NATIVE TITLE HOT SPOTS

NATIONAL NATIVE TITLE TRIBUNAL LEGAL NEWSLETTER MAY 2011 ISSUE 34

Contents

National Native Title Tribunal

Native title group for area agreement ILUA

QGC Pty Ltd v Bygrave (No 2) (2010) 189 FCR 412; [2010] FCA 1019

Reeves J, 17 September 2010

Issue

Two main issues were dealt with in this case. First, could the Native Title Registrar's delegate decide *not* to give notice pursuant to s. 24CH of the *Native Title Act 1993* (Cwlth) (NTA) of an agreement if the delegate decided it was not an indigenous land use agreement (ILUA) as defined in the NTA? Second, did the 'registered native title claimant' become a party to the agreement by naming one or more of the nine people named as 'the applicant' in the Register of Native Title Claims as a party to the agreement? It was found that:

- the delegate had no power to refuse to give notice of the agreement; and
- naming any one of those persons whose names appear in the Register as the applicant is sufficient to make the 'registered native title claimant' a party to an ILUA.

These findings raise several issues which are noted below.

Background

QGC Pty Ltd (QGC) entered into an agreement with the Iman People that was intended (among other things) to deal with 'future acts' in relation to the development of a natural gas project. The Iman People #2 claim, which is registered, covers the agreement area. Nine people's names appear on the Register as the applicant for that claim. One of those persons, Madonna Barnes, refused to sign the agreement. The application for registration was certified under s. 203BE by Queensland South Native Title Services Limited (QSNTS), a body funded under s. 203FE to carry out the functions of a representative body.

The delegate determined that s. 24CD(1) was not met and, therefore, that the agreement was not an ILUA as defined in s. 24CA because it was not signed by all the persons who jointly comprised the registered native title claimant (the RNTC) as defined in s. 253. The RNTC was a mandatory party. As a result, the delegate decided not to give notice of the agreement under s. 24CH because she was only authorised or required to do so if the agreement was an ILUA.

QGC applied for review of the decision to refuse to notify. The delegate was the first respondent and the persons comprising the RNTC were the second respondents. QSNTS applied and was joined as a respondent—see *QGC Pty Limited v Bygrave* [2010] FCA 659, summarised in *Native Title Hot Spots* Issue 33. The RNTC supported QCG's submissions. QSNTS made submissions in support of the delegate's decision.

Basis for review

QGC submitted that the decision not to give notice of the agreement was a decision within the terms of s. 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (the AD(JR) Act), and if not, it was a decision of a Commonwealth officer for the purposes of s. 39B of the *Judiciary Act 1903* (Cwlth) (Judiciary Act). If the decision was to be reviewed under s. 5 of the AD(JR) Act, it had to be of an administrative character and 'made under an enactment'—see s. 3(1) of that Act. Justice Reeves noted it was necessary to construe the provisions of the

NTA as a whole and to consider the context, including the purpose and policy of the relevant provisions—at [16] to [17].

The delegate purported to make the decision pursuant to s. 24CH(1) which provides that the Registrar 'must' give notice of the application to register an agreement which, in the delegate's view, was a reference to an agreement meeting the requirements of s. 24CA. It states: 'An agreement meeting the requirements of sections 24CB to 24CE is an indigenous land use agreement'. The delegate considered that, if s. 24CD(1) was not satisfied, then the agreement could not meet the requirements of s. 24CA and so was not an agreement covered by s. 24CH.

Reeves J reviewed the ILUA provisions and, in particular, the provisions relevant to this case, i.e. Pt 2, Div 3 Subdiv C (the area agreement provisions). As his Honour indicated:

> One obvious purpose of these provisions is to ensure the Registrar is provided with the critical details of which notice has to be given under s 24CH ... . Those critical details are spelt out in s 24CH(2)—at [24].

Reeves J identified the general purpose of the area agreement 'procedural' provisions by referring to *Murray v National Native Title Tribunal* (2003) 132 FCR 402; [2003] FCAFC 220 (*Murray*, summarised in *Native Title Hot Spots* Issue 7), where the Full Court said the purpose of ss. 24CG and 24CL was:

> [T]o ensure that all persons who hold, or may hold, native title in the area have been identified and notified of the agreement and have either authorised the making of the agreement or successfully taken steps to formalise their claim to hold native title in relation to land or waters in the area of the agreement—at [23], Spender, Branson and North JJ.

Justice Reeves failed to see 'how applying the prerequisite provisions of the Act ... before giving notice ... serves to do that'. It was found that the use of the word 'must' in s. 24CH 'indicates in the clearest terms' that the delegate was 'obliged to give notice of the agreement ... without ... giving any consideration to ... whether the agreement could be classified as an ILUA'—at [25] to [26].

Review not available under AD(JR) Act but used Judiciary Act

His Honour concluded that:

- the delegate was neither required nor authorised under s. 24CH to make any decision about whether the agreement satisfied ss. 24CB to 24CE and, specifically, 'whether the persons specified in s. 24CD were parties' to it before giving notice under s. 24CH;
- therefore, the delegate's decision was not a 'decision under an enactment' within the terms of s. 5 of the AD(JR) Act—at [32].

The proceedings could have been disposed of by ordering the delegate to give notice of the agreement but his Honour decided not to do so because it would not resolve 'the primary issue' between the parties, i.e. the interpretation of s. 24CD as to how the 'registered native title claimant' becomes a party to the ILUA. Since the applicant also sought review under s. 39B of the Judiciary Act, and the Registrar's counsel supported this approach, his Honour dealt with the primary issue under that provision—at [34] and [37] to [38].

Comment – no decision on notification

Reeves J noted that:

- this case required the court to 'review the Act in some detail and … grapple with its many novelties, complexities and idiosyncrasies'; and
- 'in this statutory environment, any exercise in construction is fraught with difficulty and it is not always possible to achieve an entirely satisfactory result'—at [1].

This is an entirely apposite comment. The NTA is densely populated with interrelated provisions, particularly in relation to ILUAs.

Circular reasoning?

With respect, the reasoning applied appears to be circular. The general purpose of the area agreement provisions (as described in *Murray*) relates to the process set up for *registration* of ILUAs. It does not provide support for the view that *notice* must be given of any agreement submitted for registration regardless of whether or not it is an ILUA.

Parliament's intent

It seems unlikely Parliament intended notice must be given of an agreement that is clearly not an ILUA given the expense involved. Yet this decision means the Registrar is obliged to do so even if the agreement in question could never be registered. Reeves J supported this conclusion by pointing out that the ILUA registration process concludes with an express requirement for a decision as to whether or not to register the agreement (see s. 24CJ). This was said to carry 'an implicit requirement' for a decision as to 'whether the agreement meets all of the prerequisite provisions for an ILUA'. In support, at [27] Reeves J quoted Justice Logan in *Fesl v Delegate of the Native Title Registrar* (2008) 173 FCR 150; [2008] FCA 1469 (*Fesl*, summarised in *Native Title Hot Spots* Issue 29) at [39]:

> The only decision which falls to the Registrar ... to make under Subdiv C of Div 3 of Pt 2 ... which has the requisite quality of statutory provision and affectation of legal rights to make it a "decision" for the purposes of the AD(JR) Act is a decision under s 24CJ as to whether or not to register an agreement on the Register.

However, Reeves J did not note that Logan J also found in *Fesl* at [85] that:

> [T]he Delegate was perfectly entitled, as a matter of good public administration, to make a pre-notification assessment of whether the agreement presented with a registration application was indeed an ILUA. There is obvious good sense in not progressing an application to the notification stage if it does not relate to what is truly an ILUA.

Therefore, there is a difference of opinion expressed in these two decisions, albeit that Logan J's comments are obiter dicta.

Registration conditions

Reeves J noted the intersection between ss. 24CD, 24CH(2)(d)(ii) and 24CL(2). While s. 24CL was not relevant (because, in this case, the application for registration of the agreement was certified by QSNTS), his Honour considered s. 24CH 'has to be construed by reference to the Act as a whole', taking into account 'a range of circumstances in which the provisions may apply'—at [29].

Sections 24CH and 24CL (which relate to applications for registration that are not certified) set out a process that allows persons claiming to hold native title in relation to any part of the agreement area to make a claimant application pursuant to ss. 13 and 61(1) over the relevant area (the new claim). If the new claim is made in time and eventually registered, it can either block registration of the area agreement or give rise to a requirement that the RNTC for the new claim be made a party to that agreement—see s. 24CL(2)(b). This led Reeves J to draw the following conclusions:

> It is ... possible ... that a registered native title claimant – one of the persons specified in s. 24CD(2)(a) .... – may come into existence after an agreement is made and, more importantly, in response to a notice under s 24CH. It follows that it would be premature ... for the Registrar, before giving notice ... and, therefore, before ascertaining whether any more registered native title claimants may come into existence in response to that notice, to decide whether or not all of the persons specified in s 24CD are parties to the agreement—at [31].

However, with respect, ss. 24CL and 24CK indicate the opposite is correct for the following reasons.

Among other things, s. 24CD requires that all RNTCs and all Registered Native Title Bodies Corporate (RNTBsC) in relation to any of the area covered by the agreement must be parties to the agreement.

The second condition for registration of an area agreement where the application for its registration is certified - see s. 24CK(3) - is that '*when the Registrar proposes to register the agreement*, there is a [RNTBC] ... in relation to any of the land or waters in the area covered by the agreement, *that body corporate* is a party to the agreement'. There is no mention of RNTCs having to be parties to the agreement for this condition to be met.

The first condition for registration of an area agreement that is *not* certified - see s. 24CL(2) - is that *any person* who is *at the end of the notice period* a RNTC or a RNTBC must be a party to the agreement. In addition, where a *claimant application* is *made before the end of the notice period* and subsequently registered in accordance with s. 24CL(2)(b), the *RNTC must also be a party to the agreement* before it can be registered. So, where a claimant application is made *after the end of the notice period* but registered *before the ILUA registration decision* is made, *the RNTC need not be a party* for the agreement to be registered.

It is clear that ss. 24CK(3) and 24CL(2) impose conditions that are *contrary to the requirements of s. 24CD*. Neither of those conditions require all RNTCs and all RNTBsC in relation to the agreement area to be parties to the agreement *at the time the registration decision is made*. If read as an integrated set of provisions, all of which are operative, it seems Parliament's intention was:

- compliance with s. 24CD was required prior to notification being given under s. 24CH;
- after the notification day, the conditions in ss. 24CK(3) or 24CL(2) would apply (as the case requires) *instead of* s. 24CD.

