Native Title Hot Spots

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Contents

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Recent cases

Yorta Yorta High Court appeal

Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58

per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 12 December 2002

Issue

This decision deals primarily with the meaning of 'native title' and 'native title rights and interests' as defined under s. 223 of the *Native Title Act 1993* (Cwlth) (NTA). It arises out of an appeal brought by the Yorta Yorta people against the finding that they did not have native title to their traditional lands.

Background

In 1998, his Honour Justice Olney found that the tide of history had washed away any real acknowledgement by the Yorta Yorta of their traditional laws and any real observance of their traditional customs and, therefore, that native title did not exist in relation to the area claimed. In 1999, a majority of the Full Court of the Federal Court dismissed the appeal against this decision. In 2001, the High Court gave the claimants special leave to appeal. For further background information, see this web site at http://www.nntt.gov.au/media/1039673670_2340.html

Gleeson CJ, Gummow and Hayne JJ

Their Honours delivered a joint judgement in which they held that the appeal should be dismissed and that the Yorta Yorta people should pay the costs of the appeal. McHugh and Callinan JJ agreed with those orders but gave separate judgements.

Primacy of the NTA

Their Honours again emphasised that consideration of a claimant application begins with the NTA: '[W]hat the claimants sought was a determination that is a creature of that Act, not the common law' — [32]. The judges also commented that, at first instance, Olney J may have given 'undue emphasis' to what was said in *Mabo [No 2]* (1992) 175 CLR 1, 'at the expense of recognising the principal, indeed determinative, place that should be given to the *Native Title Act'* — at [70]. Later, it was said that:

> To speak of the "common law requirements" of native title is to invite fundamental error. Native title is not a creature of the common law…Native title, for present purposes, is what is defined and described in …the *Native Title Act. Mabo [No 2]* decided that certain rights and interests…survived the Crown's acquisition of sovereignty…It was this native title that was then "recognised, and protected"…in accordance with the *Native Title Act* — at [75].

Require a normative system that pre-dates sovereignty

It was noted that the native title rights and interests that survived the acquisition of sovereignty 'owed their origin to a normative system [i.e. a system of laws or rules] other than the legal system of the new sovereign power'. In other words, those rights and interests originated from acknowledged traditional laws and observed traditional customs and not from the common law of the new Sovereign power.

Their Honours went on to say that it was 'clear' that the relevant laws and customs are those that derive from a body of norms or a normative system that existed before sovereignty was asserted. They were quick to point out that it would be incorrect to assume that this is a reference to a system that has all the characteristics of a body of written laws. However, the rules that constituted the traditional laws and customs of the group under which the rights or interests are possessed must be rules having normative

content: 'Without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters' — at [38] to [42].

Effect of assertion of sovereignty

It was found that, once the Crown acquired sovereignty, the normative system that gave rise to native title could no longer validly create new rights, duties or interests. Further, as from the time sovereignty was asserted, there could be no parallel law-making system. As a result, the only rights or interests that will be recognised as native title rights and interests after the date of the assertion of sovereignty are those that find their origin in pre-sovereignty law and custom — at [43] and [44].

It was noted that the new legal order recognised then existing rights and interests in land and the rules of traditional law and custom which dealt with the transmission of those interests. Further, changes or developments in traditional law and custom that occurred after sovereignty was asserted may need to be taken into account, at least where these are of a kind contemplated by that traditional law and custom — [44].

Meaning of traditional in s. 223(1)(a)

According to the judges, in the NTA context, the use of the word traditional refers to a means of transmission of law or custom and conveys an understanding of the age of the traditions. Only the normative rules of the Indigenous societies that existed before the assertion of sovereignty are 'traditional' laws and customs. The judges later said that traditional:

> …does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre-sovereignty traditional laws and customs — at [46] and [79]. See also Callinan J's comments at [186].

It was found that s. 223(1)(a) is the relevant section for considering the issues raised by these proceedings, rather than s. 223(1)(c), upon which the full court had relied.

Continuing, vital system required

The judges emphasised that the normative system must have continued to function uninterrupted from the time sovereignty was asserted to the time of the determination of native title. In their view, the reference in s. 223(1)(a) to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned requires that the traditional laws and customs must be a 'system that has had a continuous existence and vitality since sovereignty'. If the system ceased to operate for any period, then the rights and interests that owe their existence to that system will cease to exist. Any attempt to revitalise that former system would not 'reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title' — at [47].

The judges noted that law and custom do not exist in a vacuum. Rather, they arise out of and define a society i.e. a body of persons united in and by its acknowledgment and observance of a body of law and customs:

> '[I]f the society out of which the body of laws and customs arises ceases to *exist as a group* which acknowledges and observes those laws and customs, those laws and customs *cease to have continued existence and vitality*. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise' — at [50], emphasis added.

This was because 'laws and customs and the society which acknowledges and observes them are inextricably interlinked'. In this context, the judges concluded that when deciding whether or not s. 223 is satisfied:

> ‘it will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs — at [55] and [56].

Meaning of ‘recognised by the common law’

The reference in s. 223(1)(c) to the rights or interests being recognised by the common law does not incorporate some pre-existing body of the common law of Australia defining the rights or interests known as native title into the NTA: ‘It is…wrong to read par (c) of the definition of native title as requiring reference to any such body of common law, for there is none to which reference could be made’ — at [76]. The requirement for common law recognition has two functions:

- it may mean that rights or interests which, in some way, are antithetical to fundamental tenets of the common law are refused recognition; and
- it emphasises the fact that two legal systems intersected when sovereignty was asserted. It is the rights and interests that existed at sovereignty and which survived the change in legal regime are the rights and interests which are ‘recognised’ by the common law — at [77].

Evidence

The judges acknowledged that ‘demonstrating the content of that traditional law and custom may… present difficult problems of proof’. But it was said that ‘the difficulty of the forensic task which may confront claimants does not alter the requirements of the statutory provision’. Their Honours went on to note that claimants were likely to

> …invite the Court to infer…the content of traditional law and custom at times earlier than those described in the evidence. Much will, therefore, turn on what evidence is led to found the drawing of such an inference and that is affected by the provisions of the *Native Title Act* — at [80].

It was also said that the amendments to s. 85 of the NTA in 1998 may have narrowed the ‘base [that] could be built for drawing inferences about past practices’. Under the old Act, the court was not bound by technicalities, legal forms or rules of evidence and was required to pursue the objective of providing a mechanism of determination that was ‘fair, just, economical, informal and prompt’. The new Act now provides that the Court is bound by the rules of evidence ‘except to the extent that the Court otherwise orders’ and the reference to fairness etc was removed — at [81].

Changes in laws and customs

In relation to the extent to which native title rights and interest could change over time, it was said that:

- demonstrating the content of pre-sovereignty traditional laws and customs may be especially difficult in cases where the laws or customs have been adapted in response to the impact of European settlement;
- some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the assertion of sovereignty and the present will not necessarily be fatal to a native title claim;
- it may be difficult to assess what, if any, significance should be attached to the fact of change or adaptation or to decide what it is that has changed or adapted. There is no single ‘bright line’ test for deciding either what inferences may be drawn or what changes or adaptations are significant;
- the key question is whether the law and custom can still be seen to be traditional law and traditional custom i.e. is the change of such a kind that ‘it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs

observed by the relevant peoples when that expression is understood in the sense earlier identified?' — at [82] and [83].

Interruption of use and enjoyment

The judges acknowledged that the interruption of use or enjoyment of rights and interests arising under traditional law and custom presented more difficult questions than those raised by change or adaptation of laws and customs because:

- the exercise of native title rights or interests may constitute powerful evidence of both the existence of those rights and their content;
- evidence that, at some time since sovereignty was asserted, some native title claimants have not exercised the rights and interests they are claiming does not inevitably lead to a conclusion that s. 223(1) has not been satisfied. Those provisions are directed to:
  - — possession of the rights or interests, not their exercise;
  - — the existence of a relevant connection between the claimants and the land or waters in question.
- both ss. 223(1)(a) and (b) are cast in the present tense, which means that the inquiry is focussed on present possession of rights or interests and present connection of claimants with the land or waters. However, the continuity of the chain of possession and the continuity of the connection are relevant;
- the claimants must prove that their connection to country is a connection by their traditional laws and customs, in a context where traditional refers to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty;
- laws and customs will only be properly described as the traditional laws and customs if acknowledgment and observance of those laws and customs has continued substantially uninterrupted since sovereignty — at [84] to [86].

Their Honour's conclusion was that any interruption to use and enjoyment would mean that traditional laws and customs had not been transmitted from generation to generation of the society for which they constituted a normative system. If use and enjoyment resumed, it would not be the same normative system in operation in the same society. This was so, in their view, even where the body of laws and customs commonly accepted or agreed to by a 'new society of indigenous peoples' has a content that was similar to or 'perhaps even identical with, those of an earlier and different society' of their ancestors:

> [C]ontinuity in acknowledgment and observance of the normative rules [i.e. the traditional laws and customs] in which the claimed rights and interests are said to find their foundations before sovereignty is essential because it is the normative quality of those rules which rendered the Crown's radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title — at [87] and [88].

The qualification that acknowledgement and observance must have continued 'substantially' uninterrupted was said to be important because:

- proof of continuous acknowledgment and observance of traditions that are oral traditions over the many years that have elapsed since sovereignty is very difficult; and
- European settlement profoundly affected Aboriginal people. It is inevitable that the structures and practices of those societies and their members will have undergone great change since European settlement.

However, they went on to say that:

> [I]t must be shown that the society under whose laws and customs the native title rights and interests are said to be possessed has continued to exist throughout that period [i.e. from the assertion of sovereignty to the present] as a *body united by its acknowledgment and observance of the laws and customs* — at [89], emphasis added.

Interruption, not abandonment or expiry

It was held that describing the consequences of an interruption in the acknowledgment and observance of traditional laws and customs as 'abandonment' or 'expiry' of native title is apt to mislead. For example, abandonment might be understood as suggesting that there has been some conscious decision to abandon the old ways, or to give up rights and interests in relation to the land or waters. (It was noted that proof of continuous acknowledgment and observance of traditional laws and customs would negate any suggestion of conscious decision to abandon rights or interests.)

