application for registration pursuant to s. 190A of *the Native Title Act 1993* (Cwlth) (NTA). The critical issues were whether:

- the applicant to a registered overlapping claimant application was a person aggrieved by the decision of the Registrar and, therefore, had standing to bring an application for review under s. 5 of the AD(JR) Act;
- the Registrar was required to afford procedural fairness to the applicant to an registered overlapping application and if so, whether it had been afforded;
- section 53A of the *Federal Court Australia Act 1976* (Cwlth)(FCA Act) prohibited the Registrar from considering material which was produced for the purposes of mediation in the Federal Court; and
- the Registrar erred in law by asking the wrong question in addressing the procedural requirements of ss.190C(2) and 190C(4) of the NTA.

It was decided that the Registrar's decision should be set aside, firstly because (in the particular circumstances of this case) the Registrar had failed to provide procedural fairness to the applicant on the overlapping registered application and, secondly, because the Registrar's finding that the application satisfied s. 190C(4)(b) of the NTA was wrong.

The decision is significant because it indicates that, absent the particular circumstances of this case, the Registrar is not required to afford procedural fairness to the applicant on an overlapping registered claim when making a registration test decision on any 'competing' overlapping claim.

Background
The Registrar accepted an application for registration under s. 190A of the NTA. It was made by three people over an area of land in the Town of Batchelor in the Northern Territory. The court called those making the application the Batchelor No 2 applicant and their application the Batchelor No 2 application. The applicant to a previously registered claimant application (Bachelor No 1 application) over the same area, referred to as the Town of Batchelor No 1 applicant, sought review under the AD(JR) Act of the Registrar's decision to register the Batchelor No 2 application. The Northern Land Council (NLC), the recognised representative body under the NTA for the area concerned, had certified the Town of Batchelor No 1

application pursuant to s. 203BE of the NTA but had not certified the Town of Batchelor No 2 application—at [12].

Standing

Those who constituted the Town of Batchelor No 1 applicant (see s. 61(2)(d) of the NTA) submitted that:

- they were aggrieved by the decision of the Registrar because it resulted in two groups of people having the same procedural rights under the NTA's future act regime in respect of the same claim area;
- success in their AD(JR) Act application would result in a benefit to them, or relieve them of a detriment, to an extent greater than ordinary members of the public.

His Honour Justice Mansfield considered that the procedural rights which the Town of Batchelor No 1 applicant obtained from registration were not diminished by the fact of the registration of the Town of Batchelor No 2 application. However, his Honour held that:

- the enjoyment of those procedural rights would be diminished because the persons who were required to afford them to the Town of Batchelor No 1 applicant would also have afford them to the Town of Batchelor No 2 applicant;
- therefore, in a practical sense and to 'put it somewhat crudely, the potential fruits of the negotiations would probably be shared rather than doubled';
- on that basis, the Town of Batchelor No 1 applicant's interests were adversely affected by the Registrar's decision to a greater extent than ordinary members of the public;
- therefore, the Town of Batchelor No 1 applicant had standing under s. 5 of the AD(JR) Act to make an application for review of the Registrar's decision to register the Town of Batchelor No 2 application—at [20] to [22].

Procedural fairness

Those who constituted the Town of Batchelor No 1 applicant contended that:

- the Registrar was obliged to extend procedural fairness to them;
- this included affording them an opportunity to make written submissions and present material on whether that application should be accepted for registration;
- the Registrar had failed to afford that opportunity—at [23] and [25].

The court accepted that, had this opportunity been afforded, the Town of Batchelor No 1 applicant would have (either directly or through the NLC) provided anthropological and other material to the Registrar which may have influenced the Registrar's decision—at [24].

Mansfield J considered the extent to which an entitlement to procedural fairness may have been excluded by the express terms of the NTA or any necessary implication and concluded that:

- section 66 of the NTA proceeds on the basis that a decision to accept a native title claim for registration under s. 190A not only may, but must, be made before a competing registered native title claimant in respect of the same area is notified of the competing claim because of the interaction between ss. 66(3) and 66(6)(a);
- paragraph 66(6)(a) makes it plain that, in the normal course, a competing registered native title claimant is not entitled to be given the opportunity to be heard when the

Registrar is considering whether to accept a claimant application over the same area for registration—at [25] to [26], referring to *Kioa v West* (1985) 159 CLR 550.

However, Mansfield J considered that a 'combination of particular circumstances' meant this case did not follow the 'normal course' but, rather, gave rise to a legitimate expectation on the part of the Town of Batchelor No 1 applicant, and an obligation on the part of the Registrar, that the NLC and its solicitors would be given:

- notification that the Registrar was considering whether to accept the Town of Batchelor No 2 application for registration; and
- a time within which to make submissions and provide additional information to the Registrar—at [28].

The 'combination of particular circumstances' giving rise to the legitimate expectation were that:

- the NLC had certified the Town of Batchelor No 1 application;
- both the NLC and the Town of Batchelor No 1 applicant had the same solicitors;
- the Town of Batchelor No 1 applicant was aware that the Town of Batchelor No 2 application had been made, probably because the Registrar gave the NLC a copy of it and the accompanying material as required by s. 66(2A);
- the solicitors for the NLC and the Town of Batchelor No 1 applicant had indicated a desire to make submissions to the Registrar on whether the Town of Batchelor No 2 application should be accepted for registration;
- this was acknowledged in an email exchange between the solicitors for the NLC and the Town of Batchelor No 1 applicant and the Registrar's staff;
- in that email exchange, the Registrar's staff indicated that any submissions should be delayed until after proposed amendments to the Town of Batchelor No 2 application were made and that the NLC would be notified of the time within which it was to do so;
- the Registrar gave the NLC notice that the Town of Batchelor No 2 application had been amended and was to be tested but did not give notice as to when any submissions and additional information were to be provided by the NLC and so made the registration decision without affording that opportunity—at [27].

While the communication between the Town of Batchelor No 1 applicant, the NLC and the Registrar's staff referred only to a submission from the NLC, Mansfield J held that there was such a 'coincidence of interest' between the Town of Batchelor No 1 applicant and the NLC (which was apparent to the Registrar because the Town of Batchelor No 1 application had been certified by the NLC) that the opportunity to make a submission and to present additional information was an entitlement to procedural fairness that 'covered' both the NLC and the Town of Batchelor No 1 applicant—at [28].

The court held that the Registrar's decision should be set aside because the nature of any submission and any additional information which may have been provided had an opportunity to do so been afforded might have affected that decision—at [29] to [31].

Use of mediation information

The Town of Batchelor No 1 applicant contended that the Registrar, in considering the Town of Batchelor No 2 application against the condition found in s. 190B(5) of the NTA, could not

have regard to material which was prepared for the purposes of mediation in the court in relation to the Batchelor No 1 claim. This submission was based on s. 53B of the FCA Act, which provides that evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under s. 53A is not admissible:

- in any court (whether exercising federal jurisdiction or not); or
- in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence. (Compare s. 136A(4) of the NTA.)

Mansfield J held that:

- the Town of Batchelor No 2 applicant was entitled to provide material to the Registrar in addition to that in the Town of Batchelor No 2 application for the purposes of satisfying the requirements of s. 190B(5) of the NTA;
- section 53B (although his Honour refers to s. 53A) of the FCA Act did not prevent a party producing in evidence the same material as that presented at mediation (provided, of course, it is relevant);
- the Registrar simply recorded that he understood the material to have been prepared for the purposes of mediation and did not receive material as to what was said at the mediation, 'or of anything there said';
- had the Registrar actually received information that the material was presented at the mediation, then s. 53B may have been infringed but, because there was no apparent reliance by upon the fact of it having been presented to the mediation, it would have been 'an error without consequence';
- the material was apparently 'of a factual and conclusory nature and was equally eligible to be presented to the Registrar as to a mediator'—at [38].

Authorisation

The final contention was that the Registrar fell into error by identifying the wrong issue, and asking the wrong question, in addressing the requirements of ss. 190C(2) and 190C(4). In considering this point, the court focussed on s. 190C(4)(b), which provides that the Registrar must be satisfied that those who constitute the Town of Batchelor No 2 applicant are members of the native title claim group and are authorised to make the application and deal with matters arising in relation to it by all the persons in the native title claim group.

The court concluded that the Registrar's decision to overlook the shortcomings in the attachments to the Town of Batchelor No 2 application, because they were not professionally prepared, was understandable. However, the substance of the material had to be adequate to satisfy the requirements of s. 190C(4)(b) and his Honour was of the view that the material did not have that quality. So, for that reason also, the decision of the Registrar to accept the Town of Batchelor No 2 application for registration under s. 190A was set aside—at [42] to [52].