If this is correct, then it is contrary to Reeve's J decision.

The construction of s. 24CD

In this case, there was a registered claimant application over the entire agreement area and so the 'native title group' for the purposes of s. 24CD consisted of that RNTC.

His Honour identified the following questions as arising from the parties' submissions. First, according to ss. 24CD(1) and (2), which of the following must be a party, or parties, to the agreement:

- the RNTC as 'a collective entity'; or
- all of the individual persons who comprise the RNTC as defined in s. 253?

Second, must those who are specified to be 'mandatory' parties under s. 24CD consent to being made parties to the agreement?

In construing s. 24CD, Reeves J found it convenient to begin by 'considering its statutory context' and then considering 'its general and particular purpose', concluding that:

> [T]he ILUA process ... is intended to achieve a balance between allowing future acts to be validated, so as to provide certainty for the broader Australian community, but at the same time, ensuring that those who hold, or claim to hold, native title in the land and waters affected by such future acts, agree to them being undertaken and, if they do, to obtain a corresponding benefit from so agreeing—at [59].

The court must 'adopt a construction' of the ILUA provisions that served to 'facilitate that process'—at [61].

Purpose of s. 24CD – an aid to creating a contractual relationship

Reeves J noted that:

- once registered, an ILUA creates a contract between the parties (assuming one does not already exist) which binds persons who hold native title to the agreement area whether or not they are parties to the agreement;
- native title rights and interests are special in nature and are often held by a large unincorporated group with fluctuating membership;
- the 'particular purpose of s 24CD lies' in overcoming the difficulty of contracting with such a group—at [66] to [69].

RNTC not constituted as a legal person

In this case, the RNTC was a group of nine persons. After considering a number of cases and the provisions of the NTA (including the definition of registered native title claimant in s. 253), his Honour concluded that the RNTC, in such cases, had probably not been constituted as a legal person under the NTA—at [71] to [75].

'All' persons in the 'native title group'

Subsection 24CD(1) states that: 'All persons in the native title group ... in relation to the area must be parties to the agreement'. In this case, the 'native title group' was one RNTC comprised of nine persons. In these circumstances, his Honour did not think 'all' could be construed to refer to the individuals who comprise the RNTC but, instead, that the definition of the expression RNTC in s. 253 'performs the role of defining who, or what, constitutes a registered native title claimant for the purposes of it becoming a party to the ILUA'—at [79].

All 'persons' in the native title group

In relation to the definition of 'person' in the *Acts Interpretation Act 1901* (Cwlth), Reeves J found that 'a contrary intention appears' in s. 24CD(1), i.e. it 'must be construed to refer to those persons or entities described in s 24CD(2) and (3) [as the native title group], whether or not one or more of them is a legal person'. Thus, despite the RNTC not being a 'legal' person, it is the 'person' who must be a party to the area agreement—at [82].

Meaning of RNTC

Unless a contrary intention appears, 'registered native title claimant' is defined in s. 253 to mean: 'A person or persons whose name or names appear [sic] in an entry in the Register of Native Title Claims as the applicant'.

Reeves J found that 'the reference to the word "*applicant*"' in s. 253 does not adopt 'the definition of the expression "*applicant*" in ss 253 and 61(2) for the purposes of defining the expression' RNTC. The reasons for doing so were that the s. 253 definition:

- did not use the word 'all' (i.e. did not say 'all persons whose names appear etc.') as did ss. 24CD(1) and (2)(a), both of which refer to 'all' RNTCs and RNTBsC;
- used 'a' person or persons, rather than the 'more specific' word 'the' and so was to be construed to mean 'one or more (but not necessarily all) of the persons who are named in the entry on the Register may comprise the registered native title claimant';
- referred to 'the name or names of persons appearing in an entry on the Register as the applicant'; and
- since the only part of an entry on the Register that mentions 'the applicant' is s. 186(1)(d), which requires the name and address for service of the applicant to be entered, 'this must be the part of the entry that is being referred to'—at [83].

Conclusions on ss. 24CD(1) and (2)

His Honour concluded that:

- each RNTC 'may be made a party to an area agreement by naming one or more ... of the persons named in that part of the entry in the Register of Native Title Claims which identifies the name and address for service of the applicant', i.e. s 186(1)(d);
- these persons then 'act as representative parties for the native title contracting group to allow that group to enter into the ILUA', with their role being 'limited' to being named as a representative party—at [84].

It was found that:

> [T]he specified party or parties under ss 24CD(1) and (2), in this case, was [sic] not the RNTC, as a collective entity, because it is not a legal person, and nor was it all the individuals who comprise the RNTC. Instead … it was *one or more* of the persons *named in the relevant entry* in the Register of Native Title Claims *acting in their capacity as representative parties* to the ILUA—at [85], emphasis added.

The consequences of this conclusion

In summary, his Honour considered that the consequences of this decision include:

- there is no requirement for the persons named on the Register as the applicant to act collectively or unanimously because 'there is no purpose to be served by them acting jointly, or otherwise';

- their only role is 'to be named as representative parties as a statutory mechanism or device to provide a means by which the native title contracting group can enter into an ILUA';
- no veto is created because a member of the RNTC group will be unable to frustrate the will of the 'native title contracting group';
- the 'representative party' under s. 24CD has no role in assenting to, signing or consenting to be a party to an ILUA;
- the group of persons who hold or may hold native title to the relevant area are the 'native title contracting party' or the 'principal indigenous contracting group' under an ILUA;
- this is the group that must authorise the making of the agreement pursuant to s. 251A;
- no privity of contract is created between the members of the RNTC and the person or persons wishing to carry out the future acts on the agreement area;
- rather, there is privity of contract between those who want to do the future acts and the native title contracting group;
- 'no purpose would be served' by creating privity of contract between those wishing to carry out future acts and the members of the RNTC because the RNTC will already be members of the principal (the native title contracting group), i.e. s. 61(1) requires that the persons who comprise the applicant and, therefore, the RNTC, must be members of the native title claim group;
- it is the native title contracting group that must 'assent' to the agreement, not the members of the RNTC;
- none of the members of the RNTC need to sign the agreement or consent to being a party to it because s. 251A provides a specific identification and authorisation processes for the making of the agreement;
- the use of the word 'must' in s. 24CD(1) (i.e. 'All persons in the native title group ... *must* be parties to the agreement) is an 'obligation or a necessity' that the native title group be a party—at [88], [95], [99] to [103], [108].

Authorisation to make the agreement

His Honour was of the view that s. 251A provided for a 'wider, sanctioning or approving, form of authorisation'—at [113].

The chapeau ('hat' or first paragraph) to s. 251A states that:

> For the purposes of this Act, persons holding native title in relation to land or waters in the area covered by an indigenous land use agreement authorise the making of the agreement if: … .

Reeves J was of the view that:

> [T]he words "*making of the agreement*" [in s. 251A] encompass matters such as the native title contracting group deciding: to accept the terms of the agreement; to communicate that acceptance to the other party to the agreement; and how it wishes to indicate its assent to the agreement. This means it could do the latter by authorising someone, eg a solicitor, to sign the agreement on its behalf or, as here, by authorising all, or some, of the members of the RNTC to do that. Alternatively ... it could elect... to rely ... upon the certificate of the authorised representative body … to the effect that it had properly authorised the making of the agreement under s 251A … . Conversely, for these reasons, I do not consider the words "*making of the agreement*" ... can be construed as providing any authority to the members of a registered native title claimant who are named as representative parties under s 24CD, to perform any wider role in relation to an ILUA—at [113].

His Honour provides further support for this view by distinguishing the role of the RNTC and the applicant under the various provisions of the NTA—at [114] to [117].

Decision

It was found that:

- the RNTC must be a party to the agreement;
- this could be achieved by naming one or more of those whose names and addresses appear on the Register as the applicant;
- those so named do not need to assent to, or sign, or consent to becoming a party to, the agreement;
- therefore, the agreement in this case met the requirements of s. 24CD.

Reeves J set aside that part of the delegate's decision dealing with the requirements of ss. 24CD(1) and 24CD(2)(a). A declaration was made that the agreement complied with those provisions by naming as parties to the agreement the nine members of the RNTC. The court also ordered that the delegate give notice of the ILUA in accordance with s. 24CH and otherwise deal with the application to register the agreement according to law.

Comment

The ILUA provisions considered in this case are ambiguous. Those who drafted them may not have given sufficient consideration to the issues that arise where multiple persons constitute the applicant (and are named on the Register, if the claim is registered). However (and with respect), his Honour's analysis appears to overlook provisions of the NTA suggesting Parliament's intent was that the RNTC have a less passive role than that proposed in this decision.

Operation of s. 24EA - is privity relevant?

In looking at the role of the 'native title group' as defined in s. 24CD, his Honour noted that s. 24EA(1)(b) introduces a concept 'quite foreign to the common law', namely that 'certain indigenous persons are bound by the ILUA even though they are not parties to it'. This is 'contrary to common law principles such as privity of contract and the voluntary assumption of contractual obligations'—at [63].

However, having noted this, Reeves J then considered the issue of privity of contract, finding that:

- privity is created between the native title contracting group and the person or persons wishing to carry out the future acts on the land concerned (the proponent);
- no privity of contract is created between the proponent and 'the members of the registered native title claimants who are acting as representative parties' under s. 24CD—at [97] to [98]

In doing so, his Honour accepted scenario (a) and rejected scenario (b). Those scenarios are:

- by creating privity of contract between the third party [the members of the RNTC acting as representative parties] and his principal [the native title contracting group] without himself becoming a party to the contract;

- by creating privity of contract between the third party and his principal, whilst also himself becoming a party to the contract.

His Honour says that paragraph (b) (among others) is:

> [Q]uite inapposite in relation to an ILUA because no purpose would be served by creating privity of contract between the persons or persons wishing to carry out the future acts on the land concerned and the members of the registered native title claimant as representative parties. This is so because they will already be members of the principal.

If his Honour is correct, i.e. scenario (a) applies to cases where the native title group is constituted by an agent RNTBC (i.e. a BCA) or includes an agent RNTBC for some of the area, or where the NTRB for the area is the only person in the native title group (i.e. an AA or an APA), they would not be parties to the agreement because those entities will not be 'members of the principal'. With respect, scenario (a) cannot apply in those cases because s. 24CD(1) *requires* those persons in the 'native title group' to be parties to the agreement. Further, and more importantly, s. 24EA(1)(b) provides that, while registered, the ILUA:

> [H]as effect, in addition to any effect it may have apart from this subsection, *as if* ... all the persons holding native title in relation to ... the area covered by the agreement, who are not already parties to the agreement, *were bound* by the agreement *in the same way as* the *registered native title bodies corporate* [for a BCA], or *the native title group* [for an AA or an APA], as the case may be' (emphasis added).