Their Honours were of the view that the inquiry about continuity of acknowledgment and observance does not require consideration of why acknowledgment and observance stopped. Continuity of acknowledgment and observance is a condition for establishing native title. If it is not demonstrated that that condition was met, examining why that is so is important only to the extent that the presence or absence of reasons might influence a judge's decision about whether there was such an interruption — at [90].

While expiry may be a more neutral term, using it to describe the situation may distract attention from the terms in which native title is defined. 'That is reason enough to conclude that its use is unhelpful for it is the words of the *Native Title Act* to which the inquiry must always return' — at [91].

This means that, in cases such as this one, the finding should be that there has been an interruption in the continuity of acknowledgement and observance of traditional law and custom and, therefore, a failure to fulfil the requirements of proof of native title under s. 223.

Conclusion

As their Honours found that the society that had once observed traditional laws and customs had ceased to do so, it was held that it no longer constituted the society out of which the traditional laws and customs sprang. Therefore, any claim by the Yorta Yorta people that they continued to observe laws and customs which they, and their ancestors, had continuously observed since sovereignty must be rejected — at [92] to [95].

It was expressly stated that this conclusion was not about changes in law and custom over time. It was about the interruption of observance of traditional laws and customs. This was, they said, a 'more radical finding than is acknowledged by arguments about the particular content of laws and traditions at particular times'. What had been found was that:

- the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs; and
- there was no evidence that they continued to acknowledge and observe those laws and customs.

'Upon those findings, the claimants must fail' — at [96].

Therefore, despite finding that the majority of the full court had made some errors in its interpretation of s. 223(1) and in reading that paragraph as incorporating notions of extinguishment by expiry into the definition of native title, since they were of the view that the claim was destined to fail in any case, their Honours dismissed the appeal with costs.

McHugh J

His Honour was 'unconvinced' that the interpretation of s. 223(1)(c) by the other members of the court reflected what the Parliament intended, making reference to statements made in the Senate: '[Those statements] showed that the Parliament believed that, under the *Native Title Act*, the content of native title would depend on the developing common law' and the principles laid down in *Mabo v Queensland [No 2]* — at [132]. In his view, excluding the common law from the definition of native title, gave s. 223 a narrower scope that was intended. However,

McHugh J was also of the view that the appeal should be dismissed with costs — at [135] and [136].

Callinan J

His Honour agreed that the appeal should be dismissed with costs. In relation to the interruption in connection, it was said that there may be exceptional cases where the laws or customs of the group 'contemplated discontinuity of acknowledgment or observance, or absence or departure from the land' — at [174].

Callinan J made reference to s. 190B(7)(a) — see [184]. His Honour expressed the view that this section, which is the part of the registration test that requires that the Native Title Registrar must be satisfied that at least one member of a native title group currently has, or previously had a traditional physical connection with the claim area, supported his view that the NTA implicitly requires actual presence on the land claimed. However, his Honour did not note that the section does not always require evidence of traditional physical connection in circumstances where the claimants have, for various reasons, been unable to access the claim area — see s. 190B(7)(b).

Gaudron and Kirby JJ (dissenting)

In a joint judgement, their Honours held that the appeal should be allowed with costs and the matter remitted to Olney J for reconsideration.

Continuity and maintenance

Their Honours acknowledged that the notion of continuity is a matter that 'bears directly on the question whether present day belief and practices can be said to constitute acknowledgement of traditional laws and observance of traditional customs' — at [111]. However, they found that s. 223(1)(b) requires 'only that there be a present connection to the claim area'. Holding otherwise led Olney J to make an error of law. They were also of the view that s. 223(1)(a) does not require that the claimants establish that the claimed rights and interests have been continuously exercised — at [103]. 'The notion of continuity as a traditional community "does not... find expression" in the definition of "native title" and "native title rights and interests" found in the NTA.' — at [109].

Gaudron and Kirby JJ were of the view that:

> The question whether there is or is not continuity is primarily a question of whether, throughout the period in issue, there have been persons who have identified themselves and each other as members of the community in question — at [118].

In their view, physical presence in a particular place was not necessary:

> Communities may disperse and regroup. To the extent practicable, individuals may, on the dispersal of a community, continue to acknowledge traditional laws and observe traditional customs so that, on regrouping, it may be that it can then be said that the community continues to acknowledge traditional laws and observe traditional practices — at [119]. See also [104].

Meaning of tradition

In relation to the requirement that laws and customs be traditional, Kirby and Gaudron JJ said:

> In the face of the acknowledged history of dispossession, it must be accepted that laws and customs may properly be described as "traditional"…notwithstanding that they do not correspond exactly with the laws and customs acknowledged and observed prior to European settlement — at [113].

Determination of native title

De Rose v South Australia [2002] FCA 1342

per O'Loughlin J, 1 November 2002

Issue

The question in this case was: Did native title exist in relation to the area claimed? The question was answered in the negative. While the claimants did prove that they retained *knowledge* of their traditional laws and customs, his Honour Justice O'Loughlin found that there was insufficient evidence given to prove that the claimants were currently acknowledging (or, as it was put, adhering to) those laws and observing those customs in the manner required under the NTA. This decision is subject to appeal.

His Honour was at pains to point out a 'most important qualification' in relation to the litigation, which was that the court must make a decision based upon what is put before it: 'That is, and always will be, a weakness in the adversarial system: a decision has to be made on the evidence that counsel places before the Court without the Court knowing whether it is the totality of the evidence that is available on the subject' — at [144].

Some of the findings noted below need to be read in the light of the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, summarised above. For example, the finding that native title was abandoned should be read in the light of the comments in the joint judgement at [90] and [91].

Background

This case concerns an application for a determination of native title that was made over three pastoral leases in the far north-west of South Australia that are collectively known as De Rose Hill Station (De Rose Hill). The group making the claim did so as *Ngura*ritja i.e. traditional owners of the claim area. The court accepted that the claim area was within Yankunytjara country. Some of the claimants were born on the station and many had previously worked or lived on the station. The last of those who worked on the station left in 1978. It should be noted that the claimants' traditional country extended beyond the station boundary.

The evidence of the claimants

Twenty-six Aboriginal people gave evidence in support of the application. O'Loughlin J provides an extensive summary of the evidence in his reasons for decision. Only two of the 23 witnesses were in what his Honour described as the younger generation, which led to the comment that:

> It was…very disappointing and somewhat significant not to have received evidence from more young people. One is left wondering whether the members of the younger generations have the same interest in native title elements as their elders — at [17].

One of the people who originally brought the application, identified as *Ngura*ritja in the anthropological reports, did not give evidence. No reason was given as to why this was so. This led O'Loughlin J to draw an inference that, if the person in question had given evidence, it 'would not have assisted the claimants' case — at [11], with reference to *Jones v Dunkel* (1959) 101 CLR 298.

His Honour was also concerned that, when asked what they would do if they were successful in obtaining a determination of native title, none of these witnesses gave 'detailed evidence that amounted to statements of intention to resume the observance of traditional customs or the maintenance and acknowledgement of traditional laws' — at [39].

Expert evidence

In addition to the Aboriginal witnesses, a linguist, an archaeologist, a historian, a former missionary and three anthropologists all gave evidence in support of the claim. A fourth anthropologist, who was to take a leading role,

was unable to give evidence due to illness. However, genealogies she prepared were used in the case. The only witness called by the state was an anthropologist. O'Loughlin J emphasised that:

> The evidence of the claimants and their Aboriginal witnesses will provide the most compelling evidence in any native title case. Even the evidence of [an anthropologist who is] a fully-initiated Western Desert man [and] also an eminently qualified anthropologist, could not be more important than the claimants' evidence when it comes to establishing whether the claimants are entitled to a determination of native title over the claim area — at [351].

He later noted that his conclusion in relation to the manner in which connection was established was 'no more than an inference that is based more on the evidence of Anangu [a word meaning 'person' or 'people' that the Pitjantjatjara and Yankunytjatjara people use to refer to themselves and other Aboriginal people] witnesses than it is on the opinions of the experts' — at [373].

His Honour referred favourably to the evidence of one of the anthropologists, commenting that he walked the path between being an initiated man and a neutral expert witness with 'considerable skill' and that he provided detail and explanations of traditional laws and customs relevant in establishing the laws and customs of the Western Desert region — at [337] and [344]. However, O'Loughlin J was of the view that:

> [W]hat was needed from the claimants was evidence that applied [the expert witness's] evidence to the claim area. That [evidence] was not forthcoming…
>
> [The expert witness] was not able to give evidence that the claimants acknowledged and observed traditional laws and customs. That is not a satisfactory basis from which to impute a level of knowledge to the claimants that is equivalent to that displayed by [the expert witness]. It would …be drawing a long bow to suggest that statements made by [the expert witness], who has never been on the claim land and has no significant personal knowledge of the claimants themselves, could be used to establish or support a level of observance and acknowledgement of traditional laws and customs by the claimants. That was, essentially, for the claimants themselves to establish on the basis of their evidence — at [342] to [343].

In respect of another of the anthropological experts, his Honour took the view that he was:

> [T]oo close to the claimants and their cause; he failed to exhibit the objectivity and neutrality that is required of an expert who is giving evidence before the court. Rather, he seemed — too often — to be an advocate for the applicants — at [352].

This led the judge to conclude that he could not safely rely on this witness's evidence where it was controversial, challenged or uncorroborated by clear evidence from another reliable source. His Honour was also critical that the anthropologist relied on interview rather than observation to ascertain the laws and customs of the people i.e. many of his opinions were drawn from interviews — at [374].

The linguist's evidence was not, according to the court, supported by the weight of the claimants' evidence. O'Loughlin J found that the Antikirinya and Yankunytjatjara are separate (though closely related) peoples. The evidence was referred to in relation to the state's contention that the Antikirinya had, at some early stage, been displaced from or otherwise left their traditional lands and had been replaced by new arrivals from the west. This contention arose, in part, from the maps of the early ethnographers, which showed the Yankunytjatjara and Antikirinya as separate languages and territories — at [306] to [313].