Decision

The court made orders:

- setting aside the Registrar's decision to accept the Town of Batchelor No 2 application for registration; and

- granting the Town of Batchelor No 2 applicant leave to apply in the event that the applicant wished to have the Town of Batchelor No 2 application referred for reconsideration by the Registrar. On this point, see *Hazelbane v Doepel* [2008] FCA 291, summarised in this edition of *Native Title Hot Spots*, where his Honour made an order striking out the Town of Batchelor No 2 application but ordered it not be sealed for 14 days and 'lie in the registry' until then or until further order.

Strike out under s. 84C

Hazelbane v Northern Territory [2008] FCA 291 (Town of Batchelor No 2)

Mansfield J, 7 March 2008

Issue
This case concerns an application to strike out a claimant application under s. 84C of the *Native Title Act 1993* (Cwlth) (NTA) on grounds that it did not comply with ss. 61 or 62 of the NTA. It is related to the judgment in *Hazelbane v Doepel* [2008] FCA 290 (summarised in this issue of *Native Title Hot Spots*).

Background
There are two claimant applications over the town of Batchelor, referred to here as Town of Batchelor No 1 and Town of Batchelor No 2. In September 2002, a group that identified itself as the Finniss River Brinkin Group (FRBG) was joined as a respondent to Town of Batchelor No 1. FRGB was said to be comprised of the patrilineal members of eight clans, three of which were the Emu Clan, the Blue Tongue Lizard Clan and the King Brown Snake Clan.

Town of Batchelor No 2 was made subsequently, initially on behalf of these three FRGB clans. It was then amended so that it was brought only on behalf of members of the Emu Clan and the Blue Tongue Lizard Clan. The three people named as 'the applicant' (see s. 61(2)(d) of the NTA), Thomas Petherick, May Stevens and Captain Wodidj, were said to have been authorised by the 'Emu and Blue Tongue Lizard Kungarakan group', with the native title claim group said to be members of the Emu and Blue Tongue Lizard Clan native title claim groups who 'constitute local descent groups affiliated with the Kungarakany language area'.

Both the applicant and the native title claim group for each of the Town of Batchelor claims were comprised of different persons. In November 2005, the court ordered that the applications be heard together.

The applicant for the Town of Batchelor No 1 was joined as a respondent to Town of Batchelor No 2 and subsequently sought strike-out of Town of Batchelor No 2 pursuant to either s. 84C(1), on the basis that the application did not comply with ss. 61, 61A or 62, or O 2 r 2(1) of the Federal Court Rules.

Nature of s. 84C application

His Honour Justice Mansfield noted, among other things, that:

- an application under s. 84C should be allowed 'only where a clear case for summary dismissal has been made out;
- those seeking strike-out under s 84C must make out 'a very clear case of want of authorisation' or 'a clear failure to comply with one or other of the requirements' of ss. 61, 61A or 62—at [11].

After noting that 'proper authorisation is fundamental to the legitimacy' of a claimant application, Mansfield J went on to observe that:

> It is, therefore, hard to resist the temptation of determining such a fundamental issue...before a full trial...To do so has the attraction of expedition and economy. Certain recent decisions of the Court have illustrated that proper authorisation is a matter which should not be overlooked, and the possibility of a challenge, at an early point in the proceeding...The mere complexity of an issue, or the fact that extensive argument may be necessary to demonstrate that the claim is untenable, is not a reason not to dispose of an application summarily—at [14].

However, his Honour went on to say that, despite this fact and 'the obvious advantages' to the Town of Batchelor No 1 applicant of having the authorisation issue heard and determined on its strike out motion:

> [I]t can only succeed if upon the whole of the evidence on the motion it satisfies the Court that there is no real prospect of the...applicants in the Town of Batchelor No 2 application establishing that they are authorised in terms of s 61(1)...and...s 251B...and that they have complied with s 62—at [16].

Contentions

The applicant for Town of Batchelor No 1 contended that:

- the persons who constituted the applicant on the Town of Batchelor No 2 application were not authorised by all the members of the native title claim group to bring that application;
- the members of the Emu and the Blue Tongue Lizard clans were only part of the native title claim group; and
- the Town of Batchelor No 2 applicant did not comply with the requirements to provide an affidavit and other information under ss. 61 and s. 62, in particular that, contrary to s. 62(1)(a), the application as amended was not accompanied by affidavits deposing to the matters referred to in ss. 62(1)(a)(i) to (v).

History to the proceedings

Mansfield J noted that:

- it was apparent that the FRBG was comprised of at least eight clan groups;
- for many years, FRGB had been seeking to have its interest in (among others) the area covered by the Town of Batchelor No 2 application recognised under the *Aboriginal Land Rights (Northern Territory) Act* (1976) (Cwlth) and the NTA but both the Aboriginal Land Rights Commissioner (see the Finniss River Land Claim 1980) and the Northern Land Council (NLC), the relevant representative body under the NTA, declined to recognise that interest;
- NLC also declined to provide financial or other support to the FRBG to pursue its claims;

- consequently and 'unsurprisingly' (given the process of making such a claimant application 'is complex and the information required is detailed'), the Town of Batchelor No 2 application and other of the FRBG's documents had 'some unsatisfactory aspects';
- that said, the court was required to determine the motion for strike-out 'having regard to the principles applicable to' s. 84C and on the material before it—at [24].

Failure to comply with s. 61(1)

The Town of Batchelor No 2 application named Captain Wodidj, Tjalma Tiger Jongman, Madntingi, Thullumbun and Chugulla (with all but Captain Wodidj being deceased) as the apical ancestors for the Emu Clan, with George Birid Stevens and Jimmy Jeribid (both deceased) named as the apical ancestors for the Blue Tongue Lizard Clan.

Mansfield J found that:

- there was clear evidence that four of the five persons named as apical ancestors for the Emu Clan did not possess native title rights and interests in respect of the Batchelor claim area and, in particular, there was strong evidence that Captain Wodidj did not claim to be a member of any native title claim group with rights and interests in the Town of Batchelor area;
- this was sufficient to determine the application adversely to the Town of Batchelor No 2 applicant for failure to comply with s. 61(1)—at [26] to [27] and [29] to [30].

His Honour also held that:

- Captain Wodidj was not, as required by s. 61(1), a member of the native title claim group as that group was described in the amended application;
- there was no evidence that Thomas Petherick was authorised by all the members of the native title claim group to bring the application on their behalf;
- at best, the relevant attachments to the application described Mr Petherick as a 'spokesperson interpreter in the courts representing the FRBG itself, and not the two particular clans' and he was not named in either of those attachments as an 'Authorised Person' or a 'Clan Group Representative Spokesperson';
- the native title claim group as described in the amended application was confined to members of the Emu Clan and the Blue Tongue Lizard Clan but the material presented by Mr Petherick indicated that his inquiries had been on behalf of the FRBG generally;
- on Mr Petherick's own material, those two clans are a mere subset of the FRBG and, therefore (in accordance with the authorities cited in the reasons for judgment), it was 'inappropriate that they should constitute the native title claim group'—at [34] to [35].

Decision

His Honour decided that:

> [T]here are clear reasons why the Town of Batchelor No 2 application, as presently expressed is not capable of being maintained in its present form. I propose to strike it out. I will give the second applicants 14 days within which to apply by motion for orders which may save the application...The strike out order is therefore not to be sealed for that time. I do not suggest that the second applicant should make any such application, but I think it appropriate to give them the opportunity to do so—at [38].

Validity of a non-native title interest on a DOGIT

Murgha v Queensland [2008] FCA 33

Dowsett J, 25 January 2008

Issue

The issue before the Federal Court in this case concerned, essentially, whether declaratory orders should be made as to the validity of a lease purportedly granted under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld) (Land Holding Act).

The area in question is in Queensland and forms part of a larger area subject to both a claimant application under the *Native Title Act 1993* (Cwlth) (NTA) and a deed of grant in trust (DOGIT). The court decided that, despite several irregularities, the lease was validly granted and declaratory orders should be made.

Background

The particular area in question in this case is part of Lot 207 on Plan NR 7310 (Lot 207) and lies east of Cairns. Most, if not all, of Lot 207 has been reserved for Aboriginal use for many years. In October 1986, Lot 207 was included in a DOGIT to the Yarrabah Aboriginal Council (now the Yarrabah Shire Council and referred to here as the council).