Thus, for this key provision to operate the RNTC (which, in this case, is the native title group) must be a party to the agreement and the RNTC must be bound by it 'in the same way' as it is intended native title holders who are not parties to the agreement would be bound. Similarly, where the native title group includes an agent RNTBC or NTRB, they must be parties to the agreement and be bound by it in same the way it is intended to bind the native title holders who are not parties to the agreement.

With respect, if one of the scenarios noted earlier is applicable, it is scenario (b). However, the better view seems to be that none of the scenarios mentioned by his Honour need to be posed in order to interpret the legislative scheme. If the native title group is a party to the agreement as required, s. 24EA(1)(b) is the 'radical' provision that will bind all native title holders for the area who are not parties to the agreement 'in the same way' as the 'native title group' is bound. This, with respect, appears to more accurately reflect what Parliament intended.

Meaning of RNTC

Reeves J compared the 'entity' described in the definition of RNTC in s. 253 with the 'applicant' under s. 61. However, the applicant and the RNTC relate to different things. A RNTC is an entity 'in relation to land or waters'. There may be a number of RNTCs in relation to any particular area (e.g. if it is shared, or contested, country). This is recognised in the use of 'a' before 'person or persons' in the definition of RNTC. However, there can only be one 'applicant' in relation to any particular claimant application. Further, it is not surprising that the definition of RNTC in s. 253 refers to an entry on the Register rather than to s. 61(2) or the 'applicant from time to time'. Not every applicant is a RNTC, i.e. only an applicant with a registered claim is a RNTC. Therefore, the definition of RNTC can (and, it is

suggested, should) be interpreted to mean all those persons named in an entry on the Register.

The 'native title group'

The role of the 'native title group' as defined in ss. 24CD(2) and (3) (which was the RNTC in this case) seems to be more than to be named as a party (as found) given that s. 24CD(7) provides that:

> If there are any representative Aboriginal/Torres Strait Islander bodies for any of the area and none of them is proposed to be a party to the agreement, a person in *the native title group*, before entering into the agreement:
>
> (a) must inform at least one of the representative Aboriginal/Torres Islander bodies of *its intention* to enter into the agreement; and
>
> (b) may consult any such representative Aboriginal/Torres Strait Islander bodies about the agreement (emphasis added).

It seems Parliament intended the 'native title group' (in this case, the RNTC) would have an active role and that it was this group (not the native title contracting group) that would 'enter into' the agreement. The 'contracting group' do, of course, authorise the making of the agreement. However, when s. 24CD(7) is read with s. 251A, it seems Parliament intended the 'native title group' would be authorised to make the agreement on behalf of the relevant contracting group and would enter into the agreement on the contracting group's behalf.

Multiple contracting groups

Some difficulties in interpreting s. 251A stem from the fact that there may be multiple groups who claim to hold native title to an area agreement ILUA. For example, the relevant area may be:

- in part, subject to a determination recognising the existence of native title with a RNTBC in place;
- in part, subject to a registered claimant application made by an unrelated native title group with a RNTC;
- in part, have neither a RNTBC nor a RNTC and a different group claims to hold native title to the area but has not made a claimant application over the area.

In this example, there may be three native title contracting groups, each of which would (respectively) have a different mandatory party, i.e. the RNTBC, the RNTC and (say) the representative body to enter into the area agreement on their behalf: see s. 24CD(2). Alternatively, there may be a single contracting group made up of subgroups. However, it seems all three (i.e. the RNTBC, the RNTC and the representative body) would be part of the 'native title group' for the purposes of s. 24CD.

'Deeming' provision

His Honour appears to accept that s. 24CD operates as a kind of deeming provision, i.e. it makes the 'native title group' a party to an area agreement whether or not entities and individuals that constitute that group in any particular case agree to this.

However, when s. 24CD is read with ss. 24CA to 24CE, these are 'requirements that must be met for an agreement to be an [area agreement] ILUA' (see table 7.1 in [7.10] of the

Explanatory Memorandum to the Native Title Amendment Bill 1997). For example, s. 24CB says the agreement 'must be about' one or more specified matters. The use of 'must' cannot mean that one could simply 'deem' an agreement to be about at least one of the requisite subject matters if, in fact, it was not. Further, the use of 'may' in ss. 24CD(5) and (6) (i.e. the Commonwealth, State or Territory '*may* … be a party') indicates clearly that 'must' should *not* be read to require that only the persons in the native title group may be parties (refer to table 7.1 of the EM).

However, his Honour's findings indicate that a RNTBC, a representative body (or s. 203FE funded body) can be made a party to an ILUA without their consent which, as noted, appears contrary to the intent of s. 24EA. If the native title group (or, for a Body Corporate Agreement, the RNTBC) is not really bound by the terms of the agreement, then nor are native title holders who are not already parties to the agreement.

Further, a RNTBC must comply with Reg 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* before making a 'native title decision', i.e. consult with, and obtain the consent of, the affected native title holders before surrendering native title or doing, or agreeing to do, any other act that would affect the native title rights or interests of the common law holders of native title. Therefore, a RNTBC cannot simply be 'deemed' to be a party to the agreement by naming it in the agreement unless the view is taken that making it a party to an ILUA does not involve the RNTBC in the making of a 'native title decision'.

In relation to alternative procedure agreements (see Pt 2, Div 3, Subdiv D of the NTA), there is no authorisation process and the consent of the native title holders is not required before the representative body enters into an ILUA on behalf of its constituents. However, it must comply with s. 203BH. His Honour's reasoning in relation to the 'native title group' being 'deemed' to be a party, and the limited role of that group, does not appear to apply at all to alternative procedure agreements.

No necessary veto or frustration if alternative view is taken

His Honour was concerned that an individual member of the RNTC could frustrate or veto the making of an ILUA by refusing to sign it. However, with respect, using such emotive language may cloud the issue. There is no veto or 'frustration'. A person who is a member of the RNTC acting outside the scope of their authority in an ILUA context can be removed via an order made under s. 66B(2). Depending upon the terms of the original authorisation for the claimant application, this may not require a further authorisation meeting. In any case, it could be dealt with as part of the ILUA authorisation process if it is considered beforehand.

Right to negotiate provisions

The passive role of the RNTC in the ILUA provisions, as found by Reeves J, is directly opposed to the role the RNTC plays in the right to negotiate provisions of the NTA. Pursuant to ss. 29, 30, 31, 32 and 75, the RNTC is a 'native title party'. As a result, the Tribunal has found Reeves J's views 'are relevant only to the execution and registration of ILUAs' and do not affect the Tribunal's decision-making role under the right to negotiate provisions: *Queensland Gas Company Limited/Iman People #2/Queensland* [2010] NNTTA 210 at [44], Deputy President Sosso. It should also be noted that, if his Honour's interpretation of the definition of RNTC is correct, competing persons within the RNTC group may put different positions to the grantee and government parties in negotiations and seek separate representation

before the Tribunal. This has occurred previously and the Tribunal has noted it is undesirable: see, e.g. *Coalpac Pty Ltd/New South Wales/North Eastern Wiradjuri People* [2009] NNTTA 133 at [57] to [60].

Writ of certiorari in ILUA process

Edwards v Santos Limited [2011] HCA 8

French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, 30 March 2011

Issue

The question in this case was whether a writ of certiorari should issue to quash Federal Court orders summarily dismissing an application for a declaration that renewals of an authority to prospect (ATP) were not valid. The High Court unanimously decided it should. This case may be limited to its facts. However, the decision does imply that, at least where parties are contractually bound to negotiate an indigenous land use agreement (ILUA) pursuant to an earlier 'agreement to agree' and a dispute arises as to certain terms of the ILUA, that dispute may be a 'matter' within Federal Court's jurisdiction under s. 213(b) of the *Native Title Act 1993* (Cwlth) (NTA) even where (as in this case) the dispute concerns a question of State law.

Background

Those seeking the writ (the native title party) constitute the 'registered native title claimant' (RNTC) for an application made on behalf of the Wongkumara People under ss. 13 and 61 of the NTA. Santos Limited and Delhi Petroleum Pty Ltd (the petroleum companies) hold the relevant ATP, which has purportedly been 'varied, extended or renewed' several times since it was first granted in 1979. If the ATP is valid and certain conditions are met, the petroleum companies have a right to the grant of a petroleum lease pursuant to s. 40 of the *Petroleum Act 1923* (Qld) (Petroleum Act). The petroleum parties 'did not raise any shadow of a doubt about … their capacity to satisfy' those conditions—at [22], Heydon J.

In 2001, representatives of the Wongkumara People made an agreement, referred to as an ILUA, with the petroleum companies. It was not registered on the Register of Indigenous Land Use Agreements and was to expire in 2006 (the unregistered ILUA). From 2005, the parties to the unregistered ILUA negotiated about making a new ILUA to deal with, among other things, the doing of future acts as defined in the NTA (the new ILUA). It was the negotiations for the new ILUA that gave rise to these proceedings. Heydon J characterised the negotiations for the new ILUA as being 'in fulfilment of an obligation created by' a clause in the unregistered ILUA in which the parties 'agreed to negotiate the terms of a new ILUA'—at [25].

In 2009, during the negotiations for the new ILUA, a dispute arose that led to the native title party applying to the Federal Court for, among other things, declarations that:

- the grant of a petroleum lease to the petroleum companies under s. 40 of the Petroleum Act *would not* be a pre-existing rights based act within the meaning of Pt 2, Div 3, Subdiv I of the *Native Title Act 1993* (Cwlth) (NTA);

- the grant of such a lease *would not* be valid under s. 24ID of the NTA *unless* the requirements of Subdiv P of Div 3 of Pt 2 (the right to negotiate provisions) of the NTA were satisfied.

An order restraining the State of Queensland from granting such a lease was also sought.