The evidence of the archaeologist, 'an articulate and impressive witness', that the claim area had been occupied by Aboriginal people prior to the acquisition of the land by the Crown was accepted. However, it did not

identify who the Aboriginal occupants of the land were at the time of sovereignty: 'Whether they were Yankunytjatjara, Pitjantjatjara, Antikirinya or some other group, cannot be ascertained by reference to his evidence — nor, indeed, by reference to any evidence in the trial' — at [315].

The evidence of the historian was accepted. However, his Honour was of the view that some of it was of little assistance to the court:

> I cannot make a finding in favour of the claimants based solely on [historical] evidence of the wider region, or because, by comparison to "their southern brethren", the north-west Aboriginal people [where De Rose Hill is situated] retained greater access to their land and greater observances of their traditional laws and customs. There must be specific evidence relating to the claimants, to those who preceded them and to the claim area…
>
> [T]he degree to which the requisite connection to the land has been retained (if at all) cannot be ascertained by reference to the evidence of [the historian]. It will be necessary to have regard to other sources of evidence, most notably the evidence of the claimants themselves — at [319] and [321].

Attitude of the pastoralists

Evidence for the respondents was given by the man who established De Rose Hill Station, his son (who now manages the station) and a former police officer and pastoral board inspector. In terms of their treatment of Aboriginal people, O'Loughlin J had 'no difficulty' in accepting that both father and son:

> [L]ack appreciation of Aboriginal culture. They showed no interest in the practices and beliefs of the Aboriginal people and, as a result, the Aboriginal people had no inclination to volunteer any information to them. That was why [they] had no knowledge of any place of special interest to Aboriginal people — at [464].

Overall, on many points, his Honour preferred the evidence of the Aboriginal claimants to that of the pastoralists:

> I do not accept that [the father] adopted an attitude of benevolence towards all Aboriginal people in general. I believe his attitude was to drive away those who were not workers or members of the immediate family of workers. [The father] did not appreciate that he had an aggressive bullying demeanour — at [436].

In particular, it was found that the father did not hesitate to intimidate Aboriginal people or to destroy their property by the use of firearms and that such conduct was 'high-handed in the extreme':

> The evidence…established that, by and large, the Aboriginal people and [the pastoralist] got on well initially but that, unfortunately, their relationship became strained and the claimants developed an apprehension that the [father and son] had an attitude of hostility towards them — at [436] and [448].

Later in his reasons, O'Loughlin J returned to this issue:

> The evidence showed [the father]…was mostly well disposed towards his Aboriginal workers and their families, but …would not hesitate to physically assault people…He would not tolerate Aboriginal people who wished to visit friends and relatives…living on the station…[O]nly those who worked for him and their families were, in his assessment..., entitled to be on "his property"….[H]e would not hesitate to resort to the occasional use of firearms to make his point…Even allowing for his shooting of the [Aboriginal people's] dogs, his conduct was not such as to justify a claim from the resident Aboriginal people that he was the cause of them having to leave their land. His son was possessed of a somewhat dour and unfriendly personality [and] like his father, neither understood nor cared about Aboriginal custom and culture. However, those weaknesses in his character and attitude cannot be converted into justifiable causes for the Aboriginal people leaving the claim area — at [895].

Reasons for leaving

Many of the witnesses for the claim group said that they had not returned to De Rose Hill since leaving because they were afraid to do so. However, despite his findings in relation to the lessee's attitude, O'Loughlin J held that, while the conduct of the father was one of the factors leading to the claimants leaving the station, any perception that the claimants had as to the hostility of the pastoralists to their presence on the land was not sufficient to show that they were forced into staying away from the property:

> If the Aboriginal people left De Rose Hill Station for an unreasonable or illogical reason (even though subjectively they may have thought their departure was necessary) they cannot now turn their lack of reasonableness and lack of logic to their advantage. Sadly, there are, in our Colonial history, numerous accounts of Aborigines having been driven off their land against their will. One can easily imagine, in such circumstances, how an Aboriginal person would retain a yearning for his or her country; and that yearning could easily translate into a retention of a spiritual connection with the country. But, as will become apparent when I discuss the evidence of the Aboriginal witnesses, there was no suggestion that the conduct of the [pastoralists] was so extreme that it forced the Aboriginal people to leave De Rose Hill Station against their will — at [291]. See also [893].

The evidence of many of the witnesses was that a number of gates on the station had been locked, thus impeding access to their country and creating the impression that De Rose Hill was 'locked country'. It was submitted that the locked gates, along with the strained relationship and hostility of the pastoralists, made it difficult for the claimants to access the land and be present on it — at [490]. O'Loughlin J held that some gates were first locked somewhere between 1991 and 1994 but noted that not all the gates were locked. This led to a conclusion that:

- the fact that gates were locked could only have served as some form of deterrent to entry to the station since the early 1990s;
- those witnesses who left De Rose Hill prior to the early 1990s could not use locked gates as their reason for not returning to care for the country;
- in any case, the claimants could have, if they wished to, entered De Rose Hill to follow their traditional pursuits e.g. pursuant to rights available to them under the reservation in favour of Aboriginal people to which the leases were subject — at [491].

In relation to submissions that the claimants left the stations as a result of various other factors, including natural disasters and the establishment of missions and other settlements, his Honour made the following comments:

> [I]t must be recognised that natural calamities such as droughts, floods and sickness may well be matters that militate against the Aboriginal claimants. Far from evoking an attitude of sympathy and leniency to an application, they may constitute the very reason for explaining why the Aboriginal people have left a particular area and, in so doing, have broken their connection with that land. This is and will continue to be an ongoing problem in the pursuit of native title. Aboriginal claimants must be ready to maintain and assert their rights and interests in relation to land and waters where those "rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by" the Aboriginal people. Thus it is that many native title claimants will have to overcome such matters as the introduction of livestock, the availability of rations, the establishment of Missions and the other matters to which reference has been made. Neither the common law nor the provisions of the NTA constitute a bulwark against the presence of these European influences. Any of them may, in a given case, have such an effect as to break the necessary connection with the claim area — at [888].

His Honour was of the view that the two main reasons why Aboriginal people left De Rose Hill, both of which 'deny the presence of a continuing connection with the claim area' were:

- the opening of a community centre in 1968. 'It was like a magnet, offering easy accessibility to food and water coupled with the community facilities that were available'. Later, the community also became the location for pension payments; and
- opportunities for work began to dry up for various reasons, including that, from 1968, pastoral lessees were required to pay award rate wages to Aboriginal employees — at [896].

His conclusion was that:

> Of the two factors, the factor of greatest significance was the loss of work. That resulted in the Aboriginal people leaving De Rose Hill; they did not attempt to stay in the area and maintain a physical or spiritual connection with the land in accordance with the traditional laws acknowledged and the traditional customs observed. In a lifestyle that was more in line with European practice, the loss of employment in one location led to a re-location in another place, preferably in the hope of obtaining paid work. The movement of the Aboriginal people away from De Rose Hill Station was not associated with their Aboriginal lifestyle, traditions or customs; it was governed by aspects of European social and work practices — at [896].

Care of sites of significance

Two of the primary witnesses for the claimants gave evidence that they did not attend to certain ceremonies in relation to significant sites while working on the station because they feared that they would be sacked if they did — at [104]. O'Loughlin J rejected this evidence:

> The strength of Aboriginal culture is well-known; the attachment to land intense; the importance that is attached to secret and sacred places is exceptionally strong. If [those who were] *Nguraritja* for De Rose Hill were intent on performing their duties… they would have entered upon the land — even surreptitiously if necessary — to perform their duties. Save for some occasional hunting trips, not one witness for the claimants has attended to any religious, cultural or traditional ceremony or duty on De Rose Hill Station in almost twenty years — at [106].

His Honour was of the view that the claimants could have undertaken these duties outside of working hours. Further, their failure to attend to these things could not be characterised as an evolution of the traditional law and custom under the pressure of changing circumstances because the evidence was that caring for sites of significance is still an important responsibility — at [107].

Knowledge of law and custom

The court took evidence on 13 sites, eight of which are within the station boundary. His Honour was satisfied that the claimants had demonstrated their knowledge of both the particular sites and the activities which are engaged in at those sites:

> [T]he evidence on these subjects was sufficient to establish that those witnesses still retain a knowledge of those activities, many of which are site specific. Nevertheless, the question still remains: can it be said that the claimants' knowledge of those activities means that the claimants have retained a connection to the claim area? — at [381].

His Honour was particularly concerned 'that there has been *a virtual absence of all Aboriginal people from the claim area for twenty years or so*' — at [382], emphasis added.

Nguraritja as native title holders

The evidence established that there were a number of methods by which a person may be *Nguraritja*:

- being born on the claim area;
- having a long-term physical association with the claim area;

- having ancestors who were born on the claim area; or
- having geographical and religious knowledge of the claim area; and
- being recognised as *Ngurarítja* for the claim area by the other *Ngurarítja* — at [562].

However, O'Loughlin J held that a finding that a person is *Ngurarítja* for the claim area will not necessarily lead to that person satisfying s. 223(1) of the NTA. That subsection provides that:

> The expression *native title or native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples…in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples…; and
>
> (b) the Aboriginal peoples…, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

His Honour commented that:

> Some of the claimants may well be *Ngurarítja*…and may thereby satisfy the requirements of par 223(1)(a) of the Act. However, par 223(1)(b) requires that, by those laws and customs acknowledged and observed, those claimants must have a connection with the claim area…Given that native title can give rise to significant rights and interests in land, there should be…more than a mere trifling connection to the claim area for an individual, group or community to be entitled to a determination of native title in his, her or their favour — at [561].

As he was of the view that some of the claimants 'had a much stronger claim to a connection to the claim area than others', O'Loughlin J thought he must 'assess the degree of connection to the claim area of each witness who has been put forward as *Ngurarítja*'. This inquiry was said to be necessary in order to establish 'whether that person or those persons have the requisite connection that the NTA requires'. Only then did his Honour feel he would be in a position to assess the connection of the claimants as a whole — at [563].