The DOGIT was a grant in fee simple in trust to be held for the benefit of Aboriginal inhabitants and for no other purpose. The DOGIT area is subject to a claimant application referred to here as the Combined Gunggandji claim. The 14th respondents to the Combined Gunggandji claim, Elaine and Darryl Pollard (the Pollards), claimed an interest in part of Lot 207 based on an application they made under the Land Holding Act for the grant of a lease over a part of Lot 207 that is referred to as Lot 13 on an unregistered survey plan (RC 159893).

As his Honour Justice Dowsett pointed out:

- consideration of the Combined Gunggandji claim would necessarily involve determining the effect of the interest the Pollards claimed to hold, which would in turn require determining the validity of that interest;
- other persons also claimed similar non-native title interests (the non-native title claims) in parts of the area subject to the native title claim;
- the non-native title claims were obstacles to the resolution of the Combined Gunggandji claim largely because the parties were unclear as to whether or not those making the non-native title claims were 'legally justified' i.e. whether the interest they claimed had been validly created under the relevant Queensland legislation, in particular under the Land Holding Act;
- for that reason, it was appropriate to determine the validity or otherwise of the non-native title claims in advance of the determination of the native title claim;
- in this case, the interested parties had effectively agreed that the Pollards' claim should succeed so the question for the court was whether it should grant appropriate declaratory relief—at [2] and [3].

Dowsett J set out ss. 5, 6, 9, 10 and 11 of the Land Holding Act to determine whether the Pollards were 'qualified persons' who could apply for, and be granted, a lease under that Act and also considered the role and duties of the council in granting security of tenure for qualified persons over a DOGIT area—at [4] to [8].

Material before the court

The history of the Pollards' claimed interest is factually complex and set out fully in the reasons for judgment. Briefly put, there was an exchange of correspondence between the Pollards and the council in the mid-1980s, which pre-dated the enactment of the Land Holding Act, in relation to an application they made for a block of land for farming purposes in another area. However, by mid 1986, the Pollards had decided they wanted to live closer to town and applied to the council for the land in which they now claim an interest i.e. the area identified as Lot 13 on the unregistered survey plan. By early 1987, the Pollards had started clearing the land. In April that year, Mr Pollard signed an application form for a grant under the Land Holding Act that had been filled out for him by the council's land clerk, apparently as a result of the council's letter of 24 March 1987 to those who had applied for grants to complete 'special new forms' at the council's office.

There were a number of irregularities in the way the form was filled out, including that the Pollards' three eldest children appeared to have be included as applicants for the grant despite not qualifying because they were not yet 18 years of age. The evidence was that the council's land clerk subsequently came to mark out the block.

In October 2002, Mr Pollard received a letter from the council's solicitor which:

- stated that the State of Queensland 'has now confirmed your entitlement' to the grant of a perpetual lease;
- informed them of the existence of the native title claim; and
- asked them whether they would accept the grant of the lease.

Mr and Mrs Pollard subsequently confirmed that they would accept the grant and Mr Pollard attended a meeting with state government surveyors where he was told that a lease would issue when the survey was complete. The unregistered survey plan was apparently a result of that meeting.

There were also minutes from three council meetings held in 9 March 1988, 1 June 1988 and 13 July 1988 that were relevant. Dowsett J drew an inference from these minutes, and other evidence, that the council approved the Pollards' application pursuant to the Land Holding Act at the latest on 13 July 1988.

Irregularities in exercise of statutory power

The court had some concern as to whether notice of the council's resolution to approve the Pollards' application (which was to be given within seven days pursuant to s. 6(1)(b) of the Land Holding Act) was given to the Pollards. Further, the state had been unable to locate any record of having received notice of the Pollards' application or the council's approval of it. Given no contemporaneous notice was given to the Pollards, his Honour thought it possible that no notice was given to the relevant minister either, which s. 6(1)(c) of the Land Holding Act required to be given within 28 days of council's approval of the application—at [21].

Dowsett J found that:

- the absence of notification was of no significance;
- nothing in the Land Holding Act supported the proposition that 'qualified persons' such as Mr and Mrs Pollard, who had an application approved by the council that entitled them to a lease, were liable to lose that entitlement because the council did not comply with its obligations to give notice under s. 6(1) of that Act—at [22].

However, his Honour had considerable concerns about irregularities in the application for the grant, particularly the fact that:

- Mrs Pollard had not signed it; and
- the underage, and therefore 'unqualified', children of Mr and Mrs Pollard were included on the form—at [23] to [25].

In these circumstances, Dowsett J decided that what was said in *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93] and [97] was of particular note i.e. the test for determining the effect of failure to comply with a statutory requirement that regulated the exercise of a statutory power was to ask whether the legislature intended that:

> [A]n act done in breach of the provision should be invalid...In determining the question of purpose, regard must be had to...the language of the relevant provision and the scope and object of the whole statute.
>
> Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act.

In light of those comments, and after consideration of s. 40 of the *Acts Interpretation Act (1954-1962)* (Qld) in relation to relief from strict compliance with prescribed forms, Dowsett J concluded that there was sufficient compliance with the requirements of the Land Holding Act and its associated regulations, particularly in the light of the fact that the council's land clerk filled out the application form for the Pollards—at [28] to [31].

The court's final concern was that the Pollards were absent from the leased area between 1994 and 2002. A lease under the Land Holding Act could, among other things, be forfeited under s. 22 of that Act if the leased area was not occupied 'by or on account of' the lessee for a continuous period of two years. His Honour concluded (among other things) that, while 'one might have expected that questions would have arisen concerning the possible operation of...s 22', it was for the council 'to act as it thought appropriate'. Therefore, the court was not required to take the matter further—at [32].

Decision

For the reasons summarised above, Dowsett J decided it was appropriate to grant declaratory relief. The proposed declarations are, essentially, that:

- on 13 July 1988 at the latest, the council determined to approve an application by the Pollards for a lease of the land described as Lot 13 on RC 159893;
- upon that determination, the Pollards became entitled to a lease in perpetuity of Lot 13, the land was divested from the council and so became Crown land within the meaning of the *Land Act (1962-1985)* (Qld); and

- the Pollards were then entitled to the grant of the lease of that land in perpetuity—at [33].

The court gave the parties an opportunity to make submissions as to orders and any other outstanding matters. On 25 January 2008, orders were made in the terms proposed in the reasons for judgment.

Section 211 – honest claim of right as defence to fisheries prosecution

Mueller v Vigilante [2007] WASC 259

McKechnie J, 1 November 2007

Issue

This appeal to the Supreme Court of Western Australia raised the issue of whether a person was criminally liable for an offence if they honestly claimed a right to property enjoyed by another i.e. an honest claim of right under s. 22 of the *Criminal Code* (WA) (the Code). The defendant's understanding of the effect of s. 211 of the *Native Title Act 1993* (Cwlth) (NTA) was relevant to this question.

Background

The respondent, Thomas Vigilante, is an officer with the Kimberley Land Council who is not of Aboriginal descent. In July 2006, while in Derby, he decided to go fishing in his boat, accompanied by his brother and two Aboriginal boys aged 12 and 13. They were fishing for crabs. Both Mr Vigilante and the boys had pots and bait.

A number of crabs were caught and stored in the single esky. Mr Vigilante was the 'driver' of the boat. When they returned to the Derby boat ramp, fisheries inspectors found nine undersized brown crabs in the esky. Under the *Fish Resources Management Act 1994* (WA) (FRMA), undersized brown crabs are 'totally protected fish' and, pursuant to s. 45 of the FRMA, a person must not have in their possession any totally protected fish.

Proceedings at first instance

Mr Vigilante, who was the only witness, gave evidence before the magistrate that:

- he had worked in Kalumburu for four years and had undertaken a number of trips with traditional owner groups where people were fishing and hunting according to custom;
- the boys' father had lived in Derby most of his life, practised his lore and culture and would not fish in areas that were not his country;
- he intended to take only legally sized crabs but when undersized crabs appeared in the pots, the eldest boy asked if they could keep them;
- he believed that the boys were within their rights to keep the crabs under their lore and customary rights;
- his understanding was that Aboriginal people's hunting and fishing practices, including sustainability matters, were determined by reference to the *Native Title Act*

1993 (Cwlth) (the NTA), whereas things like size limits and bag limits were not a traditional factor but were things imposed by legislation and so were inconsistent with the NTA.

At first instance, the magistrate (among other things) found that the Mr Vigilante was in possession of totally protected fish (a finding against which no cross-appeal was brought). However, as the possibility that he was acting under an honest claim of right could not be excluded, the case was dismissed. The prosecution appealed against the dismissal.

Grounds of appeal

The magistrate's conclusion of law was challenged but the findings of fact were not. Two issues arose for consideration:

- whether a claim for possession of the crabs, as part of traditional rights, was a claim of right in respect of property;
- if it was, whether Mr Vigilante could take the benefit of that claim—at [7] to [8].