This was the relief sought in their amended pleadings before the Federal Court. Originally, a declaration was sought that a grant of a petroleum lease under s. 40 of the Petroleum Act would not be a pre-existing rights based act because the ATP was invalid for non-compliance with the Petroleum Act (the State law question). The native title party was alleged that purported renewals of the ATP in 1983 and 1987 were of no effect because, at that time, there was no power in the Petroleum Act to extend the term of an ATP and, therefore, all subsequent purported renewals of the ATP were void and of no effect: see *Edwards v Santos Limited* [2009] FCA 1532 at [6].

The primary judge dismissed the proceedings summarily pursuant to s. 31A(2) of the *Federal Court Act 1976* (Cwlth) (FCA) on the ground that the application had no reasonable prospects of success because:

- the court had no jurisdiction to give an advisory opinion on a hypothetical question; and
- 'mere status as a registered native title claimant' did not give the native title party 'standing to claim any of the relief sought, including any part which relies only on State law'—*Edwards v Santos* [2009] FCA 1532 at [35], [44] and [49].

Costs were ordered against the native title party. The Full Court refused leave to appeal from the orders of the primary judge: see *Edwards v Santos* [2010] FCA 34. The Federal Court decisions are summarised in *Native Title Hot Spots* Issue 32.

Certiorari

Heydon J noted that:

- the native title party sought a writ of certiorari in the High Court's original jurisdiction pursuant to s. 75(v) of the Constitution because s. 33(4B)(a) of the FCA precluded an application for special leave to appeal;
- while the writ of certiorari is not mentioned in s 75(v), 'it may issue in the exercise of an implied ancillary or incidental authority to the effective exercise of s 75(v) jurisdiction'—at [21] and [53].

The court was unanimous in finding that a writ in certiorari should issue for the reasons given by Heydon J—at [1], [6] and [53]. All paragraph references in this summary are references to Heydon J's reasons for judgment. Where his Honour is quoted, all footnotes have been omitted.

Two approaches available – wrong one taken

The primary judge found the Federal Court had no jurisdiction because there was no 'matter' involved, the native title party had no standing and the application was 'merely for an advisory opinion'. It was found the primary judge's reasoning, which was not disturbed by the Full Court, was 'incorrect'. The native title party 'could have established standing and other necessary conditions in one of two ways':

- 'vindicate an enforceable right' of its own; or

- 'attack' the petroleum companies' claim of a right 'which interfered with' the native title party's interests—at [33] to [34].

According to Heydon J, the primary judge's mistake was to concentrate 'on the first question – whether the ... [the native title party] had an enforceable right'. In his Honour's view, what the primary judge should have considered was:

> [W]hether the plaintiffs had reasonable prospects of establishing that the claim of the petroleum [companies] … that the grants of … leases, emanating from the ATP were "pre-existing rights based acts" was erroneous on the ground that the ATP was void—at [34].

Relevant facts

As part of the negotiations for the new ILUA, the native title party asked the petroleum companies to 'gift' two pastoral leases to the native title claim group. According to his Honour:

- this request was made 'pursuant to negotiations' that the parties to the unregistered ILUA were 'contractually obliged' to conduct;
- they were also 'negotiations regulated in certain respects by the NTA';
- the request was refused because the pastoral leases were said to be 'worth in excess of $20m', apparently on the ground that the ATP pre-dated the NTA, the extensions of the ATP were valid and that the grant of leases under s. 40 of the Petroleum Act 'would be automatic'—at [35].

However, if the native title party was successful in challenging the validity of the extensions of the ATP, this valuation 'might collapse', which would improve the prospects of the native title party obtaining the leases as a 'gift' to the Wongkumara People. Therefore, the native title party's claim 'to challenge the [validity of the] ATP extensions' did not depend on them actually having native title. This was because:

> The new ILUA could be concluded and have the statutory effect given it by the NTA [assuming it got registered] irrespective of whether the plaintiffs had obtained or would obtain a determination that native title exists—at [34].

Standing, hypothetical questions, advisory opinions, jurisdiction

At [36], Heydon J noted that this case raised a number of questions that could not be 'wholly disentangled', namely:

- did the Federal Court have jurisdiction to grant declaratory relief?
- did the native title party have standing, or a 'sufficient interest' or a 'real interest'?
- was the question raised hypothetical?
- was the native title party seeking an advisory opinion?

For the reasons noted below, Heydon J was satisfied that the first declaration sought by the native title party about the petroleum companies' rights:

> [I]s one which a court of equity has jurisdiction to grant; the plaintiffs have standing to seek … ; the question … is not hypothetical, but concrete and real; and the opinion they seek is not merely advisory—at [39].

The native title party's claim that the petroleum companies had no right to apply to under s. 40 of the Petroleum Act because the ATP had 'ceased to be valid' and the claim that the

Minister could be restrained were within Federal Court's jurisdiction 'to grant declaratory and injunctive relief'. The native title party had a sufficient interest because 'success in those claims would advance their interests in the negotiations *which the parties were contractually obliged to conduct*' The native title party had standing because of 'an interest in the question whether the ATP is valid which is greater than that of other members of the public'—at [37], emphasis added.

The questions asked by the native title party 'were not hypothetical' because Santos Limited had written in November 2005 indicating that the petroleum companies intended to apply to the Minister under s. 40 of the Petroleum Act and 'predicted that success would be "automatic"'. The native title party 'would be seriously disadvantaged' if that happened 'because their negotiating position would be gravely weakened'. On the other hand, if the native title party 'obtained the … declaration' sought that the grant of the lease under s. 40 would not be a pre-existing rights based act, the native title party 'would be correspondingly better off'. The declaration would 'produce foreseeable consequences' by allowing negotiations for the new ILUA to continue with the negotiating parties 'armed with knowledge of the correct legal position in relation to the ATP'—at [37].

In this case, regardless of whether or not the native title party had enforceable rights against the petroleum companies:

> [T]he question whether the ATP is valid is not hypothetical, it is of real practical importance to the plaintiffs, they have a real commercial interest in the relief, the petroleum defendants (and Queensland) are plainly contradictors, and there is obviously a real controversy—at [38].

Heydon J emphasised the native title party's bargaining position as a relevant factor later in his reasons. A submission was made that, if the ATP is valid, then the grant of a petroleum lease under s. 40 of the Petroleum Act would also be valid as a 'pre-existing rights based act' under Pt 2, Div 3, Subdiv I of the NTA, in which case it would not need to be included in the new ILUA. The same was true if the ATP is invalid because the petroleum companies would have no right under state law to obtain petroleum leases and so there would be no need to address that issue in any ILUA. According to Heydon J:

> This … [did] not undercut the proposition that the bargaining position of the plaintiffs could be much improved if they could demonstrate the invalidity of the ATP, because it would negate one of the reasons why the petroleum defendants refused to make a gift of the Pastoral Leases—at [48].

Federal jurisdiction – matter arising under the NTA

There was another 'more distinct' question: Was the native title party invoking federal jurisdiction? Heydon J found this was the case for (among others) the following reasons:

- the interest the native title party was protecting arose out of a federal statute, i.e. the NTA;
- their 'activity is designed to ensure that, if their native title claim succeeds, they will have received present advantages' (i.e. the pastoral leases) in compensation for 'any future subjection' of their native title to the petroleum companies' interests;
- their involvement in the new ILUA negotiations led to a dispute about its terms which 'turned on whether the petroleum defendants had the "immediate right" [under s. 40 of the Petroleum Act] which they claimed';

- the validity of a future act turned on the existence of that 'immediate right' and so that 'immediate right' was 'integrally connected with the NTA';
- therefore, a 'matter' existed 'in federal jurisdiction', i.e. 'a matter arising under' the NTA within the meaning of s. 213(2) and a matter arising 'under a law of the Federal Parliament within the meaning of s 39B(1A)(c) of the *Judiciary Act 1903* (Cth)' (Judiciary Act);
- the NTA is 'linked with the process of negotiating the new ILUA because the NTA contains many provisions ... about the process of negotiation before it is finalised', including obtaining assistance from the National Native Title Tribunal (s 24CF) and 'making ... all reasonable efforts to ensure that all persons who hold or may hold native title in the relevant area are identified and authorise the new ILUA'—at [41], referring to ss. 24CD(7), 24CG(3)(b)(ii) and 24CL(3).

It was noted (among other things) that:

> [T]here is … a matter arising under a federal law if the source of a defence which asserts that the defendant is immune from a liability or obligation of that defendant is a law of the Commonwealth. Here the petroleum defendants are alleging that they are immune from the "right to negotiate provisions of the NTA" because of the pre-existing rights based acts provisions of the NTA. Hence there is a matter arising under a federal law—at [45].

Conclusion

It was found that the primary judge mistakenly found the Federal Court had no jurisdiction because the primary judge concluded there was no 'matter', the native title party had no standing and the application was 'merely for an advisory opinion'. The Full Court did not disturb these findings. Heydon J found that: 'Mistakenly to deny jurisdiction is a jurisdictional error attracting a writ of certiorari'—at [46].

Comment – reliance on s. 24DJ

At [41], Heydon J gave s. 24DJ(1) as an example of the 'significance of the issue of what advantages the representatives of the Wongkumara People … negotiating the new ILUA … can obtain'. According to his Honour, it demonstrated that, if the Wongkumara People's representatives negotiated the new ILUA, other persons claiming to hold native title in the new ILUA could object to its registration on the ground that it was not fair and reasonable to register it because those representatives 'failed to obtain the most favourable terms' from the petroleum companies. With respect, this ground of objection to registration is only available if the ILUA is an alternative procedure agreement: see Pt 2, Div 3, Subdiv D of the NTA. In the case before the court, it seems the proposal is to negotiate an area agreement: see Pt 2, Div 3, Subdiv D of the NTA.

Decision

The court issued a writ of certiorari quashing the orders of the Federal Court and the Full Court. The matter was referred back to the Federal Court with the native title party's costs at first instance, on appeal to the Full Court and in the High Court to be paid by the other parties.