Connection

His Honour found that, while there is no requirement that the claimants prove a biological connection between the Aboriginal people who occupied the claim area prior to the assertion of sovereignty and the present claimants, some continuity, whether through migration, marriage or even tribal dispute, must be shown. In this case, it was sufficient that the claimants had established a form of connection with those in occupation when sovereignty was asserted by a process of incorporation that reflected the pattern of migratory movements of the Western Desert people — at [372]. See also [345] and [346].

While accepting that the claimants must show 'substantial maintenance' of their connection from sovereignty to the present day in order to be entitled to a determination recognising the existence of their native title, O'Loughlin J was of the view that:

> [I]f I were to be satisfied that the claimants currently have a connection with the claim area through traditional laws and customs observed and acknowledged, and the best evidence available provides some support for the presence of that connection in the past…it might be open to me to make a finding of substantial maintenance of continuity of connection from sovereignty to the date of the application for a determination of native title…notwithstanding significant gaps in the chronology in the historical timeline for the claim area. To place any higher burden of proof on the claimants, who have a wholly oral tradition that reaches back reliably no further than three or …four generations, would be manifestly oppressive — at [570].

Onus of proof

His Honour noted that:

- the ultimate burden of proof rests on the claimants: *Coe v Commonwealth* (1993) 118 ALR 193 per Mason CJ at 206;
- although there may be an evidentiary burden on those alleging extinguishment because of abandonment to raise the issue, it is not for the respondents to prove that extinguishment has occurred. The claimants must establish that extinguishment has not occurred;
- the claimants must show that native title rights and interests currently exist and they will fail to do so if the rights and interests that they once possessed have been abandoned.

No connection or abandonment of connection

His Honour then detailed the evidence of the Aboriginal witnesses and, in the light of the matters discussed below, found that either they could not establish a connection with the claim area or that they had abandoned that connection — at [572] to [887].

His Honour was satisfied that:

- there was a time when Aboriginal people had exclusive possession in respect of the claim area;
- the traditional owners of the claim area were those who were recognised and accepted by others as *Ngurarítja*;
- ceremonies performed by the claimants show that the Aboriginal witnesses still retain knowledge of their traditional laws and customs;
- the evidence led showed the dreamings were not forgotten, but the claimants did not otherwise establish as a matter of probability that a particular individual still maintained a spiritual connection with the area — at [904] and [906].

His Honour went on:

> The claimants have submitted that the Aboriginal people, who are properly described as *Ngurarítja* in respect of the claim area, still maintain a spiritual and physical connection with the land. I have concluded that there is not now, and there has not been, any such physical connection to the claim area for the last twenty years or so. I realise that an ongoing physical connection is not necessary; a spiritual connection …can still be used to identify a retention of native title. I accept that many of the witnesses…have claimed that they have retained some affinity with the land. However, their actions belie their words. The occasional hunt for kangaroos, whilst no doubt traditional, stands out in isolation. No other physical or spiritual activity has taken place in the last twenty or so years. The *Ngurarítja* are presently individual people who, if they did once form part of a community or a group, no longer do so. There is not now and there has not been for many, many years, an *Anangu* community or a group of *Anangu* who could properly be described as having, as a community, or as a group, a physical or a spiritual connection with the claim area. In my opinion, it is appropriate to conclude that there is a lack of connection between the claimants and the claim area; the claimants have lost their physical and spiritual connection and, because of that loss, there has been a breakdown in the acknowledgment of the traditional laws and in the observance of the traditional customs; that breakdown is fatal to their claim — at [911].

Factors going to finding of abandonment

O'Loughlin J cited the following as factors relevant to his conclusion that the requisite connection did not exist in this case:

- the last of the claimants physically left De Rose Hill in 1978. The physical activities that would have been tangible evidence of a spiritual connection to the claim area occurred long ago. The participants in those activities are now either dead or are limited to the older witnesses;
- none of those who identified as *Ngurarítja* for the claim area has, since that time, lived together or joined together as a cohesive community or group;
- most of the claimants, having left De Rose Hill (for whatever reason) have made no

attempt, until the native title field trips, to return to the claim area;

- in the last twenty years or so, no claimant has attended to or cared for any sacred site on the claim area and no ceremony of any nature has been organised or performed on the claim area;
- there was insufficient evidence that any of the claimants had combined their work duties on De Rose Hill with their responsibilities as *Ngurariţja* for the land and waters;
- many of the Aboriginal witnesses chose to work on the various stations in the north-west area of the state so that they could earn money and obtain rations rather than caring for the land in the traditional ways of the *Ngurariţja*;
- there was inadequate evidence from members of the present generation about their connection with the claim area. Many of the Aboriginal witnesses referred to the fact that they had children, yet only two members of the younger generation came forward to assert a claim that they were entitled to a determination of native title in their favour over De Rose Hill — at [905] [910], [911] and [913].

In relation to the claim to being locked out, O'Loughlin J found that, even if he had been satisfied that this was the case (and he was not — see above), the claimants failed to put forward any substantial evidence that ceremonial activities referred to in the proceedings have been performed in the last twenty years on parts of their country that are outside of the station's boundary and where access is not an issue. This led his Honour to conclude that 'the adherence to (as distinct from knowledge of) traditional laws and traditional customs has eroded away' — at [907].

Decision

O'Loughlin J found that the claimants had failed to prove that they have retained a connection to the claim area by traditional laws and customs acknowledged and observed by them sufficient to satisfy s. 223(1)(b) of the NTA. Therefore, it was found that native title has ceased to exist because those who have asserted title have not established the present subsistence of the necessary connection s. 223(1)(b). Therefore, the application for a determination of native title was dismissed — at [914] and [915].

His Honour did note that his findings did not mean that the Aboriginal witnesses have lost their culture:

> [F]ar from it. Time and again, events occurred which made it plain that there were subjects that had particular significance to them. An obvious example was their respect for the memory of a person who has recently died and the use of the title "Kunmanara" for another person of the same name. Cissie Riley still follows the old lifestyle — sleeping under the stars in preference to a house and sitting on the ground rather than in a chair. Angkaliya said that she still prepares bush tucker. Tanya Singer-Ducasse is making determined efforts to learn about bush tucker, bush medicine and the songs and dances that are for the women. The Aboriginal men, on several occasions, sang secret and sacred songs at locations some of which I have named and which can readily be identified by anyone who has access to the restricted transcript of the trial. Two very remarkable ceremonies were performed…The first of those might have had general application in Aboriginal culture but the second, because of the topography, was explicitly site specific. These examples are only a few of the many examples that could be listed to show that the Aboriginal witnesses still retain *knowledge* of their traditional laws and customs — at [903], emphasis added.

Yet, according to O'Loughlin J, this evidence was not sufficient to show the *continuance* of traditional laws and customs — at [903].

Right to protect cultural knowledge

One of the rights and interests listed in the proposed determination of native title was:

> The right to prevent the disclosure otherwise

> than in accordance with traditional laws and customs of tenets of spiritual beliefs and practices (including songs, narratives, rituals and ceremonies) which relate to areas of land or waters, or places on the land or waters.

His Honour commented that, despite the reference to traditional laws, beliefs and practices which relate to land or waters in the proposed determination area, this was no different from the right to protect cultural knowledge which was rejected as a native title right or interest in the joint judgement in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*). According to O'Loughlin J, this right was a 'matter of spiritual beliefs and practices [which] are not rights in relation to land and do not give the connection to land that is required by s. 223 of the NTA' — at [51].

Effect of the grant of a pastoral lease in South Australia

As the pastoral leases under consideration were granted before the *Racial Discrimination Act 1975* (Cwlth), no question of invalidity due to the existence of native title arose and so there was no question of the past act provisions of the NTA applying. In coming to this conclusion, his Honour rejected the lessee's submission that the application of the transitional provisions in the *Pastoral Land Management and Conservation Act 1989* (SA) (the new Act), pursuant to which a pastoral lease granted under earlier legislation was converted to a lease under the new Act, gave rise to a new statutory lease which was a category A past act — at [245] to [246].

As O'Loughlin J was of the view that the grant of the pastoral leases under the South Australian legislation did not give the lessee a right of exclusive possession, each of the leases was said to be a non-exclusive pastoral lease as defined under the NTA — at [5] and [534]. According to his Honour, it followed from the findings in the joint judgement delivered in *Ward* that the grant of such a lease was inconsistent with:

- the native title right of possession, occupation, use and enjoyment of land to the exclusion of all others; and
- any native title right to control the access to and use of land, subject to an exception in relation to other Aboriginal people, which is discussed below.

Other native title rights and interests would survive the grant, including the right of access the area and the right to forage and hunt 'to name a few' — at [534] and [541].

Control of access by other Aboriginal people

His Honour was of the view that the grant of the lease did not extinguish 'residual rights of control of access and use as between the holders of native title and any other Aboriginal people who seek access to, or use of, the claim area in accordance with the traditional law and customs'. However, O'Loughlin J went on to say that:

> [T]he native title holders could not exercise any control over any person who was present on the claim area as a lawful invitee or licensee of the lessee; no question of competing decisions will arise. If the lessee were to refuse entry to an Aboriginal person who had been invited onto the claim area by the native title holders, the decision of the lessee would prevail — at [558].

With respect, this renders the proposed native title right somewhat nugatory.

Operational inconsistency

His Honour, in considering what would have been an appropriate determination had the requisite connection been proved to exist, made some comments in relation to the notion of 'operational inconsistency' and expressed the view that, over areas where the homestead, sheds, outbuildings and airstrips had been built or created (including a buffer zone), native title was extinguished — at [542] to [558]. In surveying the relevant case law, O'Loughlin J noted that: 'The judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Ward* indicates that their Honours have

not discarded the theory of operational inconsistency' — at [554].

While this is correct, with respect, it was said in the joint judgement that the term 'operational inconsistency' was useful only by way of analogy and that 'the analogy cannot be carried too far'. The notion of 'operational inconsistency' may be useful in determining the extent of the rights of a third party grantee, such as a pastoral lease holder, for the purposes of the application of the inconsistency-of-incidents test. However, their Honours went on to reject 'in principle' the notion that the 'operational inconsistency' analogy applied so that native title rights and interests are extinguished over areas where improvements are made: see *Ward* — at [149] to [151] and [394]. It is noted that this was in the context of the 'project approach' taken by the majority of the Full Bench of the Federal Court in relation to the Ord River irrigation project. However, there seems to be no reason why it should not apply equally to pastoral leases.