Who was in control of the boat and in possession of the crabs?

Section 4 of the FRMA defines 'possession' as including:

> [H]aving under control in any place, whether for the use or benefit of the person in relation to whom the term is used or another person, and whether or not another person has the actual possession or custody of the thing in question.

His Honour Justice McKechnie concluded that Mr Vigilante was in control of the boat and in possession of the mud crabs because:

- he was in charge and gave permission for the undersized crabs to be retained;
- even if the crabs were for the use or benefit of the boys, he was in control of the vessel;
- he did most of the 'driving', he threw or caused to be thrown back the 'really small' crabs and was asked by the boys whether they could retain the undersized crabs—at [9] to [10].

Honest claim of right

Section 22 of the Code provides:

> Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by an offender is expressly declared to be an element of the offence.
>
> But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.

Was a claim for possession of the crabs part of a traditional right?

His Honour found that:

- prima facie, all persons were in possession of totally prohibited fish;
- the conduct elements of an offence under s. 46 of the FRMA had been made out;
- however, the boys could mount a claim of right to possess the fish on the basis that they were satisfying their personal, domestic, or non-commercial communal needs in the exercise or enjoyment of their native title rights and interests i.e. the right or interest claimed was the native title right 'preserved' by s. 211 of the NTA—at [13].

It was noted that:

> An Aboriginal person does not have an unfettered immunity from the FRMA s 46. There must be some evidence that they were satisfying personal, domestic, or non-commercial needs and; further, that they were doing so in exercise or enjoyment of native title rights or interests. It is necessary, on this analysis, for the Aboriginal person claiming the right to, in fact, assert the right. The right is not created by statute - the Native Title Act s 211…removes Commonwealth and state prohibitions in the exercise of the right in circumstances specified in s 211. Because these circumstances are specified, an Aboriginal person seeking to establish that state law, such as FRMA, is inapplicable to them, must bring themselves within s 211(2)—at [14], noting this was consistent with *Wilkes v Johnson* 21 WAR 269 at [105].

On the facts, McKechnie J found that the boys could mount a claim of traditional rights with respect to fishing that came within s. 211 of the NTA—at [15].

Was the right to possess crabs a right in respect of property?

The court noted that:

- although it 'remains an authority' on s. 22 of the Code, having regard to the NTA, any principle that may be extracted from *Walden v Hensler* (1987) 163 CLR 561 to the effect that a traditional right may not be a right under s. 22 'can now be doubted';
- section 22 should be given its literal and broad effect, may be raised in relation to offences not contained in the Code and also applies to a claim of right arising under a statute as well as at common law;
- the claim of right asserted was at least a claim under statute, although it was better understood as a traditional right to property created through the activity of fishing, and a right to fish must necessarily cover a right to property produced by the activity of fishing;
- the concept of possession generally, and the definition in s. 4 of the FRMA specifically, was the control or custody of a thing and a 'thing' in law was anything that could be the subject of a property right—at [17] to [19].

After reviewing the case law on s. 22 of the Code, his Honour held that possession of the crabs by an Aboriginal person in this case constituted a claim of right in respect of property—at [26].

Could the respondent take the benefit of that claim?

His Honour was of the view that:

- as 'a matter of general principle, and without regard to authority', s. 22 of the Code was wide enough to encompass a person acting on behalf of another person in respect of property or authorised by another person to act on their behalf in respect of property pursuant to a claim of right;
- it was not difficult to imagine situations where a person, in pursuing a claim of right, sought the assistance of others;
- there was no reason why the principal might escape criminal responsibility for pursuing an honest claim of right but the person aiding the principal would be criminally liable;
- the few decided cases on claims advanced by an aider to a person exercising a claim of right tended to support the general principle that an aider might come under the umbrella of an honest claim of right—at [27] to [28].

After reviewing the case law, his Honour held that:

- section 22 of the Code could apply in circumstances where the claimant was acting pursuant to a claim of right held by another person;
- in this case, although there was no occasion for them to formally exercise it, the boys, by reason of their status as Aborigines, had a claim of right to the undersized crabs that were in the possession of the respondent and they were entitled to possession;
- the respondent's possession of the undersized crabs was no more than an incident of the possession of the persons who had a claim of right to possess—at [43].

Decision

The court concluded that:

- a claim by an Aboriginal person in the circumstances arising in this case was a claim of right with respect to any property within the meaning of s. 22 of the Code;
- such a claim was able to be advanced by the respondent in this case by reason of the nature of possession of the undersized crabs, notwithstanding that he was not the primary beneficiary of a claim of right;
- the appeal should be dismissed—at [45] to [46].

Claims must be actively progressed

Naghir People 1 v Queensland [2008] FCA 192

Greenwood J, 21 February 2008

Issue

The issue before the Federal Court in this case was, essentially, the protracted nature of the proceeding and what should be done to expedite its resolution.

Background

The court considered a work plan adopted by the parties to a claimant application made under the *Native Title Act* 1993 (Cwlth) on behalf of the Naghir People, which indicated that after further anthropological research and site inspections were conducted, 'further negotiations' with an overlapping claim group would commence. While the court was willing to allow the work plan to 'proceed according to its own timeframe', his Honour Justice Greenwood wanted to 'inject some other elements into the matter' because:

- the Naghir People's claimant application was filed almost 12 years ago, the registration test was applied in 1999 and, apparently, very little had happened since then;
- the claim had been in 'external' mediation (i.e. with the National Native Title Tribunal) for at least 12 years and so had been 'a long time in progressing';
- the days of native title mediations, or 'the progression of native title claims over horizons of 12 years are over. They are finished. It is no more'—at [2] to [5].

Decision

Greenwood J decided that, while the work plan could proceed as agreed by the parties, the applicant must file and serve a notice of facts and contentions by 30 May 2008 to include (among other things):

- a description of the persons on whose behalf the claimant application was made;
- a description of the native title holding society at the time of sovereignty (the original society) and a description of the society to which the members of the claim group belong (the current society);
- the identification of the connection between the original society and the current society from the time of sovereignty to the present;
- a list of the rights and interests claimed and what they conferred;
- an outline of the facts relied upon to prove connection—at [8] to [19].

These were seen as the imposition of some steps in the progression of the matter with which the parties would 'just have to do the best they can'—at [6].

The applicant for a claimant application that entirely overlapped the Naghir People's application was ordered to file a notice of facts and contentions along the same lines—at [21] to [25].

The solicitor for the overlapping claim group indicated that assistance was being sought from the relevant representative body for the purposes of the preservation of evidence. His Honour noted that:

> What is really critical in these kind of matters is that the interests of the claimant groups be protected by advancing these matters to conclusion within timeframes that enable rational people, who are not infirmed but are old, to be able to formulate and give their evidence. So this is the very dilemma that arises when matters linger on for 12 years—at [28].

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

Jones v Northern Territory [2007] FCA 1802

Mansfield J, 22 November 2007

Issue

The issue in this case was whether the Federal Court should dismiss 55 claimant applications in the Northern Territory pursuant to s. 94C of the *Native Title Act 1993* (Cwlth) (the NTA) as a consequence of receiving two reports from Native Title Registrar (the Registrar) pursuant to s. 66C. It was found that the conditions specified for the exercise of the power to dismiss in s. 94C(1) had not arisen.

Background

Section 94C was inserted into the NTA by the *Native Title Amendment Act 2007* (Cwlth) (2007 amendments). It 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 Registrar may advise the Registrar of the court of any applications that meet certain criteria found in s. 94C(1). Both ss. 66C and 94 were subsequently amended by the *Native Title Amendments (Technical Amendments) Act 2007* (Cwlth) (technical amendments).

The Registrar's reports in this case advised the court that certain applications '[fell] within the shadow' of s. 94C. One report was given before the technical amendments came into force and the other after. His Honour Justice Mansfield did not think that this gave rise to any different issues because 'in relevant respects', the provisions in ss. 66C(1) and 94C had the same substantive effect. No party had applied to dismiss any of the applications. The question was whether the court, of its own motion, should do so—at [7], [9] and [13].

Webb approved and followed

His Honour referred to His Honour Justice French's comments in *Webb v Western Australia* [2007] FCA 1342 (*Webb)* at [11] to [12] (summarised in *Native Title Hot Spots* Issue 26), where French J said:

> Where the Native Title Registrar provides an advice under s 66C and the Court finds the facts set out in his advice, consideration of mandatory dismissal does not follow automatically…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.
>
> 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.