Determination of native title – defective authorisation, non-native title orders

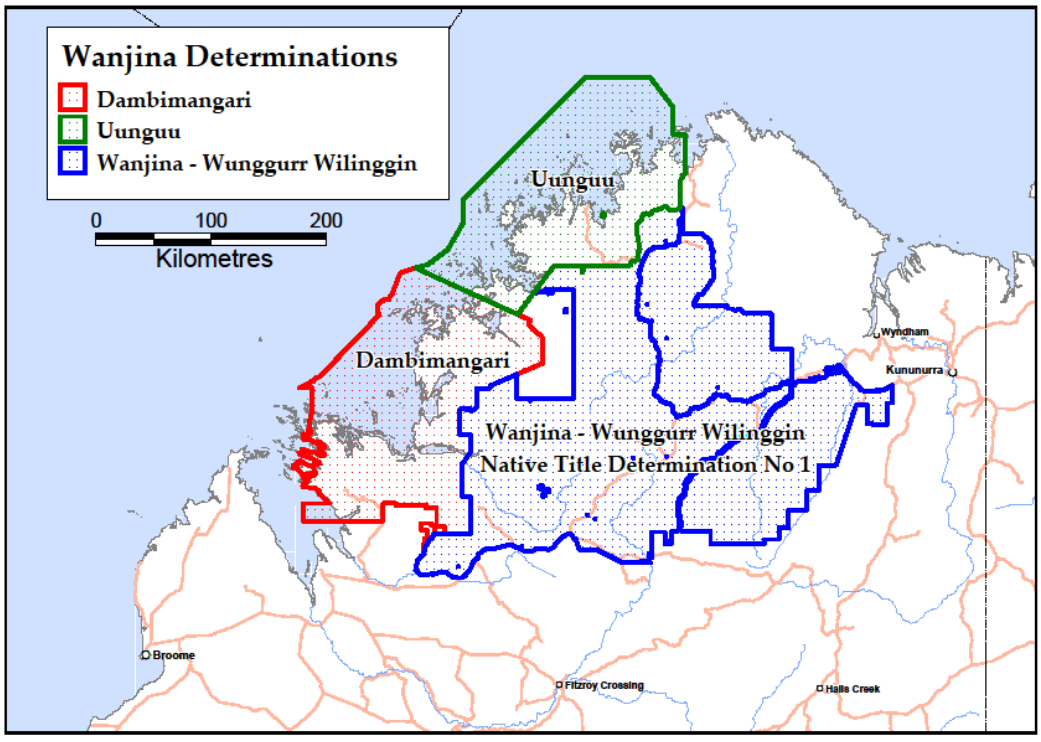
Goonack v Western Australia [2011] FCA 516

Gilmour J, 23 May 2011

Issue

The main issues before the Federal Court were whether to make a determination recognising native title exists under the *Native Title Act 1993* (Cwlth) (NTA) in a case where there may be a defect in the authorisation and whether it was appropriate to make an order that the State of Western Australia and the determined registered native title body corporate (RNTBC) 'negotiate in good faith to reach agreement' about a number of matters, including the negotiation of various indigenous land use agreements (ILUAs). It was decided that it was appropriate for the court to do so.

This is the second of three determinations recognising the Wanjina-Wunggurr Community (WWC) of the West Kimberley as native title holders. The combined area covered by those determinations is around 121,000 square kilometres, an area almost twice the size of Tasmania, as illustrated in the map below. The determination itself is not summarised here.



Background

The Wanjina-Wunggurr Uunguu (WWU) claimant application, made in October 1999, covers about 26,000 square kilometres, including part of the Mitchell River and Lawley River national parks, parcels of unallocated Crown land and some islands and sea areas. It is one of four applications (the Wanjina-Wunggurr applications) made on behalf of those 'who hold in common the body of traditional laws and customs concerning land and waters known as Wanjina-Wunggurr'. The first of two of these (the Wanjina-Wunggurr Willinggin applications) were dealt with in *Neowarra v Western Australia* [2003] FCA 1402 (summarised in *Native Title Hot Spots* Issue 8 and Issue 9), where Sundberg J recognised that the Wanjina-Wunggurr Community (WWC):

> [C]onstituted a society and were bound together by a normative system of laws and customs which had continued to be acknowledged and observed by its members in a substantially uninterrupted manner since prior to the declaration of sovereignty over Western Australia—at [4].

In *Neowarra v Western Australia* [2004] FCA 1092 (*Neowarra*), Sundberg J determined that native title existed in relation to most of the area covered by the Wanjina-Wunggurr Willinggin application and that the native title was held by the WWC. In *Barunga v Western Australia* [2011] FCA 518 (summarised in *Native Title Hot Spots* Issue 34), Justice Gilmour determined that the WWC hold native title existed in relation to most of the area covered by the Wanjina-Wunggurr Dambimangari application.

Through mediation with the National Native Title Tribunal, the parties reached an agreement that, among other things, provided for the recognition of native title held by members of the WWC. They agreed the area claimed in the three Wanjina-Wunggurr applications together make up the traditional country of the WWC. It was not disputed that the WWC's traditional system of law comes from spirit beings called Wanjina. The parties subsequently sought a determination by consent recognising native title is held by the members of the WWC 'for their respective communal, group and individual rights and interests in the proposed determination area'.

John Catlin, on behalf of the State of Western Australia, provided affidavit evidence that:

- the state advised the applicant that, subject to establishing the members of the WWC had maintained the requisite connection to the claim area, Sundberg J's findings as to the WWC applied and could be adopted in the WWU application;
- the state assessed the relevant materials in accordance with its guidelines;
- that material and Sundberg J's findings satisfied the state that a body of traditional laws and customs existed under which the members of the WWC hold rights and interests within the proposed determination area.

Authorisation issues – s. 84D applied

Subsection 84D(4) provides that if there is a defect in authorisation:

> The Federal Court may, after balancing the need for due prosecution of the application and the interests of justice ... hear and determine the application, despite the defect in authorisation ... or ... make such other orders as the court considers appropriate.

As seven of the 15 persons named as the applicant had died, there was a question as to whether the surviving eight people were authorised as required. Written evidence as to the terms of the authorisation given in 1999 could not be found. In these circumstances, it was not possible to determine whether terms of the authorisation accommodated the death of one or more of the 15 authorised persons. Justice Gilmour exercised the discretion available under s. 84D(4) to make the determination 'despite any perceived defect in authorisation' on the basis that:

- the purpose of authorising the original 15 people was to prosecute the native title holders' claim to the area concerned and it was now all but finally prosecuted successfully;
- there would be a denial of justice if it did not proceed to determination;
- the delay, cost and confusion resulting from requiring strict compliance at such a late stage would 'bring no credit upon the legal system'—at [16] to [17], applying the same

rational as Justice Finn employed in *Akiba v Queensland (No 2)* [2010] FCA 643 at [930] to [931].

Native title claim group description v native title holders – s. 84D applied

The description of the native title claimant group in the WWU application was close, but not identical, to the description of the native title holders in the determination made by Sundberg J in *Neowarra* (the WWW determination). The order sought in this case was in the same terms of the WWW determination. If it was made, it would effectively mean the determination was 'referable to an expanded native title claimant group. However, there had been no amendment to the WWU application to reflect this expanded group. Gilmour J noted the court was 'not limited to making a determination in the form sought in the application and may ... make a determination in such form as it sees fit based on the evidence, provided the application is valid'—at [18], referring to *Patch v Western Australia* [2008] FCA 944 at [18].

His Honour found that, pursuant to s. 84D(4), it was 'in the interests of justice to make the determination sought' despite any 'defect in authorisation'. Reliance was placed on s. 84D(3), which covers circumstances where those who are (or were) the applicant have dealt (or do deal) with a matter arising in relation to the application in circumstances where they were (or are) not authorised to do so. In this case, this apparently refers to the seven surviving members of the applicant seeking a determination in favour of an expanded group as native title holders—at [19].

Comment on ss. 47A(3) & 47B(3) and the group recognised

There is one issue that may arise if the claim group described in application is not the same as the group recognised as holding native title. Subsections 47A(3) or 47B(3) both state that if 'the determination on the application is that the *native title claim group* hold the native title rights and interests claimed' (emphasis added), then the effect of determination recognising native title is as prescribed in ss. 47A(3) and 47B(3) e.g. the non-extinguishment principle applies to the creation of certain prior interests. 'Native title claim group' is defined in s. 253 as 'the group mentioned in relation to the application in the table' in s. 61(1). In turn, s. 61(1) describes that group as 'all the persons ... who, according to their traditional laws and customs, hold the common or group rights and interests comprising the *particular native title claimed*' (emphasis added). Therefore, in this case, if it can be said that the 'particular native title claimed' is that of the WCC, it seems the conditions of ss. 47A(3) and 47B(3) are satisfied.

Section 87 or 87A?

One area of unallocated Crown land that was included in the application area was excluded from the determination area to allow for mediation to continue with a view to a later determination being made that the excluded area is subject to s. 47B. This meant the determination area related to part of (rather than the whole of) the application area. In such a case, the determination could be made under either ss. 87 or 87A but it was 'preferable to use s 87A' because:

- the WWU application will then be 'deemed' to have been amended to remove the determination area;
- the excluded area will remain registered on the Register of Native Title Claims;
- that Register will be amended to reflect this;
- the registration test will not be applied—at [20] to [21].

Comment – s. 87A and the registration test
With respect, it is only if pursuant to s. 64(4) the Registrar is given a copy of an registered application that is amended because 'an order was made under s 87A' that 'the Registrar need not consider the claim made' in the amended application against the conditions of the registration test—see s. 190A(1A).

However, regardless of whether ss. 87 or 87A is relied upon, if the court's Registrar gives the Tribunal's Registrar notice of the orders made as required under s. 189A, then pursuant to s. 190(4)(e), the Register must amend the Register of Native Title Claims to reflect those orders and no question of applying the test to any undetermined area (such as the excluded area in this case) arises.

Applying s. 87A
His Honour set out s. 87A which (in paraphrase) provides that the court may make a determination of native title by consent over part of an application area without holding a hearing provided certain pre-conditions are met, the court is satisfied the orders sought is within power and it appears appropriate to the court to make those. The pre-conditions were either met or not relevant. It was accepted there was no reason not to be satisfied that an order in, or consistent with, the terms of the agreement was within power and complied with ss. 13(1)(a), 67(1), 68, 94A and 225 of the NTA—at [22] to [23].

In considering whether it would be appropriate to make the orders sought, it was noted (among other things) that:

- the exercise of discretion under to s. 87A 'imports the same principles as those applying to the making of a consent determination of native title under section 87' and so it 'must... be exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose' of the NTA;
- it is appropriate to make orders under s. 87A 'where no evidence of the primary facts ... has been received' if the court is satisfied 'that the parties have freely and on an informed basis come to an agreement';
- orders under 87A may be made if the court 'is satisfied that the State, through competent legal representation, is satisfied as to the cogency of the evidence upon which the applicant relies';
- the court might consider 'the findings on the evidence on which the State relies ... for the limited purpose of being satisfied that the State is acting in good faith and rationally'—at [24] to [26], citing various authorities.