Further, in *Ward*, their Honours noted that: 'the erection by a pastoral leaseholder of some shed or other structure on the land may *prevent* native title holders gathering certain foods in that place' — at [308], emphasis added. However, the judges did not say that this was a means by which native title would be extinguished as a result of an inconsistency with the lessee's rights. Rather, the tenor of this quote is that of *regulation* of native title rights that are *consistent* with the rights of the lessee.

His Honour does not appear to have considered the possible effect of s. 24GC and s. 44H on the notion of operational inconsistency. Both sections were inserted into the NTA by the 1998 amendments which, amongst other things, dealt with the implications of the High Court's decision in *Wik* that the grant of a pastoral lease did not necessarily extinguish all native title rights and interests: see *Wik Peoples v Queensland* (1996) 187 CLR 1. For this reason, they would appear relevant in this context.

Further, as the making of an application for a determination of native title directly engages the determination provisions of the NTA, 'the statute lies at the core of this litigation' and: '[I]t is to the terms of the NTA that primary regard must be had. The only present relevance of those decisions is for whatever light they cast on the NTA': see *Ward* at [2] and [25].

Section 44H provides (amongst other things) that, in order to remove any doubts about the effect of doing activities permitted or required to be done under a valid pastoral lease, where the activity is done lawfully in accordance with the terms and conditions of a valid lease, both the requirement and permission to do the activity and the doing of it prevail over native title rights and interests but do not extinguish them. Similarly, s. 24GC NTA deals with (amongst other things) the doing of primary production activities on or after the date of the *Wik* decision over areas subject to valid non-exclusive pastoral leases granted on or before that decision. It provides that the doing of the activity prevails over any native title rights and interests but does not extinguish them. For example, pursuant to these sections the holder of a valid pastoral lease that permits or requires the building of a shed can build a shed. If either s. 44H or s. 23CG apply, then building of the shed does not extinguish native title.

Consideration of alternative determination

O'Loughlin J gave consideration to what would be an appropriate determination should his finding that the claimants had not maintained their connection be overturned on appeal. His Honour rejected as 'inappropriate' the claimants' submission that the determination should be that they had a right to the 'non-exclusive possession, occupation, use and enjoyment of the land and waters' of the claim area. He went on to say that, if the claimants were entitled to a determination of native title, then such a determination would recognise rights to:

- access to the claim area;
- move around the claim area;
- hunt, prepare and consume game for food;
- gather and use plants for food and for bush medicine, gather wild tobacco and collect resin for the manufacture of implements and weapons;
- access and use water found in soakages, rock holes, waterholes and springs (but not in man-made waters);
- gather and use timber, stone and ochre. 'Timber could be used for shelter, fuel and the manufacture of weapons; it could also be used in the manufacture of implements such as digging sticks, coolamons and other vessels and for ritual and artistic purposes. Stone could be used for implements, for tools, for weapons and for ritual and artistic purposes';
- hold meetings, to conduct religious activities and ceremonies on the land and to participate and to invite others to participate in those activities and ceremonies — at [920]. See also [922] for a draft determination based on these comments.

It was noted that, in accordance with the NTA and the complementary state legislation, the doing of any activity in giving effect to the rights and interests granted to the pastoral leaseholder would prevail over the native title rights listed above.

Appeal filed

The claimants filed a notice of appeal on 20 November 2002. Some of the grounds of appeal are that O'Loughlin J made an error in finding that:

- the claimants were not *Ngurarijta* for the claim area, or had no connection with the claim area or had abandoned any such connection;
- paragraph 223(1)(b) of the NTA requires that the claimants have a physical connection with the land at the date of the determination;
- none of the claimants had a continuing physical connection with the claim area.

Other grounds include that the trial judge erred in not finding that:

- a subjective belief could provide a reason for leaving the land and not returning to conduct ceremonies;
- the claimants had a connection with the land by their traditional laws and customs in circumstances where it was manifestly established that the claimants retained their traditional laws and customs and that they had, by those laws and customs, a spiritual connection with the land.

Other grounds allege that O'Loughlin J's findings that the claimants had no spiritual connection to the claim area and that the claimants had abandoned their connection with the land were against the weight of the evidence.

Queensland alternative state provisions valid

Queensland v Central Queensland Land Council [2002] FCAFC 371

per Beaumont, Lee and Kiefel JJ,
27 November 2002

Issue

This was an appeal and cross appeal from the decision in *Central Queensland Land Council v A-G of the Commonwealth of Australia* (2002) 116 FCR 390 per Wilcox J, 8 Feb 2002. That case concerned, amongst other things, determinations made by the Commonwealth Attorney-General under s. 43(1) of the NTA. Wilcox J found (amongst other things) that:

- the Commonwealth Attorney-General (the relevant minister) had no power to make the determinations because there was not, at the time of making them, a law of a state or territory that provided for alternative provisions as required under that subsection. The Queensland law under consideration, although enacted, was not in force at the time the Attorney-General made the determinations in question; and
- each of the determinations were invalid and without legal effect.

Appeals

The State of Queensland and the Commonwealth Attorney-General appealed against the decision that the relevant Minister was not, pursuant to s. 43, entitled to take into account legislation which, although passed and assented to, was not yet in operation.

Decision

In separate judgments, Beaumont, Lee and Kiefel JJ allowed the appeals, interpreting s. 43 so that it was open to the relevant minister to make a determination where the relevant Queensland legislation, although enacted, was not in force. Beaumont J viewed a reference to 'a law of the State' in s. 43(1)(a) as extending to legislation enacted, even if not yet in force and a reference to 'provisions' of a law in s. 43(1)(b) to the sections of such an Act. The Commonwealth Attorney-General's duty and function under s. 43 was to form as opinion as to whether the requirements of s. 43(2)(a)-(k) were satisfied or not. It was not an essential preliminary to this task that the relevant law is in force, although it did need to be enacted. Kiefel J was of the view that the words of s. 43(1) do not require the state or territory provisions to have commenced at the point when the relevant minister makes a determination about them, although clearly the relevant minister would need to be able to identify what was intended to come into effect.

The cross appeals

The Central Queensland Land Council (CQLC) appealed against declarations made by Wilcox J that:

- amendments to the *Mineral Resources Act 1989* (Qld)(MRA) in 1998 and 1999 were not invalid because of a failure to satisfy s. 24MA of the NTA or because of inconsistency with the *Racial Discrimination Act 1975* (Cwlth)(RDA); and
- each of the determinations made pursuant to s. 26A(1) of the NTA by the relevant minister was valid and effective in law.

Decision on cross appeals

According to Kiefel J:

- the critical question was whether the amendments to the MRA can be said to affect native title in the way described in s. 227 so as to amount to future acts. The amendments clearly could not be classified as future acts. They did not, as submitted by CQLC, adversely affect native title because they withdrew the right to negotiate which had been provided for in the NTA;
- it was by way of the determination pursuant to s. 43(1) of the NTA that the right to negotiate was withdrawn and not by the Queensland amendments;
- the right to negotiate was a procedural right under the NTA and not part of the bundle of rights which are native title rights;
- it was open for the relevant minister, pursuant to the fourth condition of s. 26A, to be satisfied that certain procedural rights would operate under the alternative state provisions (thereby rejecting a submission from the CQLC that s. 392 of the MRA, a provision which can operate to deem substantial compliance as full compliance, could operate to exclude procedural rights. The judge was satisfied that, reading the MRA as a whole and considering specifically the operation of ss. 419 and 421, s. 392 had no application to the native title provisions of the MRA.)

Therefore, Kiefel J upheld the validity of the Commonwealth Attorney-General's determination pursuant to s. 26A (the low impact future act regime). Beaumont and Lee JJ agreed with the reasoning of Kiefel J and the cross appeals were dismissed. Costs were awarded against CQLC.

Postscript: On 27 November 2002, shortly after this decision was handed down, Premier Peter Beattie announced that, notwithstanding the success of the state's appeal, the Queensland alternative state provisions would be dismantled by June 2003.

Application under s. 66B to replace the applicant

Lawson v Minister for Land and Water Conservation for New South Wales [2002] FCA 1517

per Stone J, 9 December 2002

Issues

The issues for determination in this case were to assess whether the authorisation of those named as the applicant in the Barkandji (Paakantyi) people's claimant application had been revoked and under what circumstances the Federal Court will permit the replacement of the applicant pursuant to s. 66B of the NTA.

Background

Dorothy Lawson and Philip Lawson (the Lawsons) made a claimant application on behalf of the Barkandji (Paakantyi) people by on 8 October 1997. The application relates to a large area of west and south-west New South Wales. On 29 August 1999, a delegate of the Native Title Registrar accepted the application for registration, thereby accepting that the Lawsons were authorised to bring the application in accordance with the traditional decision-making processes of the claim group.

An earlier application to replace the Lawsons was unsuccessful: see *Johnson, in the matter of Lawson v Lawson* [2001] FCA 894. In those proceedings, her Honour Justice Stone accepted that the Lawsons had lost the confidence of some very important members of the claim group. However, there was insufficient evidence to show that their authority had been revoked or that the relevant members of the claim group had been authorised, in accordance with the traditional process of decision making, to replace them, as required under s. 66B. The claim was referred to the National Native Title Tribunal for mediation under s. 86B of the NTA, for the limited purpose of attempting to resolve the dispute about the Lawsons' authority to proceed as representatives of the claim group.

As a result of the mediation, the Tribunal recommended that the court order that the New South Wales Native Title Services Ltd (NTS) convene an authorisation meeting. NTS is a corporate body funded to perform the functions of an Aboriginal/Torres Strait Islander representative body and a party to the proceedings.

The meeting was convened by NTS at Broken Hill on 5 July 2002. Affidavit evidence was given of the steps taken to give interested parties notice of the meeting, which included:

- extensive advertising of the meetings that included a map of the claim area, an agenda for the meeting and contact details for further information, along with notice that limited travel and accommodation assistance to attend the meeting was available;
- information sessions convened by NTS;
- sending letters advising of the meeting to 130 people and to Local Aboriginal Land Councils within the claim area and letters to the Lawsons and their legal representative.