Mansfield J adopted French J's views. As in *Webb*, the existence of the conditions in ss. 94C(1)(a), (b) and (c) were not really in issue in this case and the Registrar's reports did not address the alternative conditions in s. 94C(1)(e) because this is not one of the matters specified in s. 66C(1)—at [10] to [12].

Lead matter strategy

A strategy to address and manage the many claimant applications relevant to this case had been adopted by the court following directions hearings and user group meetings involving the applicants, the representative bodies, the Northern Territory, the Commonwealth and the respondents. Various applications were grouped into categories with the intention that a 'lead matter' in each category be progressed to resolution so that issues common to applications in each category would be heard and determined. It was expected that other applications within each category would then, subject to issues peculiar to it, be resolved by agreement, assisted by ongoing court supervision. As the court noted, the lead matters in each of the categories had now resolved, were about to resolve, or there were other circumstances indicating the prospect of timely resolution. It was expected that there would be a progressive resolution of the claims, or many of them, without the need for further hearings—at [16].

Decision

As the conditions specified in s. 94C(1)(e) for the exercise of the power in s. 94C(1) in respect of any of the 55 matters had not arisen, his Honour simply noted the two reports—at [17] to [28].

Party status

Doyle v Queensland [2007] FCA 1941 (claim group member seeks joinder and strike-out)

Dowsett J, 2 November 2007

Issue
The issues before the court were whether to join Mr Taylor as a party to proceedings and then, on his motion, order that the proceedings be struck out for failure to comply with the requirements of the *Native Title Act 1993* (Cwlth) (NTA). As the application was 'misconceived', it was dismissed.

Background
In November 2005, resolutions were passed to discontinue or withdraw a number of claimant applications made on behalf of the Kalakadoon People and to commence a new application, subsequently filed as the Kalkadoon People # 4 claim. Mr Taylor, who was a member of the group of people jointly comprising 'the applicant' in respect of some of the earlier applications but not for the Kalkadoon #4 claim, sought joinder to that application and an order that it be struck out for failure to comply with the requirements of the NTA.

His Honour Justice Dowsett was of the view that the grounds raised by Mr Taylor in his application were of no relevance:

> He is clearly a member of the claim group, but he was not nominated by the claim group as an applicant. That is an end of the matter. If he wishes to revisit that position or to vary that position, he should seek to convene a meeting of the claim group and propose an appropriate resolution—at [3].

Decision
The court found that the motion was misconceived and so it was dismissed—at [5].

Akiba v Queensland (No 3) [2007] FCA 1940 (Papua New Guinean resident)

French J, 7 December 2007

Issue
This case concerned the review of a Deputy District Registrar (DDR) of the Federal Court's refusal to join a person resident in Papua New Guinea as a party to the Torres Strait Regional Seas Claim (TSRSC). The motion for review failed because the court could not be satisfied that a determination over the TSRSC area could affect any interest of the person concerned.

Background
In July 2005, Pastor Guzu Dorogori sought to be joined to the TSRSC under s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA) on behalf of Hiamo-Tureture Villagers in Papua New Guinea. A direction was made that any further affidavits be filed and served by 8 September 2005 and the motion was adjourned. No affidavits had been filed by 22 September 2005 and

so the DDR dismissed the notice of motion. The application for review of that decision was brought some 18 months out of time but no explanation for the delay was given. His Honour Justice French decided to deal with the motion for review on its merits despite the very substantial delay because:

- issues relating to the joinder of Papua New Guinean parties had only recently been resolved by the Full Court (see *Gamogab v Akiba* (2007) 159 FCR 578, summarised in *Native Title Hot Spots* Issue 25);
- the orders made subsequently governing the joinder of those parties would apply to Pastor Dorogori if he were to be joined as a party; and
- there was no relevant prejudice to any other party—at [17].

Submissions

The affidavit filed in support of the notice of motion annexed materials said to be relevant to Pastor Dorogori's family history and links to the Torres Strait sea claim area. Included was an account of the origins of the Hiamo Umumere people, which referred to attacks upon Hiamo people by other Indigenous people in the area. It stated (among other things) that, because of those attacks, the Hiamo people emigrated from Daru and Bobo Islands in the Torres Strait to Papua New Guinea, which was why the group separated from each other but were one Hiamo Umu Mere tribe. There was also:

- an assertion of a right to claim because the Hiamo-Tureture were the owners of the reefs and the sea as well as the land;
- a genealogy, evidently produced in 1977, for the Hiamu Umumere clan showing a person called Guza, a male in a line of descent through another male called Dorogori, with the line of descent ultimately traced back to a male called Kabai.

The court interpreted Pastor Dorogori's oral submissions as suggesting he was an original inhabitant of the area and that he and his clan should be included in any determination of rights in relation to the Torres Strait islands—at [9].

The motion was opposed by the applicant for the TSRSC on the basis that (among other things) no relevant interest in the claim area was identified nor any interest shown that might be affected by a determination in the proceedings. The Commonwealth submitted that:

- Pastor Dorogori had not identified any area of land or reefs or sea within the claim area in respect of which he asserted ownership;
- there was no material to support such an assertion or provide any basis under traditional law and custom.

Decision

French J found that the motion for review failed because there was no basis upon which the court could be satisfied that a determination over the TSRSC area could affect any interest of Pastor Dorogori that was:

> [C]apable of clear definition and, equally importantly,...of such a character that they may be affected in a demonstrable way by a determination in relation to the application—at [51], referring to *Byron Environment Centre Inc v Arakwal People* (1997) 148 ALR 46.

While Pastor Dorogori asserted that the people he represented had a history in the claim area, the court was of the view that:

- no historical basis for the assertion of ownership of reefs, seas and waters had been disclosed;
- the location of areas allegedly owned by Mr Dorogori and his people were not disclosed; and
- the fact that he may be descended from people who came from an island in the Torres Strait did not, of itself, support the inference that there was some kind of interest which may be affected by a determination—at [18] to [20].

Access to documents in native title proceedings

Allison v Western Australia [2007] FCA 1969

Sackville J, 12 December 2007

Issue
The issue before the court was whether to make an order allowing five members of a native title claim group to access to certain documents relating to a claim brought on their behalf (along with others) under the *Native Title Act 1993* (Cwlth) (NTA). Access was sought to enable them to obtain independent legal advice as to how they should proceed. The access order was made, subject to undertakings by the relevant legal advisors.

Background
Five members of the claimant group (the movers) in the Wanmulla/Sir Samuel claim (Sir Samuel 2) sought orders from the Federal Court for access to certain documents. The area covered by the application is in the north-west Goldfields region of Western Australia. The movers sought orders requiring the applicants in the Sir Samuel 2 proceedings (other than the movers themselves) to provide for inspection and copying (among other things) all documents in their possession, custody or control relating to:

- Sir Samuel 2;
- any native title proceeding lodged after 1 September 1995 which had previously been consolidated into the Sir Samuel 2 claim; and
- any proposed new application which included or overlapped the boundaries of the Sir Samuel 2 claim.

The claimant group in Sir Samuel 2 originally consisted of the same 29 people who originally comprised the claimant group in the Tjupan Ngalia/Sir Samuel claim (Sir Samuel 1), although some members had died since the proceedings were instituted. Sir Samuel 1 related to a larger area adjacent to, and south of, the land subject to the Sir Samuel 2 claim. The Goldfields Land and Sea Council (GLSC) acted for the Sir Samuel 2 claim group and had previously refused to provide the movers with access to the documents they sought, 'at least on terms satisfactory to' the movers—at [4].

Mr Allison (one of the movers) deposed that he filed a claimant application in December 1995 on behalf of the Wanmulla people which covered the areas of the Sir Samuel 1 and Sir Samuel 2 claims. At some unidentified time, the GLSC was retained as the legal representative for the Wanmulla claim. As the result of mediation, proposals were made to consolidate various native title claims in the region and Sir Samuel 1 and Sir Samuel 2 were

filed. While neither claim had progressed very far, His Honour Justice Sackville noted some relevant developments:

- in October 2005, an in principle agreement to reformulate the Sir Samuel claims was reached but (partly because of disagreements within the claimant group) it appeared that no progress had been made in implementing it;
- there was a decision by his Honour Justice Lindgren to dismiss several native title claims in the Goldfields (see *Harrington-Smith v Western Australia (No 9)* (2007) 238 ALR 1, summarised in *Native Title Hot Spots* Issue 24) which Sackville J thought might be relevant to both of the Sir Samuel claims—at [7] to [9].