In this case:

> The State ... played an active role in the negotiation of the proposed consent determination ... . [I]n so doing, the State, acting on behalf of the community generally, having regard to the requirements of the Native Title Act and through a rigorous and detailed assessment process has satisfied itself that the determination as sought is justified in all the circumstances—at [27].

Orders giving effect matters other than native title – s. 87A(5)
Subsection 87A(5) was introduced by the *Native Title Amendment Act 2009* (Cwlth). According to the Explanatory Memorandum to the Native Title Amendment Bill 2009 (EM), it was intended:

> [T]o enhance the powers of the Court. The changes would encourage and facilitate more negotiated settlements of native title claims. These changes would also create a more flexible native title system and one that produces broad benefits to Indigenous people and certainty to stakeholders—EM at 31.

The parties asked the court to make orders pursuant to s. 87A(5) that Wanjina-Wunggurr (Native Title) Aboriginal Corporation (the RNTBC) and the state 'will negotiate in good faith to reach agreement on the matters in Attachment A to these orders, as provided for in Attachment A'. This would give effect to an agreement that those parties 'enter into negotiations in good faith to reach agreement on the relationship between the native title rights and interests ... and the non-native title rights and interests which exist' within the determination area. It includes an agreement to negotiate ILUAs dealing with:

- the relationship between the native title rights and interests and the rights and interests of the Department of Environment and Conservation with respect to certain conservation reserves;
- the validation, joint management and protection of native title rights and interests with respect to those reserves;
- alternative processes for the grant of future exploration and prospecting tenements and standard heritage agreement provisions for the determination area.

The parties sought orders under s. 87A(5) so as 'to have their agreement to negotiate the matters formally recorded'. The court accepted it was:

> [I]n the public interest that orders that give effect to the terms of an agreement that involve processes for formalising and regulating the exercise of the rights of the native title holders and of the broader Australian community are made in open court and are on the public record—at [29].

At [32], Gilmour J found that what was said of s. 87 by Justice Mansfield in *Brown v South Australia* [2010] FCA 875 at [24] 'applied equally' to s. 87A, namely that it:

> [C]ontemplates that ... the Court may make such orders as it considers appropriate even if it does not proceed to make a determination of native title. ... [I]t is difficult to see that the parties ... could not agree upon any of the matters encompassed within the coverage of an ILUA ... . Nor is there any apparent reason why the range of matters which may be the subject of an agreement incorporated into ... orders under s 87 is confined to those matters ... . The only step the Court must take to include the terms of an agreement is to be satisfied that it is appropriate to do so.

Therefore, his Honour was satisfied that 'it would be appropriate and within power' to make the orders.

Comment on scope of s. 87A powers

As noted, his Honour agreed with Mansfield J's comment that: '[I]t is difficult to see that the parties to an application under s 61 could not agree upon any of the matters encompassed within the coverage of an ILUA'. However, with respect, there may be occasions when the NTA will require either an ILUA or that the matter be otherwise be dealt with in accordance with Pt 2, Div 3 (the future act regime) rather than ss. 87 or 87A. For example:

- One of the conditions in s. 28 must be met to ensure that a future act that attracts the right to negotiate is valid and an order under s. 87 or 87A is not one of those conditions. The only alternative means of ensuring validity is where the future act is covered by

registered ILUA in which parties consent to it being done and it includes a statement that Subdiv P is not intended to apply—see s. 26(2).

- Section 24OA provides that a future act is invalid to the extent that it affects native title unless a provision of the NTA' otherwise provides'.
- Section 24EC provides (in paraphrase) that government parties can make 'other agreements' (i.e. other than an ILUA) with native title holders that 'relate to their native title rights ... (*other than agreements consenting to the doing of future acts*)' (emphasis added). Sections 87 and 87A refer to orders being made in terms of agreements reached. If the relevant government is to be a party, it seems the agreement cannot involve the native title parties 'consenting to the doing of future acts';
- Section 11 provides that native title cannot be extinguished contrary to the NTA. Where the parties agree to a surrender of native title, an area agreement ILUA, a body corporate ILUA or a s. 24MD(2A) agreement would seem to be required because it is only under these agreements that provision is made in the NTA for extinguishment via surrender.
- An ILUA may also be required where the parties agree that the non-extinguishment principle should apply to a future act that would otherwise extinguish native title given that principle is a creature of the statute.

Decision
Orders were made as sought by the parties.

Barunga v Western Australia [2011] FCA 518

Gilmour J, 26 May 2011

Issue
The main issues before the Federal Court were whether to make a determination recognising native title exists under the *Native Title Act 1993* (Cwlth) (NTA) in a case where there may be a defect in the authorisation and whether it was appropriate to make an order that the State of Western Australia and the determined registered native title body corporate (RNTBC) 'negotiate in good faith to reach agreement' about a number of matters, including the negotiation of various indigenous land use agreements (ILUAs). It was decided that it was appropriate for the court to do so.

This is the third of determination recognising the Wanjina-Wunggurr Community of the West Kimberley as native title holders. The combined area covered by those determinations is around 121,000 square kilometres, an area almost twice the size of Tasmania. A map of the area is included in the summary of *Goonack v Western Australia* [2011] FCA 516 in *Native Title Hot Spots* Issue 34. The determination itself is not summarised here.

Background
The Wanjina-Wunggurr Dambimangari (WWD) claimant application was a combination of two applications (originally known as 'Worrora and others') made in 1996. There were combined in April 1999 and the combined application amended to state that the claim group was comprised of those people 'who hold in common the body of traditional laws and customs concerning land and waters known as Wanjina-Wunggurr'. The application covered about 28,000 square kilometres in the west Kimberley region in Western Australia. It was one of four claims known as the Wanjina-Wunggurr applications. The first of two of these (the

Wanjina-Wunggurr Willinggin applications) were dealt with in *Neowarra v Western Australia* [2003] FCA 1402 (summarised in *Native Title Hot Spots* Issue 8 and Issue 9), where Sundberg J recognised that the Wanjina-Wunggurr Community (WWC):

> [C]onstituted a society and were bound together by a normative system of laws and customs which had continued to be acknowledged and observed by its members in a substantially uninterrupted manner since prior to the declaration of sovereignty over Western Australia—at [4].

In *Neowarra v Western Australia* [2004] FCA 1092 (*Neowarra*), Sundberg J determined that the WWC hold native title to most of the area covered by the Wanjina-Wunggurr Willinggin applications. In *Goonack v Western Australia* [2011] FCA 516 (summarised in *Native Title Hot Spots* Issue 34), Justice Gilmour determined determined that the WWC hold native title existed in relation to most of the area covered by the Wanjina-Wunggurr Uunguu application.

Through mediation with the National Native Title Tribunal, the parties to the WWD application reached an agreement that, among other things, provided for the recognition of the members of the WWC as the native title holders in relation to almost all of the WWD application area. The parties subsequently sought a determination by consent pursuant to s. 87A recognising native title is held by the members of the WWC 'for their respective communal, group and individual rights and interests' in relation to a large part of the proposed determination area. It was agreed that, apart from the land and waters of one island, the area covered by the WWD is the traditional country of the members of the WWC. The traditional system of law of the WWC comes from 'spirit beings known as Wanjina'—at [8] to [9].

John Catlin, on behalf of the State of Western Australia, provided affidavit evidence that:

- the state advised the applicant that, subject to establishing the members of the WWC had maintained the requisite connection to the claim area, Sundberg J's findings as to the WWC applied and could be adopted in the WWU application;
- the state assessed the relevant materials in accordance with its guidelines;
- that material and Sundberg J's findings satisfied the state that a body of traditional laws and customs existed under which the members of the WWC hold rights and interests within the proposed determination area.

Defect in authorisation – s. 84D applied

Subsection 84D(4) provides that if there is a defect in authorisation:

> The Federal Court may, after balancing the need for due prosecution of the application and the interests of justice ... hear and determine the application, despite the defect in authorisation ... or ... make such other orders as the court considers appropriate.

As two of the seven persons named as the applicant had died since the application was amended in 1999, a question arose as to whether the surviving five people were authorised as required. Evidence as to the terms of the authorisation given in 1999 could not be found and so it was not possible to determine whether terms of the authorisation accommodated the death of one or more of seven authorised persons.

Justice Gilmour exercised the discretion available under s. 84D(4) to make the determination 'despite any perceived defect in authorisation' on the basis that:

- the purpose of authorising the original seven people was to prosecute the native title holders' claim to the area concerned and it was now all but finally prosecuted successfully;
- there would be a denial of justice if it did not proceed to determination;
- the delay, cost and confusion resulting from requiring strict compliance at such a late stage would 'bring no credit upon the legal system'—at [16] to [17], applying the same rational as Justice Finn employed in *Akiba v Queensland (No 2)* [2010] FCA 643 at [930] to [931].

Native title claim group description v native title holders – s. 84D applied

The description of the native title claimant group in the WWU application was close, but not identical, to the description of the native title holders in the determination made by Sundberg J in *Neowarra* (the WWW determination). The order sought in this case was in the same terms of the WWW determination. If it was made, it would effectively mean the determination was 'referable to an expanded native title claimant group'. However, there had been no amendment to the WWD application to reflect this expanded group. Gilmour J noted the court was 'not limited to making a determination in the form sought in the application and may ... make a determination in such form as it sees fit based on the evidence, provided the application is valid'—at [21], referring to *Patch v Western Australia* [2008] FCA 944 at [18].

His Honour found that, pursuant to s. 84D(4), it was 'in the interests of justice to make the determination sought' despite any 'defect in authorisation'. Reliance was placed on s. 84D(3), which covers circumstances where those who are (or were) the applicant have dealt (or do deal) with a matter arising in relation to the application in circumstances where they were (or are) not authorised to do so—at [22].

Comment on ss. 47A(3) & 47B(3) and the group recognised

There is one issue that may arise if the claim group described in application is not the same as the group recognised as holding native title. Subsections 47A(3) or 47B(3) both state that if 'the determination on the application is that the *native title claim group* hold the native title rights and interests claimed' (emphasis added), then the effect of determination recognising native title is as prescribed in ss. 47A(3) and 47B(3) e.g. the non-extinguishment principle applies to the creation of certain prior interests. 'Native title claim group' is defined in s. 253 as 'the group mentioned in relation to the application in the table' in s. 61(1). In turn, s. 61(1) describes that group as 'all the persons ... who, according to their traditional laws and customs, hold the common or group rights and interests comprising the *particular native title claimed*' (emphasis added). Therefore, in this case, if it can be said that the 'particular native title claimed' is that of the WCC, it seems the conditions of ss. 47A(3) and 47B(3) are satisfied.