Detailed minutes of the meeting were taken. One hundred and forty people attended. This was said to be an unusually large number for a claimant meeting. The absence of the Lawsons was noted in the minutes with regret. The meeting was chaired by NTS and Mr Smiley Johnson, a Barkandji man and Chief Executive Officer of the Indigenous Land Corporation. According to the minutes, after discussion, a vote was taken by a show of hands to revoke the authority of the Lawsons to act as the applicant. The minutes record that the vote to remove the Lawsons was 'unanimous' and that eight persons were approved to replace the Lawsons by applause, rather than a formal vote.

Authorisation under the NTA

Subsection 61(1) of the NTA provides a claimant application may be made under the NTA only by those persons authorised by:

> All the persons (the native title claim group) who, according to their traditional laws and

> customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title group.

Subsection 61(2) provides that, where more than one person is named as being authorised to bring the application, the people named are jointly 'the applicant'. The concept of authorisation is dealt with in s. 251B.

Five of the eight persons named in the minutes of the meeting (the proposed applicant) made an application to the court seeking to have their names substituted as the applicant, in place of the Lawsons, pursuant to s. 66B of the NTA, on the basis that the Lawsons' authority had been revoked. Her Honour referred to s. 251B of the NTA and agreed with Mansfield J in *Ward v Northern Territory of Australia* [2002] FCA 1477 that the section applies implicitly to the revocation of authority by a native title claim group. Stone J also cited with approval the approach taken by French J in *Daniel v Western Australia* [2002] FCA 1147 — see *Hot Spots* No. 2.

The Lawsons conceded that the persons named in the s. 66B application were all members of the native title claim group, as required. All the parties accepted that the Lawsons' original authorisation was conferred by a traditional decision-making process that existed at the time. That being the case, the Lawsons submitted that the alternative decision-making process referred to in s. 251B(b) could not apply and, therefore, that the meeting at Broken Hill was not sufficient to remove them and replace them with the proposed applicant.

The proposed applicant said that there is no challenge to the traditional decision-making process that appointed the Lawsons in the first place. However, the traditional system was unable to cope with the decisions now required in respect of a native title application. Therefore, the group had to resort to the more direct approach and have the claim group directly vote on the issues relevant to the application.

Her Honour was satisfied that 'there is no relevant traditional decision-making process capable of dealing with the decisions that need to be made to progress this matter and resolve the problem of who is to represent the Claim Group' — at [21]. In light of this, it was found that reference should to be made to s. 251B(b).

After stating that she was satisfied that all reasonable steps had been taken to advise members of the claim group, her Honour found that 'non-attendance of the Lawsons [was not] sufficient to invalidate the decision-making process adopted by the meeting' i.e. the acceptance of voting by show of hands and a unanimous vote — [22]. Stone J then addressed whether this new form of decision making resulted in authorisation of the applicants and found that it is not a requirement, that all the persons in the claim group must be in agreement — at [24]ff.

Section 251B specifies what is required to establish that 'all persons in a native title claim …authorise a person or persons to make a native title determination application'. Her Honour took the view the word 'all' has a limited meaning in this context, noting that the word 'all' is not repeated in s. 251B(b), which comes into operation if there is no traditional process of decision-making 'in relation to authorising the things of that kind'. Stone J was of the opinion that the subsection does not require 'all' members of the relevant claim group to be involved in making the decision. Nor does it require the unanimous vote of every member. According to her Honour, such an approach would allow individual members to veto any decision and it would be 'difficult if not impossible for a claimant group to progress a claim'.

The court concluded that 'it is sufficient if a decision is made once the claim group are given every reasonable opportunity to

participate in the decision-making process' — at [25]. Her Honour was satisfied that all reasonable steps were taken to advise the members of the Claim Group. In the absence of any evidence to the contrary, it was accepted that those who did not participate in the meeting chose not to be involved in the decision making of the claim group — at [17]. This conclusion should be read in the light of the facts of this case i.e. there was no evidence of that members of the claim group, other than the Lawsons, did not attend the meeting — see [22].

Further, the meeting was well attended, appropriately advertised and there was no dissent from any of the resolutions that were passed. Therefore, it was safe to assume that the resolutions approved by the meeting were approved by the claim group, including the resolution to revoke the Lawsons authority and replace them — at [27].

As an incidental point, the Lawsons asserted that some of the members at the meeting who voted were not members of the claim group. Her Honour considered that this did not invalidate the vote. The NTA did not require that decisions of native title claim groups be:

> 'scrutinised in an overly technical or pedantic way. Unless a practical approach is adopted to such questions the ability of indigenous groups to pursue their entitlements under the Act will be severely compromised' — at [28]

Further, in finding that the Lawsons' authorisation had been revoked, there was no necessity to reach a conclusion or express any opinion as to their prior conduct of the claim or whether or not they have been fairly or unfairly treated by the claim group — at [29]. That said, it does not appear that this case could be relied upon where there was a challenge to the process through which authority was purportedly given pursuant to s. 251B(b).

Decision

Her Honour was satisfied that the requirements of s. 66B had been met and ordered the proposed applicant replace the Lawsons in this application.

Holborow v Western Australia [2002] FCA 1428

per French J, 20 November 2002

Issue

This was an application brought pursuant to s. 66B of the NTA by members of the claim group for the Yaburara and Murdudhunera peoples, who sought to replace the current applicant in the main proceedings.

Background

A future act agreement (see s. 31(1)(b) of the NTA), dealing with areas within the claim that were subject to acquisition notices under s. 29 and s. 24MD(6A) of the NTA, had been prepared during negotiations about the proposed future acts. The proposed agreement had the support of the majority of the native title claim group. However, Ms Cooper (who was one of the people named as the applicant in the claim) refused to sign the agreement. As the claim was registered on the Register of Native Title claims, she was also one of those who constituted the registered native title claimant. In any right to negotiate proceedings, she was included as part of the native title or negotiation party — see s. 29, s. 30, s. 61(2), s. 75 and s. 253 of the NTA. The future act agreement could not be finalised without her signature.

Subsequent to her refusal, meetings were called by the Yaburara and Coastal Mardudhunera Aboriginal Corporation (the Corporation). The Corporation is run by a committee on behalf of the native title claim group, who constitute all the Corporation's members. The decision-making process utilised by the Corporation was said to be an adaptation of a consensus model used in traditional times.

Three meetings were called, at each of which resolutions were passed to remove Ms Cooper as one of those named as the applicant by

making an application to the Federal Court under s. 66B of the NTA. There were two unsuccessful hearings of the s. 66B application subsequent to the first and second meetings. In the first, his Honour Justice French was of the view that the original meeting was procedurally flawed for reasons, amongst others, of insufficient notice: see *Daniel v State of Western Australia* [2002] FCA 1147 summarised in *Hot Spots* No. 2.

At the second hearing, following a meeting by teleconference, his Honour formed the view that nothing less than a face-to-face meeting of the native title claimant group was necessary to endeavour to resolve the issue and to ensure that resolutions, if any, passed by the group reflected the intentions of its members. Consequently, a third meeting, facilitated by a member of the National Native Title Tribunal, was held as ordered on 14 November 2002.

Decision

French J was of the view that there was no 'single mandated process of traditional decision making' covering both groups and that, while there might be a traditional decision-making process relevant to land that can be located within the subgroups of the native title claim group, the native title determination covered both groups. However, his Honour accepted that the process of decision making utilised at the third meeting of the native title claim group to resolve this issue was a process agreed to and adopted by the persons in the native title claim group — see s. 251B(b). Ms Cooper, in failing to comply with the directions of the group, had exceeded her authority. Therefore, an order was made pursuant to s. 66B to replace the applicant, the effect of which was to remove Ms Cooper as one of the people named as the applicant in these proceedings.

Ward v Northern Territory of Australia [2002] FCA 1477

per Mansfield J, 2 December 2002

Issues

This case also dealt with an application pursuant to s. 66B of the NTA in relation to a claimant application brought on behalf of the Miriuwung and Gajerrong people.

Background

This decision followed a similar application by the Northern Land Council (NLC), dealt with in *Ward v Northern Territory* [2002] FCA 171. That application was dismissed by O'Loughlin J on 8 February 2002, primarily on the ground that the evidence did not establish that the applicant had been authorised by the native title claim group. A further s. 66B application was filed by the NLC on 27 May 2002. It sought orders that would, in effect, replace the 17 people currently named as the applicant (the current applicant) with 15 people (the proposed applicant). The application was supported by affidavit evidence of 11 of the 15 people named as the proposed applicant and three affidavits from an anthropologist, Mr Kim Barber. On 9 August 2002, a joint affidavit was filed by counsel acting for 12 of the claimants who opposed the s. 66B application and who alleged, amongst other things, that certain assertions made by Mr Barber in his affidavits were wrong 'in fact and in traditional law'.

Counsel for those bringing the s. 66B application drew the court's attention to s. 77A of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth), which mirrors the concept of authorisation set out in section 251B. Referring to *Alderson v Northern Land Council* (1983) 67 FLR 353, his Honour Justice Mansfield recognised that the complexities involved in deciding who are the traditional owners meant that decisions on this point cannot be made quickly or without both a consultative process and an understanding of the relevant Aboriginal lore, traditions, observances, customs and beliefs.

Daniel principles applied

In approaching the application of s. 66B, Mansfield J adopted the principles set out by his Honour Justice French in the case of *Daniel v State of Western Australia* [2002] FCA 1147, which are summarised in *Hot Spots* No. 2.

Reliance on anthropological evidence

As in *Daniel*, reliance was placed on the evidence of a qualified anthropologist (Kim Barber) with 'considerable experience in anthropological research concerning the native title claim group since 1983', a date well prior to the commencement of the native title proceedings in 1995. Little weight was placed on the joint affidavit challenging the evidence of Mr Barber because the affidavit was assertive rather than detailed, did not address much of the material advanced, provided no description of facts or matters on which Mr Barber's view may be tested, and none of the eight deponents attended for cross-examination.