The movers acknowledged that much of the material had been created from confidential information supplied to, or collected by, the GLSC from Indigenous sources and offered undertakings to limit access, and ensure confidentiality. They accepted that some of the communications contained in the documents to which they sought access were subject to client legal privilege but submitted that:

- since they had jointly instructed the GLSC, they had the benefit of joint client legal privilege and there was no privilege between the members of the applicant group;
- consequently, each member was entitled to copies of communications to and from, and advice given by, their jointly instructed legal advisers in their capacity as such.

Those opposing the orders sought submitted that, although the movers were entitled to access to documents for 'purposes consistent with the maintenance of' the Sir Samuel claims, their new solicitor was not entitled to inspect or make copies of the relevant documents because access was sought for a purpose 'collateral to the interests' of the claim group.

Outcome

When the motion came on for hearing, Sackville J expressed doubts as to the utility of the proceedings and invited the parties to see whether agreement could be reached. Shortly before the hearing recommenced, agreement had been substantially reached. As a result, access to the documents was ordered in the terms sought by the movers. These included undertakings by the movers' solicitor and counsel that each would maintain the full confidentiality of anything they obtained access to under the order and neither would disclose to anyone, including their clients (i.e. the movers), the whole or any part of any such document and other communication unless:

- there was an express agreement in writing to do so or a further order of the court;
- the material came into the public domain otherwise than in breach of their undertakings;
- the material was filed with any court or tribunal in connection with an application in respect of native title rights and interests or as required under compulsion of law.

Costs

Gumana v Northern Territory (No 2) [2007] FCAFC 168 (Blue Mud Bay appeal)

French, Finn and Sunderg JJ, 9 November 2007

Issue
The issue is this case was what cost orders, if any, should be made in relation to the proceedings determined in *Gumana v Northern Territory* [2007] FCAFC 23 (*Gumana No 1*, summarised in *Native Title Hot Spots* Issue 24).

Background
Gumana No 1 dealt with proceedings in the Full Court of the Federal Court, namely:

- an appeal related to issues arising under the *Native Title Act 1993* (Cwlth) (NTA) (native title appeal), which was dismissed, and cross-appeals by the Northern Territory and the Commonwealth, which succeeded to the extent that the native title right to control access to the inter-tidal zone by other Aboriginal people was removed from the determination that was made at first instance;
- an appeal that dealt with issues arising under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALRA) (ALRA appeal), in which the appellants were successful.

Costs under the native title appeal
Section 85A of the NTA provides that:

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

In joint reasons for judgment, their Honours Justices French, Finn and Sundberg noted that all parties submitted that each party should bear its own costs.

The ALRA appeal
In the ALRA appeal, which related to proceedings under the *Judiciary Act 1903* (Cwlth) for declaratory relief, the appellants sought the costs of the appeal. The Commonwealth (as intervenor) relied upon the public interest dimension of the case, saying that the appellants were seeking to have the law as to the rights in respect of the inter-tidal zone conferred by a grant of fee simple under the ALRA settled while the respondents, in resisting the appeal, relied on the law as it had been declared to that point.

Decision
The court ordered that:

- the appropriate disposition of the native title appeal is that each party bear its own costs; and

- the costs of the ALRA appeal should follow the event—at [7], [13] and [14].

In relation to the ALRA appeal, it was said that:

> The question was one of great public interest. It was no doubt their perspective on the public interest that led the governments concerned to resist the appeal. That the costs of the appeal should be met by the public in the ordinary exercise of the Court's discretion on the basis that the costs follow the event is, in the circumstances, quite appropriate—at [13].

Postscript — High Court appeal

In relation to the ALRA matter, the High Court granted special leave to appeal in June 2007 and the appeal was heard in December 2007. Judgment was reserved—see *Northern Territory v Arnhem Land Aboriginal Land Trust* [2007] HCATrans 324, [2007] HCATrans 721 and [2007] HCATrans 722.

O'Mara v Minister for Lands (NSW) [2008] FCA 51 (interim injunction)

Reeves J, 30 January 2008

Issue

The issue before the Federal Court in this case was whether s. 85A of the *Native Title Act 1993* (Cwlth) (NTA) applied in relation to the costs of an application for an interim injunction concerning a future act agreement.

Background

The Wiradjuri People of the Bathurst/Lithgow/Mudgee region of New South Wales have a claimant application (the Wiradjuri claim) on foot under the NTA. Peter O'Mara and Lynette Syme are the people authorised to make that application i.e. they are jointly 'the applicant' pursuant to s. 61(2)(d) of the NTA.

Three members of the native title claim group for the Wiradjuri claim filed a notice of motion (the injunction NOM, originally dated 12 December 2007) seeking to restrain the Minister for Lands of New South Wales from doing various things, including:

- executing a future act agreement signed by Lynette Syme and Peter O'Mara 'until further order'; and
- granting two mining lease applications to Moolarben Coal Mines Pty Ltd (Moolarben) until the future act agreement was signed by 'an applicant duly authorised' by the native title claim group in the claimant application made on behalf of 'the North Eastern Wiradjuri People' or 'until further order'.

The injunction NOM was filed in the proceedings dealing with the Wiradjuri claim (NSD 429 of 2007). When the matter was first heard on 12 December 2007, among other things, Moolarben was made a respondent to the claimant application pursuant to s. 84(5) and the matter was adjourned to 20 December 2007. Two days later, Moolarben filed a notice of motion to strike out the injunction NOM (the strike-out NOM). When the matter came on for directions on 20 December 2007, the Minister for Mineral Resources was joined as the third respondent, directions for the further conduct of the matter were made and it was set down for a two day hearing commencing 29 January 2008. On 21 December, the injunction NOM was amended to seek additional orders.

On 23 January 2008, those bringing the injunction NOM applied to adjourn the hearing (the adjournment NOM), which was itself adjourned to the commencement of the hearing on 29 January 2008. Late on 25 January, those bringing the injunction NOM sought leave to 'discontinue the proceedings' but were informed by the court registry that an application for dismissal (rather than discontinuance) should be made at the commencement of the hearing. Counsel for those bringing the injunction NOM duly sought dismissal of all three notices of motion, which led counsel for Moolarben to apply for a costs order. Counsel for those bringing the injunction NOM and the adjournment NOM sought the 'protection' of s. 85A from any order as to costs, which raised the question of whether or not s. 85A applied. Subsection 85A(1) provides the: 'Unless the Federal Court orders otherwise, each party to a proceeding must bear his or her own costs'.

Decision

His Honour Justice Reeves rehearsed the parties submissions before concluding that s. 85A did not apply to this matter. The court noted, among other things, that 'a proceeding' for the purposes of s. 85A is a proceeding within the exclusive jurisdiction conferred by s 81 of the NTA and does not apply to proceedings within the non-exclusive jurisdiction conferred by s 213(2) of the NTA—at [8] to [27] and [33], quoting *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 108 FCR 453 (*Lardil*) at [157].

In addressing the parties' submissions, his Honour said (among other things) that:

- the true meaning of s. 85A could not be affected by the conduct of the parties, either by expressly relying upon s. 81 in the notice of motion or by applying under s. 84(5) to become a party;
- this matter was not an application under s. 61(1) of the Act i.e. 'clearly', it was not an application for a determination of native title, a revised native title determination application or a compensation application;
- as this was not an application of the kind described in s. 61(1), it followed that it was not an application within the exclusive jurisdiction of the court under s. 81—at [35] to [37].

For these reasons, Reeves J found that it was not an application or matter within the word 'proceeding' in s. 85A of the NTA and so that provision did not apply—at [36] and [43].

Section 66B submissions

Reeves J then referred to the applicants' submissions in relation to s. 66B and expressed the view that, whether or not this was an application under s. 66B was not to the point:

> There can be no doubt that this matter is not an application under s 61 and, therefore, the exclusive jurisdiction of the Court under s 81. If that conclusion is correct, it is of little moment where this matter stands, whether under s 66B of the Act or elsewhere, because wherever it does, s 85A does not apply to it—at [37].

However, in case this was not correct and it emerged that s. 85A applied to application under s. 66B, Reeves J made clear that, in his opinion, this was not such an application, essentially because:

- section 66B was not mentioned in the applicants' notice of motion;

- the relief sought in the applicants' notice of motion was directed towards the respondents in this matter and not the authorised native title applicant, who is the object of an application for replacement under s. 66B;
- the only time the applicants' counsel mentioned s. 66B was when it was raised by the court and all other references to s. 66B had come from the respondents;
- consistent with the whole focus of this matter being elsewhere, the claimants did not take an active role in it and did not seek to appear at the hearings—at [38] to [40].

His Honour went on to find that s. 43 of the *Federal Court of Australia Act 1976* (Cwlth) applied. The applicants were ordered to pay the respondents' costs 'forthwith'—at [41] and [43]. See also *O'Mara v Minister for Lands (NSW)* [2008] FCA 84, summarised in this issue of *Native Title Hot Spots*.