Applying s. 87A

His Honour set out s. 87A which (in paraphrase) provides that the court may make a determination of native title by consent over part of an application area without holding a hearing provided certain pre-conditions are met, the court is satisfied the orders sought is within power and it appears appropriate to the court to make those. The pre-conditions were either met or not relevant in this case. It was accepted there was no reason not to be satisfied that an order in, or consistent with, the terms of the agreement was within power and complied with ss. 13(1)(a), 67(1), 68, 94A and 225 of the NTA—at [22] to [23].

In considering whether it would be appropriate to make the orders sought, it was noted (among other things) that:

- the discretion under to s. 87(1A) 'must... be exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose' of the NTA;
- it is appropriate to make orders under s. 87 'where no evidence of the primary facts ... has been received' if the court is satisfied 'that the parties have freely and on an informed basis come to an agreement';
- orders under 87 may be made if the court 'is satisfied that the State, through competent legal representation, is satisfied as to the cogency of the evidence upon which the applicant relies';
- the court might consider 'the findings on the evidence on which the State relies ... for the limited purpose of being satisfied that the State is acting in good faith and rationally'—at [24] to [26], citing various authorities.

In this case:

> The State ... played an active role in the negotiation of the proposed consent determination ... . [I]n so doing, the State, acting on behalf of the community generally, having regard to the requirements of the Native Title Act and through a rigorous and detailed assessment process has satisfied itself that the determination as sought is justified in all the circumstances—at [27].

Orders giving effect matters other than native title – s. 87(5)

The parties asked the court to make orders pursuant to s. 87(5) that Wanjina-Wunggurr (Native Title) Aboriginal Corporation (the RNTBC) and the state 'will negotiate in good faith to reach agreement on the matters in Attachment A to these orders, as provided for in Attachment A'. This would give effect to an agreement that those parties 'enter into negotiations in good faith to reach agreement on the relationship between the native title rights and interests ... and the non-native title rights and interests which exist' within the determination area. It includes an agreement to negotiate ILUAs dealing with:

- the relationship between the native title rights and interests and the rights and interests of the Department of Environment and Conservation with respect to certain conservation reserves;
- the validation, joint management and protection of native title rights and interests with respect to those reserves;
- alternative processes for the grant of future exploration and prospecting tenements and standard heritage agreement provisions for the determination area.

At [32], Gilmour J noted what was said of s. 87 by Justice Mansfield in *Brown v South Australia* [2010] FCA 875 at [24], namely that it:

> [C]ontemplates that ... the Court may make such orders as it considers appropriate even if it does not proceed to make a determination of native title. ... [I]t is difficult to see that the parties ... could not agree upon any of the matters encompassed within the coverage of an ILUA ... . Nor is there any apparent reason why the range of matters which may be the subject of an agreement incorporated into ... orders under s 87 is confined to those matters ... . The only step the Court must take to include the terms of an agreement is to be satisfied that it is appropriate to do so.

Therefore, his Honour was satisfied that 'it would be appropriate and within power' to make the orders sought by the parties.

Comment on scope of s. 87A powers

As noted, his Honour agreed with Mansfield J's comment that: '[I]t is difficult to see that the parties to an application under s 61 could not agree upon any of the matters encompassed within the coverage of an ILUA'. However, with respect, there may be occasions when the NTA will require either an ILUA or that the matter be otherwise be dealt with in accordance with Pt 2, Div 3 (the future act regime) rather than ss. 87 or 87A. For example:

- One of the conditions in s. 28 must be met to ensure that a future act that attracts the right to negotiate is valid and an order under s. 87 or 87A is not one of those conditions. The only alternative means of ensuring validity is where the future act is covered by registered ILUA in which parties consent to it being done and it includes a statement that Subdiv P is not intended to apply—see s. 26(2).
- Section 24OA provides that a future act is invalid to the extent that it affects native title unless a provision of the NTA' otherwise provides'.
- Section 24EC provides (in paraphrase) that government parties can make 'other agreements' (i.e. other than an ILUA) with native title holders that 'relate to their native title rights ... (*other than agreements consenting to the doing of future acts*)' (emphasis added). Sections 87 and 87A refer to orders being made in terms of agreements reached. If the relevant government is to be a party, it seems the agreement cannot involve the native title parties 'consenting to the doing of future acts';
- Section 11 provides that native title cannot be extinguished contrary to the NTA. Where the parties agree to a surrender of native title, an area agreement ILUA, a body corporate ILUA or a s. 24MD(2A) agreement would seem to be required because it is only under these agreements that provision is made in the NTA for extinguishment via surrender.
- An ILUA may also be required where the parties agree that the non-extinguishment principle should apply to a future act that would otherwise extinguish native title given that principle is a creature of the statute.

Decision

Orders were made as sought by the parties.

Deceased registered native title claimant

FQM Australia Nickel Pty Ltd v Bullen [2011] FCAFC 30

North, McKerracher and Jagot JJ, 9 March 2011

Issue

The Full Court of the Federal Court agreed with the primary judge that, while the names of two deceased people appeared in an entry on the Register of Native Title Claims as 'the applicant', they continued to be the 'registered native title claimant' (RNTC) as defined in s. 253 of the *Native Title Act 1993* (Cwlth) (NTA).

Background

On September 2003, when one of the two persons named on the Register as comprising the applicant was still alive, the State of Western Australia gave notice under s. 29 of its intention to grant two mining leases the subject of these proceedings. Negotiations pursuant to s. 31(1) commenced in October 2003. However, in June 2007 (after the death of the remaining person

whose name appeared in the Register), the state granted the leases to FQM Australia Nickel Pty Ltd under the *Mining Act 1978* (WA) without either an agreement under s. 31(1)(b) or a future act determination under s. 38. The leases were granted on the basis that s. 28(1)(b) was satisfied, i.e. because, 'immediately before the act was done [i.e. the grant of each lease] there is no native title party in relation to any of the land or waters that will be affected by the act'. However, in *Bullen v Western Australia* [2010] FCA 900 (summarised in *Native Title Hot Spots* Issue 33), Siopis J declared that 'immediately before the grant' of the mining leases, there was a RNTC 'as defined by section 253'. This case deals with an appeal from that decision.

Deceased persons are still the 'registered native title claimant'

The court noted there was a conflict, or at least a tension, between the provisions of the NTA that assume a RNTC will be a living person (or persons) capable of negotiating in good faith on behalf of the claim group and other provisions that enable members of the claim group to seek orders under s. 66B(2) to replace the RNTC (actually, to replace the 'current applicant')—at [11] and [26].

Justices North, McKerracher and Jagot held that s. 66B:

- assumes a claimant application continues to exist after the death of the applicant making it and, where the application is registered, also assumes it continues to be registered;
- 'expressly provides' that 'the person who was a living applicant in relation to a claimant application continues to be the applicant on ... death', which was 'given emphasis' by the expression 'current applicant' in s 66B(1), which on its terms embraced a deceased applicant;
- was designed to enable an application for replacement of the 'current applicant' (and, if the claim is registered, the RNTC) to be made and given effect 'notwithstanding the death of the applicant'—at [31].

It was found that s. 66B assumes 'an applicant who has died after registration of their claimant application is still' a RNTC as defined in s. 253. This was said to be 'consistent' with s. 30(2), which provides that 'a person ceases to be a native title party [in right to negotiate proceedings] if the person ceases to be a registered native title claimant' but not that 'a person ceases to be a native title party on ... death'. Given this statutory context, their Honours found that:

> By the inclusion of their name on the Register the deceased person remains, for the purpose of the Native Title Act at least, a person whose name appears in an entry on the Register as the applicant in relation to a claim to hold native title in relation to the land or waters. Because the person continues to have that status despite their death, s 66B can operate to enable the replacement of that person as the current applicant and, equally importantly, the amendment of the Register to that effect—at [32].

It was also noted (among other things) that:

- it may be an 'imperfect' scheme, in that (for example) no 'maximum period ... within which an application for replacement' under s. 66B(1) is prescribed;
- this can cause 'inconvenience' but 'is not a reason to avoid giving effect to the statutory scheme which the legislature has prescribed';
- the legislature intends s. 66B to provide a mechanism for replacing the applicant – and the RNTC if the claim is registered – 'without affecting the validity of the application or of the claim as registered'—at [33] to [34].

No step in the claimant application until deceased applicant replaced?
The court was satisfied that construing the definition of RNTC as 'continuing to apply to an applicant who has died until removal of that person's name from the Register' was 'consistent with the representative character' of a claimant application under the NTA. It was noted the appellants accepted s. 66B assumed the application continued 'to exist after the death of the applicant' but with the qualification that 'no step could be taken in respect of a claimant application unless and until a deceased applicant is replaced by a living person'. It is not clear whether or not the court accepted this qualification—at [31].

Consistent with the objects of the NTA
That primary judge's construction (with which their Honour's agreed) 'gives effect to the statutory provisions and so it could not be said to 'undermine any of the purposes of the statute' outlined in s. 3 (the object's clause): 'To the contrary, it promotes those purposes where the construction of the appellants would undermine them'—at [37].

Section 66B is the 'leading provision'
It was acknowledged that the future act provisions in Div 3 of Pt 2 created 'tension or potential inconsistency with the scheme for replacement' of the applicant under s. 66B. However, the court resolved this by:

- giving effect to s. 66B 'on its own terms';
- finding that, 'when it comes to the effect of the death of an applicant', s. 66B is 'the leading provision which takes precedence'—at [38].

The fact that other definitions in the NTA, such as 'native title holder' in s. 224 and 'native title claim group' in s. 61(1) could have been used to define a 'native title party' under ss. 29 and 30 was 'a neutral consideration' because:

> The statute defines a native title party in a way which includes a registered native title claimant. It defines a registered native title claimant in a way which requires entry on the Register. It contains provisions dealing with the Register and its amendment. Those provisions include the replacement of an applicant who is a registered native title claimant where that applicant has died. Effect must be given to the scheme for which the statute provides—at [38].