Findings

Based on the material before the court, Mansfield J found that:

- the native title claim group is organised on the basis that responsibility for, and control of, the land which is the subject of the claim area is exercised by various estates or local groups. Members of the local groups, who refer to their local areas as their *Dawang* or country and who are responsible for speaking for, and looking after, the local areas are called *Dawawang* (traditional owners);
- the local groups make decisions in relation to particular land under the traditional law and custom of the native title claim group and not by some consensual or democratic process;
- traditionally, senior persons who have acquired appropriate knowledge are responsible for looking after sacred sites and rituals and also have responsibility for secular matters, such as the authorisation of persons to make a native title claim and deciding who to instruct as solicitors to conduct it;
- decisions made about the claim area, including those concerning the claim, involve consultations between the *Dawawang* for the particular areas comprising the claim area and other senior Aboriginal persons who are knowledgeable about the claim area or parts of it and who have custodial responsibility for it;
- the individual members of the native title claim group who do not agree with the decisions reached by the 'elders' by this process do not have a right of veto. Decisions reached in the manner described are not invalid or ineffective because some individual members of the native title claim group do not agree with them — at [31] to [33].

Consultation

The members of the native title group conducted meetings on both 26 January 2002 and 9 May 2002 where proposals to vary the persons named as the applicant were discussed. His Honour was satisfied that:

- the meeting on 9 May 2002 was attended by representatives of the *Dawawang* and by senior ceremonial or law persons (*Madjang*) for the claim area and that sufficient notice of the meeting had been given to all concerned;
- those present at the meeting decided that the current applicant be replaced by the proposed applicant and it was also decided that NLC represent the applicants;
- all of these decisions taken at that meeting were made in accordance with Aboriginal law and with the traditional decision-making processes required by the traditional laws and customs of the native title claim group — at [35] to [38].

Decision

Based on these findings, it was held that

- those named as the current applicant ceased to be authorised by the claim group following the decision made on 9 May 2002;

- those named as the proposed applicant are members of the native title claim group and are authorised as and from that date to maintain the application and to deal with matters arising in relation to it;
- that authorisation is subject to the expressed limitation that the Northern Land Council solicitors are to be engaged by the proposed applicants to act in the conduct of the claim.

Orders were made pursuant to s. 66B replacing the current applicant with the proposed applicant. The proposed applicant is to file both a notice of address for service within 28 days and an amended application to give effect to this order.

Anderson v Western Australia [2002] FCA 1558

per French J, 13 December 2002

Issue

The court considered whether or not the requirements of s. 66 had been fulfilled.

Background

An application under s. 66B was brought to remove Mr Yarran, one of the people included in the group named as the applicant and to replace him with another member of the claim group. It was alleged he was being uncooperative in relation to several future act matters. There was also some dispute as to whether or not SWAL&SC was representing all the claimants.

His Honour Justice French noted that, as the s. 66B application was brought by 'the applicants', it included Mr Yarran. One of the requirements under s. 66B is that the people making the s. 66B application are authorised in accordance with s. 251B of the NTA. Clearly, Mr Yarran was not so authorised. Therefore, the s. 66B application could not satisfy that condition.

The meeting at which it was decided to remove Mr Yarran was advertised in the classified section of the West Australian newspaper. French J commented that:

> It is doubtful that a notice of this kind, in fine print appearing among classified advertisements relating to creditors meetings and the like, had any real prospect of coming to the notice of those who might need to know about the meeting.

Decision

His Honour held that the evidence filed so far was clearly insufficient to meet the evidentiary requirements for an application under s. 66B, as set out in *Daniel v Western Australia* [2002] FCA 1147 — see *Hot Spots* No. 2:

> I am inclined to think that the whole process of authorisation of the s. 66B application and of the replacement applicants should be revisited if it is to be renewed. In addition, attention will need to be given to the question of proof of authorisation — at [15] and [21]

French J also commented that SWAL&SC was the only body with the funding and 'in my opinion', the authority to instruct solicitors on behalf of the applicant as a whole.

Objection to the application of the expedited procedure

The determinations summarised below raise interesting points or develop the law relating to right to negotiate applications made under s. 75 of the NTA i.e. objections to the application of the expedited procedure and future act applications. For further information about right to negotiate proceedings, see the *Guide to Future Act decisions* on this web site at http://www.nntt.gov.au/futureact/Info.html. Significant Tribunal determinations are also reported in the Federal Law Reports.

Jurisdiction

Kathleen Parry & Ors on behalf of the Wagiman, Ngangiwumeri, Malak Malak, and Kamu Peoples/ Buchanan Exploration Pty Ltd/ Northern Territory

NNTT DO01/139, Mr J. Sosso,
21 October 2002

The proposed tenement is almost entirely located on an area that is subject to Crown Lease Perpetual 435 (CLP). Tenure searches revealed that the perpetual lease was issued after the commencement of the *Racial Discrimination Act 1975* (Cwlth) (RDA) but before the commencement of the NTA. The Tribunal was alert to the jurisdictional issue raised by the High Court decision on the effect of this type of lease in *Western Australia v Ward* (2002) 191 ALR 1 i.e. in some cases, a CLP may be an act that wholly extinguishes native title.

As a general principle, there is no onus on the Tribunal to ascertain, in the absence of parties making submissions, whether it has jurisdiction. However, when the Tribunal has material before it that suggests that it is, or may be, without jurisdiction, whether either party has raised the issue, the Tribunal cannot assume it has jurisdiction. The Tribunal gave the parties an opportunity to address this matter. The native title party made submissions in support of jurisdiction and jurisdiction was not challenged by either the government or grantee party. The Tribunal found, *prima facie* on the material before it, that it could proceed with the inquiry and make a determination — at [7].

Evidence

Paddy Huddlestone and Ors on behalf of the Wagiman, Warai and Jawoyn Peoples/Northern Territory/NT Gold Pty Ltd and Ors

NNTT DO01/137, Mr J. Sosso,
27 September 2002

Affidavit

The government party challenged the use of a standard form affidavit that did not have the proper objection number, incorrectly described the grantee party, had the wrong date on the bottom of each page and substantially duplicated the content of an affidavit submitted in another objection. The Tribunal accepted that the form of the affidavit was in error, but that the error went only to form and not to substance. The reason for this finding was that the statements were not merely formulaic. They were based, amongst other things, on two similar affidavits relating to objections in the same area, which were both relatively small and over pastoral lease land — at [11] and [12].

Sites of particular significance

The government party also challenged the usefulness of a male deponent identifying a women's site, while expressly acknowledging that men cannot speak for the site. The Tribunal referred to *Little v Western Australia*

[2001] FCA 1706 and held it is a condition precedent to a finding that an area or site is of particular significance that the Tribunal have before it evidence of the importance of a given area or site, in accordance with the traditions of the native title holders. The best evidence of such traditions is from a person or persons who have the traditional knowledge and have the traditional authority to speak for the relevant area or site. No evidence was submitted by a properly authorised female native title holder. The Tribunal held mere identification of a site without the presentation of any additional evidence is not sufficient for the Tribunal to make a finding that it is of particular significance for the purpose of s. 237(b) — at [14].

Community of native title holders

A party asserting that there is a community of native title holders should properly explain the nature of the community. The Tribunal indicated that information about the number of native title holders residing or visiting the locality, whether it is seasonally or permanently occupied and whether the community is wholly or partially composed of native title holders, would be useful in this context. A bald assertion that there are communities in the locality, without more, is insufficient — at [18]

In this case, there was no primary evidence that any member of the claim group resided at either of the named communities. In the absence of any evidence or any assertion by a native title holder to that effect, the Tribunal was not prepared to assume that either comprised communities of native title holders.

Kathleen Parry & Ors on behalf of the Wagiman, Ngangiwumeri, Malak Malak, and Kamu Peoples/ Buchanan Exploration Pty Ltd/ Northern Territory

NNTT DO01/139, Mr J. Sosso,
21 October 2002

The *Upper Daly River Land Claim Report*, submitted by the native title party in this matter, reported on a site called Kalay that is situated 200 metres from the southern boundary of the proposed tenement and which was acknowledged in the report to be a very important site. There was no direct evidence about the site before the Tribunal. The Tribunal determined that the importance of this site 'is so manifest and so clear that it is appropriate in the circumstances to accept that Kalay is a site of particular significance' (without the need for any direct evidence from a native title holder) by drawing this inference from the Land Claim Report. Having found that there was a risk of direct interference in s. 237(a), the Tribunal held it was not necessary to make a predictive risk assessment regarding s. 237 (b) or (c) — at [37] and [67].

Authority to give affidavit evidence

Kathleen Parry & Ors on behalf of the Wagiman, Ngangiwumeri, Malak Malak, and Kamu Peoples/ Buchanan Exploration Pty Ltd/ Northern Territory

NNTT DO01/139, Mr J. Sosso,
21 October 2002

The government party challenged the authority of the deponent to speak for the claim group and argued that, ideally, authority should be objectively evidenced from those whom the witness purports to represent. The Tribunal raised the distinction between the nature of authorisation of a native title holder to speak on behalf of sacred sites and of a

native title holder providing evidence of social or community activities. The requisite authority discussed in *Little v Western Australia* [2001] FCA 1706 applies to sacred site evidence. Evidence of community and social activities, or history or general environment of the particular land and waters can be given by any native title holder — at [18] to [21].

The Tribunal held that the core issue, apart from the nature of the evidence itself, is whether the deponent has the relevant knowledge and experience of the activities deposed to. The Tribunal also needs to ascertain that the deponent is a member of the claim group and that they are giving direct, rather than hearsay, evidence. If these issues are addressed, then the Tribunal need not inquire further as to the deponent's status within the community of native title holders that comprise the native title claim group — at [21].

The decision of O'Loughlin J in *Ward v Northern Territory* [2002] FCA 171, referred to by the government party, was distinguished as it related to a different type of authorisation, namely authorisation to replace a current applicant under s. 66B. The Tribunal referred to *Allan Griffiths/BHP Billiton Minerals Pty Ltd/Northern Territory*, NNTT DOO1/100 in which the factors that are relevant to determining if a person has requisite authority to speak on behalf of a site of particular significance are discussed. The Tribunal held that authorisation for the purposes of s. 61 or s. 66B of the NTA is conceptually different from the type of authorisation required for s. 237(b) — at [25] to [28].