Comment
According to Dowsett J in *Lardil* at [156] to [157] (with French J agreeing at [68]), applications made pursuant to ss. 66B and 69(1) are also applications 'within the exclusive jurisdiction of the court under s. 81' and are, therefore, applications to which s. 85A applies.

O'Mara v Minister for Lands (NSW) [2008] FCA 84 (to be paid 'forthwith')

Reeves J, 1 February 2008

Issue
The issue in this case was whether, upon dismissal of an interlocutory injunction application, the applicants should pay the respondents' costs 'forthwith'.

Background
This case relates to *O'Mara v Minister for Lands (NSW)* [2008] FCA 51, summarised in this issue of *Native Title Hot Spots*, where it was found that, pursuant to s. 43 of the *Federal Court Act 1976* (Cwlth), the applicant should pay the respondents' costs 'forthwith', rather than awaiting the outcome of the 'underlying primary proceedings' i.e. an application under the *Native Title Act 1993* (Cwlth) for a determination of native title. His Honour Justice Reeves noted that, where there has been no hearing on the merits of a matter and no party wishes to proceed, the court will ordinarily order that each party bear their own costs but this was an exceptional case because the applicants no longer wished to proceed—at [1], referring *Minister for Immigration and Ethnic Affairs ex parte Lai* (1997) 186 CLR 622.

Decision
His Honour found that:
- it was not necessary to consider whether the conduct of the applicants was reasonable or otherwise because the 'plain fact' that they decided, 'obviously in their own best interests', not to proceed justified the exercise of the discretion to order they pay costs;
- the respondents' costs should be paid forthwith because the 'underlying primary proceedings 'were 'likely to be on foot for some time'; and
- execution of the costs order should be stayed pending expiration of the appeal period—[4] to [6].

Determination of native title

Ngadjon-Jii People v Queensland [2007] FCA 1937 (Ngadjon-Jii People)

Spender J, 12 December 2007

Issue

The issue before the Federal Court was whether, pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (NTA), a determination recognising the existence of native title should be made in relation to the Ngadjon-Jii People's claimant application. It was decided that the determination should be made.

Background

The proceeding arose out of a claimant application made by the Ngadjon-Jii People in October 1999. The claim area comprised approximately 13,287 hectares within various reserves and parks around Atherton, Mareeba and Cairns in far north Queensland. An agreement recognising that various exclusive and non-exclusive native title rights and interests are held by the Ngadjon-Jii People was filed with the court on 14 November 2007. In considering whether to make a determination reflecting the terms of that agreement, his Honour Justice Spender referred to the relevant provisions of NTA—at [6] to [8].

Material before the court

A summary of connection material provided by anthropologist Dr Sandra Pannell (the connection report) was before the court. Spender J noted that:

- in order to establish that native title holders existed today, it had to first be established that, at the time of sovereignty, a society of persons bound together by observance of traditional laws and customs existed;
- the connection report described the clan structure of the Ngadjon-Jii People and their traditional entitlement to ownership of the ancestral lands and waters;
- in relation to the general physical connection of the Ngadjon-Jii People to the claimed areas, Dr Pannell's report referred to fieldwork with Ngadjon-Jii informants conducted in the 1930s and 1970s, including that of Norman Tindale, who recorded that 'Ngatjan territory was virtually all in rainforest extending from Atherton in the west to near Innisfail on the coastal plains'—at [10] and [11].

His Honour also referred to parts of the connection report which identified language, cultural and spiritual connection. It contained 'many examples' that showed the Ngadjon-Jii People had maintained their connection to the determination area, including:

> [O]ccupying the remnant forests or otherwise utilizing them to avoid being taken to missions that operated during the first half of the twentieth-century; working on local farms whilst occupying traditional dwellings; engaging in occupations carried out on the country, such as timber cutting or fossicking; and in some cases, returning to Ngadjon-Jii country upon release from government missions—at [16].

Spender J was satisfied, based upon all the information before the court, that the Ngadjon-Jii People have a long-standing and continuing connection to the determination area under traditional laws acknowledged and traditional laws observed by them—at [18].

The court noted that:

> [T]he number of native title determinations…, which have been reached by consent, has dramatically increased in recent years. This suggests that governments and other parties are increasingly aware of the benefits of negotiated settlements of native title claims, which otherwise have the potential to be lengthy, costly and divisive in the community—at [21].

Determination — s. 225

His Honour concluded that it was within the court's power to make the order sought and that it was proper to do so. Accordingly, a determination was made recognising that native title exists in relation to the determination area and is held by the Ngadjon-Jii People.

In relation to part of the determination area (other than in relation to water), the native title is a right, in accordance with traditional laws and customs, to possession, occupation, use and enjoyment to the exclusion of all others. In the remainder of the determination area, the native title rights and interests are non-exclusive rights to:

- access and be physically present on the determination area in accordance with traditional laws and customs;
- hunt, fish, gather on the determination area for the purpose of satisfying personal domestic, social, cultural, religious, spiritual, ceremonial and non-commercial needs in accordance with traditional laws and customs;
- take, use and enjoy the natural resources of the determination area for the purpose of satisfying personal, domestic, social, cultural, religious, spiritual, ceremonial and non-commercial communal needs in accordance with traditional laws and customs;
- maintain and protect from physical harm, places within the determination area of importance to native title holders in accordance with traditional laws and customs;
- perform social, cultural, religious, spiritual or ceremonial activities on the determination area and invite others to participate in those activities in accordance with traditional laws and customs;
- pass on native title rights and interests in relation to the determination area in accordance with traditional laws and customs; and
- camp in accordance with traditional laws and customs (defined so as not to include the right to permanently reside or build permanent structures or fixtures).

In relation to one part of the determination area, the right to make decisions in accordance with traditional laws and customs about the use and enjoyment of the determination area by Aboriginal people who are governed by the traditional laws acknowledged and traditional customs observed by the native title holders was recognised.

The native title rights and interests in relation to water are non-exclusive rights to:

- use, enjoy, hunt on and fish in and gather from the water for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes; and
- take and use the water and its resources for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes; provided that in all such cases, the purpose is non-commercial and that any such right does not confer any right to possession, occupation, use or enjoyment of the water to the exclusion of others. 'Water' means water as defined by the *Water Act 2000* (Qld) and tidal water as defined in the *Land Act 1994* (Qld).

There are no native title rights in, or in relation to, minerals and petroleum as defined by the relevant Queensland legislation. The native title rights and interests are subject to and exercisable in accordance with the Laws of Queensland and the Commonwealth.

The nature and extent of other interests in relation to the determination area include those of:

- various permittees and licensees, as well as members of the public, relating to the use and management of the Wooroonooran National Park, the Topaz Road National Park and the Malanda Conservation Park;
- the West Tropics Management Authority;
- the local shire councils;
- Ergon Energy Corporation Limited and Telstra Corporation Limited;
- the public in relation to accessing and enjoying waterways, beds and banks and foreshores of waterways which were public places as at 31 December 1993, as well as in accordance with rights and interests held generally under the laws of Queensland and the Commonwealth.

The relationship between native title and other rights and interests is set out in detail in the determination.

The native title is not to be held in trust. An Aboriginal corporation, to be nominated in writing within 12 months, is to be the prescribed body corporate for the purposes of s. 57. Other conditions for the nomination are set out in the determination.

Walker v Queensland [2007] FCA 1907 (Eastern Kuku Yalanji People)

Allsop J, 9 December 2007

Issue

The issue before the Federal Court was whether, pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (NTA), a determination recognising the existence of native title should be made in relation to the Eastern Kuku Yalanji People's claimant application. It was decided that the determination should be made.

Background

The determination area covers approximately 144,000 hectares of unallocated state land and timber reserve in far north Queensland and incorporates an area of tropical rain forests, beaches, reefs and mountain ranges between Mossman in the south, the Annan River (south of Cooktown) in the north and the Great Dividing Range to the west. It includes Yalanji communities at Wujal Wujal and Mossman. It also includes the Daintree, Cape Tribulation, Black Mountain and Cedar Bay national parks. It falls within the Wet Tropics Bioregion, which is of international significance due to its outstanding natural and cultural values—at [2].

The Eastern Kuku Yalanji People's application was lodged with the National Native Title Tribunal (the Tribunal) in December 1994, pursuant to s. 61(1) of the NTA. The Tribunal's mediation process was supplemented with case management by court registrars. As a result, the parties agreed upon the terms of a draft determination and sought orders in, or consistent with, the terms of that agreement pursuant to s. 87.

Material before the court

An anthropological report by Peter Blackwood, a consultant for the Cape York Land Council, was before the court in which Mr Blackwood 'addressed the evidentiary requirements' of s. 225 and provided 'a comprehensive summary of anthropological research undertaken' relevant to the connection of the Eastern Kuku Yalanji claim group to the determination area. His Honour Justice Allsop noted that the report:

- illustrated, 'with some clarity', the existence of organised Aboriginal occupation and possession of the determination area extending back beyond the imposition of British sovereignty over the area;
- confirmed the continuity of an identifiable society of Aboriginal people, primarily identified by the principle of cognatic descent with an emphasis on patrilineal descent, having a connection with the determination area in accordance with traditional laws which they acknowledged and traditional customs which they observed;
- indicated that descent was traced from persons and groups recognised in the regional Aboriginal community as associated with Eastern Kuku Yalanji identity, and with the claim area, soon after European occupation—at [15] to [18].

In examining the anthropologist's report, the court was:

- 'conscious' that other experienced lawyers, anthropologists and historians retained by the State of Queensland had been closely involved in the mediation of the application and, therefore, in 'bringing forward' the consent determination;
- aware that other respondents had participated closely, as evidenced by the 15 indigenous land use agreements related to the determination area made with various respondents—at [24].

In the light of these matters, and 'in the absence of contest about the material which has been placed before me', his Honour decided it was 'appropriate' to act on the anthropological report and the anthropological and genealogical material it summarised. According to the court, the historical context in which the anthropologist's report sat 'revealed the forces against which the traditional laws, customs and organisation have had to struggle to maintain the connection of the Yalanji people with country'. European intrusion into Kuku Yalanji land 'caused deep resentment and violence ' which led to government policies to manage hostilities, including the forced relocation of families, a practice that 'continued well into the modern era' and touched members of the claim group—at [19] to [22] and [25].

Allsop J noted that:

> Through all this buffeting by others, the evidence makes clear that Yalanji law, including land law and Yalanji custom, survived, underpinning the continued connection of the Yalanji people with country—at [23].

Power of court

After reviewing the relevant provisions of the NTA, Allsop J was satisfied that, pursuant to s. 87, the court had power, and it was appropriate, to make orders in, or consistent with, the terms of the parties' written agreement without holding a full hearing— at [27] to [38].

Comments by the court

The court noted that this was a very significant day for the parties and that the recognition of native title is:

> [C]lear, solemn and final recognition by Australia and its laws of the reality of historical occupation of country by the Kuku Yalanji people and of the existence of their laws and customs long, long before European settlement—at [39].

It was also an event of 'enduring importance for all Australians' because it was part of the creation of a new national legacy within the framework of the laws of Australia—at [40].

Determination — s. 225

The court made a determination that native title exists in relation to the determination area. It is held by the Eastern Kuku Yalanji People, defined in the determination as people descended from certain named ancestors or recruited by adoption in accordance with the traditional laws and customs of the Eastern Kuku Yalanji People.

In relation to part of the determination area, the native title rights and interests (other than in relation to water) are rights to possession, occupation, use and enjoyment to the exclusion of all others and rights to inherit and succeed to those rights. In the remainder of the determination area, the native title rights and interests are non-exclusive rights to:

- be present on the determination area, including by accessing, traversing and camping (with camping defined to exclude permanent residence or the construction of permanent structures or fixtures);
- hunt animals, gather plants and take natural resources from the determination area, but not for the purposes of trade or commerce (with natural resources defined to mean any clays, soil, sand, gravel and rock on or below the surface of the determination area but excluding minerals and petroleum);
- conduct ceremonies on the determination area;
- be buried and to bury native title holders, by interment in the ground, within the determination area;
- maintain springs and wells in the determination area where underground water rises naturally, for the sole purpose of ensuring the free flow of water;
- maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas, by lawful means, from physical harm; and
- the right to inherit and succeed to the native title rights and interests referred to above.

The native title rights and interests in relation to water are non-exclusive rights to:

- hunt and fish in or on, and gather from, the water for personal, domestic and non-commercial communal purposes;
- take, use and enjoy the water for the purposes of satisfying personal, domestic and non-commercial communal needs; and
- inherit and succeed to the native title rights and interests referred to above. 'Water' means water as defined by the *Water Act 2000* (Qld) and tidal water as defined in the *Land Act 1994* (Qld).

There are no native title rights:

- to gather plants in relation to certain parts of the determination area that are below the highest astronomical tide, as defined by the Marine Parks Regulation 1990 (Qld), and above the high water mark, as defined in the determination;
- in, or in relation to, minerals and petroleum as defined by the relevant Queensland legislation.

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

- state and Commonwealth laws; and
- the traditional laws acknowledged and traditional customs observed by the native title holders.

The other interests recognised in relation to the determination area include those of the local shire councils, the Wet Tropics Management Authority and the holders of various permits and authorities. The public rights to fish in any tidal waters and to navigate in any tidal navigable river within the determination area were also noted. The relationship between the native title rights and interests and the other rights and interests is set out in detail in the determination.

The native title is held in trust by the Jabalbina Yalanji Aboriginal Corporation, which was determined to be the prescribed body corporate for the purpose of ss. 56 and 57.

Close v Minister for Lands (NSW) [2007] FCA 1847 (Githabul People)

Branson J, 29 November 2007

Issue

The issue was whether the court should make orders pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (NTA) in terms of the consent orders sought. It was decided that it was appropriate to so to.

The determination area covers over 1,120 sq km in northern New South Wales, just south of the Queensland border, and includes areas of state forest, national park and part of a travelling stock reserve. It is only the second determination recognising the existence of native title in NSW, with the first being more that a decade ago: see *Buck v New South Wales* [1997] FCA 1624.

Background

The application for a determination of native title was lodged with the National Native Title Tribunal (the Tribunal) in September 1995. The court referred the application, together with two overlapping claims, to the Tribunal for mediation. Subsequently, the overlapping claims were discontinued and remaining application, which is dealt with in this case, was amended to (among other things) remove any claim to areas in Queensland.

An indigenous land use agreement was registered in August 2007, pursuant to which (among other things) the State of New South Wales:

- recognised that the Githabul People hold native title in accordance with the consent orders the court was invited to make in this case; and

- agreed to join with the applicant in applying for the consent orders.

Court's power to make the determination
After considering the terms of s. 87, her Honour Justice Branson concluded that the court was authorised to make the consent determination in the terms sought. Branson J also decided that it was appropriate to do so because:

- the applicant (representing the Githabul People) and the state together asked the court to make the determination;
- the NTA discloses an intention that mediation leading to agreement should be the primary means of resolving native title applications;
- the parties had been assisted during the mediation process by independent and competent legal representatives; and
- the court was satisfied by affidavit evidence that, as a consequence, the respective interests of the parties have been protected and that the state had given appropriate consideration to all relevant evidence and other material in the interests of the community generally—at [4] to [7].

Comments by the court
The court noted that its orders 'do not grant native title' but, rather, 'recognise that the Githabul People have long held rights and interests in the land under the traditional laws acknowledged and the traditional customs observed by them'—at [8].

Her Honour also commented that:

> Today is…a most significant day for the Githabul People and a significant day in the history of New South Wales...Reaching an agreement of this kind can take a lot of hard work and it requires the development of mutual trust. I commend the parties on their achievement—at [9].

Determination — s. 225
The determination recognises the existence of native title in the determination area held by the Githabul People. The native title rights and interests recognised in the determination area are non-exclusive rights to:

- access and camp (defined to mean 'casual camping') on the area;
- fish, hunt and gather animal and plant resources for personal, domestic and non-commercial communal consumption;
- take and use water for personal, domestic and non-commercial communal purposes;
- access the area for spiritual purposes and access sites of spiritual significance in the area; and
- protect, by lawful means, places of importance to the Githabul People from physical harm.

These rights and interests are subject to, and exercisable in accordance with:

- the laws of the State of New South Wales and the Commonwealth;
- the traditional laws acknowledged and traditional customs observed by the Githabul People; and

- the terms of the Indigenous Land Use Agreement registered in August 2007.

The determination states that native title does not exist in minerals, petroleum or uranium as defined in the relevant NSW legislation.

The other interests recognised in the consent determination area include those of the Casino Rural Lands Protection Board and others holding interests granted by the state, members of the public arising under state or Commonwealth law or the common law, local government authorities and electricity supply authorities. The relationship between the native title rights and interests and the other interests is set out in the determination.

The Githabul Nation Aboriginal Corporation was determined to be the agent prescribed body corporate for the purposes of ss. 56 and 57.