With regard to sacred site evidence, as there was no evidence of the deponent's qualifications to speak for the sites, the Tribunal accepted, in the context of a s. 237(b) assessment, that the deponent's evidence of the sites had the weight of one member of the native title claim group — at [32].

Interference with social and community activities — s. 237(a)

Kathleen Parry & Ors on behalf of the Wagiman, Ngangiwumeri, Malak Malak, and Kamu Peoples/ Buchanan Exploration Pty Ltd/ Northern Territory

NNTT DO01/139, Mr J. Sosso, 21 October 2002

For the purposes of s. 237(a), the native title holders provided detailed evidence of current social and community activities, which was unchallenged at the hearing. The Tribunal referred to some of its earlier decisions in Western Australia, where it was determined that the grant of the future act in question would be likely to result in direct interference with community and social activities. In those matters, there was evidence of regular camping, travelling and hunting on the relevant land and waters. Further, the evidence demonstrated that the activities 'were not isolated, were conducted on a frequent basis and played an important part in the life of the claim group in question' — at [49] to [58] and [62].

The Tribunal noted that the regulatory regime governing the grant of an exploration licence in the Northern Territory is quite different from that which applies in Western Australia in that 'it was… specifically drafted with native title considerations in mind'. The Tribunal went on to say that:

> It would be incorrect to automatically apply these [Western Australian] determinations in Northern Territory expedited procedure objection inquiries. The regulatory regime governing the granting of exploration licences is quite different in Western Australia, and it is of critical importance to have regard to the overall protective regime in force in any jurisdiction when making a predictive risk assessment. Accordingly, even if there was evidence before the Tribunal of a type similar to that presented in the above Western Australian inquiries, one

> should not work on the assumption that the same result would necessarily pertain in the Northern Territory — at [63].

The Tribunal referred to *Smith v Western Australia* (2001) 108 FCR 442, where French J held that, when assessing the risk of direct interference, the Tribunal is entitled to have regard to constraints already imposed on community or social activities by third parties. In the matter before the Tribunal, the native title party was not subject to the lawful activities of a pastoral lessee because the CLP in question is held by the Northern Territory Land Corporation and was not, apparently, used for pastoral purposes. There was no evidence from the grantee party about how it intended to carry out its exploration activities so as to minimise the risk of interfering with the native title holders' activities — at [64].

The Tribunal was satisfied that, in these circumstances, there was a real chance or risk that the grant of the tenement would result in direct interference with community and social activities and, therefore, found that the expedited procedure did not apply to the grant of the exploration licence — at [66].

Future act application

Good faith negotiations

Western Australia/David Daniel & Ors/ Valeria Holborow & Ors/ Wilfred Hicks & Ors on behalf of the Wong-goo-tt-oo People

NNTT WF02/17 and 18, Hon C.J. Sumner, 12 November 2002

The Wong-goo-tt-oo people, one of the three native title parties in these proceedings, contended that the government party had not complied with the s. 31(1)(b) i.e. the requirement for the parties to negotiate in good faith prior to making an application to the Tribunal under s. 35 of the NTA. The Tribunal considered whether to combine the good faith hearing with the substantive hearing but decided that it would be a waste of resources to involve all three native title parties in a full hearing that may decide the Tribunal has no jurisdiction (since negotiations in good faith are a jurisdictional pre-condition to making an application under s. 35).

The Tribunal reviewed the legal principles on good faith negotiations both under the old and new Act and in the light of recent decisions of the Federal Court: see [34] to [40].

Confidential and without prejudice evidence

The Tribunal rejected the contention that it could not refer to confidential and without prejudice documents in making its decision. The Tribunal referred to paragraphs 4.6.1 and 4.6.2 of the *Procedures Under the Right to Negotiate Scheme* (issued 10 September 2002), which provide that the without prejudice nature of negotiations is subject to the requirements of a s. 35 determination inquiry to decide if a government or grantee party has negotiated in good faith — at [33].

Government party's negotiating position and possible extinguishment

The Tribunal was of the view that the government party was entitled to assess the strength of the different native title claims, including considering whether or not native title has been extinguished and that its views on these issues can legitimately influence offers made — at [46].

Separate negotiations

The Tribunal summarised the negotiations and found there had been substantial communications, discussions and conferences between the parties with a view to reaching an agreement. The Wong-goo-tt-oo contended they had a right to negotiate with the government party separately. The Tribunal accepted the s. 31(1)(b) obligation is to negotiate with each native title party. On the evidence, the Tribunal found that the government party did negotiate separately with the Wong-goo-tt-oo native title party. However, the final negotiating position of the government party was for a collective agreement involving all three native title parties — at [67] to [75].

Seeking agreement before the Federal Court determination of native title

The Tribunal held that it is contrary to the intention of the NTA to hold up future act negotiations and arbitrations pending a final determination of native title. Right to negotiate procedures should be conducted as far as possible in a timely manner. Unless there are exceptional circumstances, the Tribunal should fulfil its statutory responsibilities to make a determination within the times set by Parliament without awaiting the conclusion of Federal Court proceedings — at [96] to [98].

Parliamentary privilege

The Wong-goo-tt-oo native title party submitted that the Tribunal ought to receive

and have regard to the Deputy Premier's statement to the Parliamentary Estimates Committee criticising the Wong-goo-tt-oo's legal representatives. In response, the government party asserted parliamentary privilege protected the statements from being put into evidence and that the Deputy Premier could not be called to give evidence or cross-examined. The Tribunal reviewed the principle of parliamentary privilege and noted the rationale of the principle is that a member of parliament ought to be able to speak in parliament with impunity and without any fear of consequences: *Sankey v Whitlam* (1978) 142 CLR 1 at 35; *Prebble v Television New Zealand Ltd* (1995) 1 AC 321 at 324. The Tribunal held that the Deputy Premier could not be compelled to appear before the Tribunal to answer questions about what he said in parliament. The statement could be received into evidence but it is not permissible for the Tribunal to draw inferences from the statement. Even if the Tribunal could draw an inference, it was an isolated statement and it did not point to a concerted effort to undermine the native title party's legal representative — at [123], [125] and [132].

Confidentiality

The Wong-goo-tt-oo contended the government party breached the confidentiality of the negotiations about a memorandum of understanding (MOU), which was one of the matters covered by the negotiations. The government party's explanation was that the release of general principles of the proposed grant of freehold was given for the purpose of informing officers of the Shire of Roebourne to assist their understanding of one aspect of the negotiations — at [127]. The Tribunal was satisfied that the breach of confidentiality was unlikely to have had an adverse effect on the negotiations. A second breach of confidentiality occurred when details of the MOU were leaked to the media. The Tribunal made no finding about who was responsible for the breach of confidentiality.

Inequality of bargaining position

The Wong-goo-tt-oo contended that the government party failed to ensure that the native title party was adequately resourced and that this resulted in a fundamental inequality of bargaining position. The Tribunal found that the wording of s. 31(1) did not suggest that one party is obliged to fund another and that s. 31(2) did not extend negotiation beyond the effect of the future act on registered native title rights and interests — at [146]. The Tribunal found that the government party had contributed funding to the native title parties' legal costs and regarded this as an indication of good faith.

Other contentions

In response to the other contentions of bad faith negotiations the Tribunal found:

- adopting a negotiating position did not demonstrate a lack of good faith unless it could be demonstrated there were improper motives or the position was so unreasonable as to indicate a lack of sincerity in the desire to reach agreement — at [47];
- it was impossible to conclude that the government party's negotiating position exhibited bad faith given that: the existence of native title had not been established; there were three overlapping claimant groups; the government party did not accept that native title exists; and the proposed MOU offered substantial benefits to all native title parties — at [75];
- the government party's failure to accept the native title party as the traditional owners did not demonstrate a lack of good faith — at [76];
- the delays in the various stages of negotiations did not indicate unreasonableness in the government party's dealings with the native title party — at [77] to [82];
- on the facts that were accepted, the native title party was given opportunities to comment on, and negotiate about, the MOU — at [83] to [88];

- the government party's timetable for negotiations, alleged to be strict with onerous and unnecessary deadlines, was not unreasonable given the history of the negotiations — at [94];
- making a s. 35 application, or referring to an intention to make a s. 35 application once the prescribed statutory period has passed, cannot be relied upon to demonstrate a lack of good faith: *Strickland v Western Australia* (1998) 85 FCR 302 at 322 — at [95];
- the government party's conduct in taking a lead role in the negotiations on behalf of the proponents over the whole area, including areas for which there were specific proposals, did not exhibit bad faith — at [102];
- significant changes between earlier proposals and the MOU must be considered in the context of the history of negotiations. The circumstances of the development of the MOU and the changed offers it contained did not exhibit a lack of good faith — at [103] to [114];
- the content of informal discussions about the MOU between the government party's chief negotiator and a member of the Wong-goo-tt-oo native title party was a lapse in the ideal negotiating behaviour expected of a government party. As it was an isolated incident and not a consistent pattern of behaviour, the behaviour did not weaken the other evidence that the government party negotiated in good faith. An isolated incident commenting on the Wong-goo-tt-oo native title party's legal representatives was also not a pattern of behaviour which would lead to a finding that the government party had not negotiated in good faith — at [119] to [122];
- there were no grounds for finding that the government party did not engage in genuine discussions about matters described in s. 33 — at [136] to [138];
- inclusion in the MOU of land that is covered by s. 24MD(6B) and not by the right to negotiate provisions was not, in the circumstances, indicative of a lack of good faith — at [140] to [143];
- it was not incumbent on the Government to provide the Wong-goo-tt-oo native title party with relevant information on the industries to be established on the industrial estate given the future act in question was a compulsory acquisition of all native title rights and interests: *Risk v Williamson* (1998) 87 FCR 202 — at [145].

Decision

The Tribunal determined that the government party had fulfilled its s. 31(1)(b) obligations to negotiate in good faith and that it had jurisdiction to conduct an inquiry and make a determination.