Options where 'unreasonable delay' in replacing the applicant
The court noted 'other options' that would 'facilitate the operation' of the NTA if there is 'unreasonable delay' by members of a native title claim group in making an application under s. 66B(1) to replace the applicant (and, therefore, the RNTC), including:

- the grantee or government party may make a future act determination application (FADA) pursuant to ss. 35(1) and 75, albeit that 'without a living' RNTC, 'there would be no contradictor' for the purpose of that application;
- any respondent to the associated claimant application 'could have recourse to' the court, including by seeking summary dismissal for want of prosecution or abuse of process—at [36].

Declaratory relief available – question not hypothetical
The appellants argued the primary judge should have refused to make a declaration as to the status of the RNTC because the question was hypothetical. The court was satisfied that the status of persons as RNTC 'immediately before' the grant of the mining leases 'involves a

real not hypothetical question'. *Lardil Peoples v Queensland* (2001) 108 FCR 453; [2001] FCA 4 was distinguished because in that case the 'validity [of an authority to install a mooring buoy] ... depended on its grant being ... an act which affects native title'. In this case, the declaration sought did not 'depend on the assumed existence of native title'. The declaration 'would be relevant to the validity of the mining leases if native title is found to exist' but this was 'simply an aspect of its utility'. Further, there were 'other aspects of utility', for example:

- the mining leases had been granted;
- subsequently, the applicant had been replaced and the new applicant was now the RNTC;
- there was 'a real dispute' between the current RNTC and the appellants 'as to whether there was' a RNTC 'immediately before the grant of the mining leases';
- the declaration sought, if made, would quell that controversy—at [42].

It was also argued the declaration was a 'staging-post' for other litigation. When analysed properly, this was found to be 'an impermissible complaint about a discretionary exercise' of power and did not support a submission that the declaration involved 'a hypothetical and not a real dispute'—at [44].

Similarly, a submission that the primary judge failed to have regard to a relevant consideration (i.e. the fragmentation of proceedings in circumstances where the related clamant application, when resolved, could determine the issues in relation to the leases) was rejected because:

> The nature and the breadth of the discretion [relating to the making of declarations] do not permit any one consideration to be elevated to the status of a matter that the primary judge was bound to consider—at [45].

Arguments based on *Edwards v Santos Ltd* [2009] FCA 1532 and *Edwards v Santos* (2010) 185 FCR 280; [2010] FCAFC 64 are not noted because, subsequent to this decision, the High Court quashed the orders made in those cases—see *Edwards v Santos* [2011] HCA 8 (summarised in *Native Title Hot Spots* Issue 34).

Distinguishing *Chapman*, *Lennon* and *Sambo*

Chapman v Queensland (2007) 159 FCR 507; [2007] FCA 597 (summarised in *Native Title Hot Spots* Issue 24) was distinguished on the basis that:

- the issue in that case was not whether a deceased person continued to be a RNTC;
- section 66B was subsequently amended by the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth) and, accordingly, 'the present statutory context ... is different'—at [29].

Lennon v South Australia [2010] FCA 743 and *Sambo v Western Australia* (2008) 172 FCR 271; [2008] FCA 1575 (summarised respectively in *Native Title Hot Spots* Issue 33 and Issue 29) were distinguished on the basis that in neither case was the court 'confronted by the same issue as that which arises in the present case', i.e. whether a deceased person ceased to be an applicant (and thus a RNTC) 'immediately upon death'—at [30].

Decision

The court agreed with the primary's judge's finding that there was a RNTC 'immediately before the grant of the mining leases' for the reasons summarised above and 'on the facts of the present case'. Therefore, the court dismissed the appeal—at [40] and [46].

No costs order
Despite being unsuccessful, the points raised by the appellants 'were important to the construction' of the NTA and 'reasonably pursued'. Therefore, there would no order as to costs 'having regard to' s. 85A unless submissions to the contrary were filed within 10 days of the decision, which they were not—at [47].

Comment – possible implications for future act matters
Regardless of whether or not the court agreed with the appellants that no step could be taken in the proceedings before the court in relation to the claimant application until a deceased applicant was replaced under s. 66B(2), both the primary judge and the Full Court were of the view that steps could be taken before the National Native Title Tribunal in relation to right to negotiate proceedings.

At first instance, Siopis J acknowledged that deceased RNTC 'may be incapable of carrying out the statutory functions of the applicant', including 'negotiations called for' under s. 31(1), i.e. negotiation in good faith— at [56].

According to the Full Court, if there is 'unreasonable delay' on the claim group's behalf in making an application under s. 66B(1), then the government or grantee party may make application under s. 35 for a determination by the Tribunal. In such a case, 'without a living registered native title claimant, there would be no contradictor' in those proceedings—at [36].

At [28], the court refused to find that the 'express provisions' of s. 66B were subordinate to 'an implied obligation' on the claim group to 'ensure that, at all times', a RNTC 'was alive and thus capable of representing the group ... including by engaging in the right to negotiate procedures'. While not free from doubt, this seems to indicate that, without a living RNTC, there is no-one capable of taking steps on behalf of the claim group in the right to negotiate process. However, it was also found that there is a RNTC, even where all those comprising the RNTC are deceased. This means that there is a 'native title party' under ss. 29 and 30 and a native title party is a 'negotiation party' under s. 30A. This may give rise to some issues in right to negotiate proceedings, including the following.

Firstly, can government and grantee parties simply say that, since there is no competent 'native title party', they are not obliged to negotiate in good faith with anyone and so need only await the expiration of the mandatory six month period before making a FADA? In other words, are they relived of the obligation to negotiate in good faith, given it is the native title party with whom they are obliged to negotiate is not competent? Second, if the grantee or government party did make a FADA in these circumstances, must the Tribunal first find that there has been 'unreasonable delay' on the part of the claim group in making a s. 66B(1) application before it makes a determination in respect of it? Or can the Tribunal simply proceed to make a future act determination without further ado? If submissions and evidence are lodged with the Tribunal by a legal representative purporting to act on the instructions of the relevant claim group, must the Tribunal refuse to have regard to them? Is this implicit in the court's comment that there would be no contradictor? However, it seems the Tribunal could take these matters into account when making its determination under s. 38 if the Tribunal considered them relevant—see s. 39(1)(f).

There would also be a 'native title party' for the purposes of the expedited procedure objection application process pursuant to ss. 32(3) and 75. However, if an objection application was lodged by a legal representative purporting to act on the instructions of a claim group for a registered claim in circumstances where all those named in the Register are deceased, it seems the Tribunal be at liberty to dismiss the objection application under s. 148(a) because it was satisfied it was not entitled to deal with the application. In other words, it seems the Tribunal would be at liberty to find that there is no-one 'capable of representing the [claim group] in accordance with the requirements of the legislation', including the lodging of objections—at [28].

Expedited procedure — community activities

Tullock (Tarlpa)/Western Australia/Bushwin Pty Ltd [2011] NNTTA 22

DP Sumner, 24 February 2011

Issue

The question in this matter was whether the grant of an exploration licence was likely to interfere directly with the carrying on of the native title party's community activities associated with the obligation under traditional law to look after country. It was found that the grant of the licence was not likely to do so. This question was relevant to an inquiry under s. 237(a) of *Native Title Act 1993* (Cwlth) (NTA), which is part of the definition of a future act that 'attracts the expedited procedure'.

Background

The area covered by the proposed future act (the grant of an exploration licence) was overlapped by the Tarlpa claimant application, which is registered on the Register of Native Title Claims. The registered native title claimants (the native title party) made an expedited procedure objection application. Section 237 provides that:

> A future act is ***an act attracting the expedited procedure*** if:
> (a) the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders ... of native title in relation to the land or waters concerned; and
> (b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders ... of the native title in relation to the land or waters concerned; and
> (c) the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned (emphasis in NTA).

The native title party abandoned any reliance on ss. 237(b) and (c). As to s. 237(a), it argued the act did not attract the expedited procedure because the future act was likely to interfere with the community activities associated with the obligation to 'look after country' based on (among other things) the evidence of one of the Tarlpa claimants, Victor Ashwin, and the evidence of anthropologist Lindsay Langford. All parties agreed s. 237(a) was the sole issue.

Acceptance of anthropologist's evidence

The Tribunal rejected the government party's contention that 'limited, if any' weight should be given to Mr Langford's evidence because he was employed by the Central Desert Native Title Services Ltd (the native title party's legal representative) and was not a native title party. This was not 'a sufficient basis to disregard or discredit his evidence'. Further:

> [T]he Government party agreed that this matter could be determined on the papers. If it sought to impugn Mr Langford's credibility or candour, then it should have sought leave to cross-examine him—at [34].

The Tribunal also noted that comments in native title decisions made by the Federal Court as to the value of anthropological evidence were 'of assistance in this matter and support the Tribunal's acceptance' of Mr Langford's evidence—at [37].

History and interpretation of s. 237(a)

The Tribunal set out a detailed exposition of the legislative history of s. 237(a) because it was at the heart of this matter—at [54] to [75]. It was found that, in the context of s. 237(a):

- the meaning of 'to interfere' is an action which has the effect of 'hampering or affecting adversely any community activities of the native title holders';
- it is reasonable to conclude that 'carrying on' means 'continuing or going on with' the relevant activities or 'keeping up, conducting' those activities;
- a distinction must be drawn between the relevant activity as such and 'the physical aspects of carrying it on', i.e. s. 237(a) is "concerned with the likelihood of direct interference with the 'the physical conduct of the activity' in question if the future act is done";
- the notion of direct interference 'involves ... an evaluative judgment that the act is likely to be a proximate cause of the apprehended interference';
- the act must substantially impact upon the carrying on of the relevant community or social activities, i.e. 'trivial impacts' or those that are irrelevant to the carrying on of those community or social activities 'are outside the scope of the ... interference contemplated by the section'—at [106] to [108] and [110], referring to *Drury v Western Australia* (2002) 170 FLR 182; [2002] NNTTA 171 at [17.2] and citing *Smith v Western Australia* (2001) 108 FCR 442; [2001] FCA 19 (*Smith*) at [26].

It was also found that the activities concerned do not have to take place on the area that will be affected if the future act is done. Further, 'the presence or absence of an Aboriginal community or the carrying on of community or social activities of native title holders on the area' concerned 'is not a consideration' which on its own is definitive as to whether the carrying on of those activities is likely to be interfered with—at [84] and [87].

However:

> [T]he fact that there is a physical community made up of members of the native title claim group on or near the proposed tenement area … will be relevant to whether or not the future act would be a proximate cause of the alleged interference where … the ... activities relied upon are hunting, camping, fishing or ceremonial activities. … [A]ctivities of that kind ... carried on by … claim group members at great distances from the proposed tenement area ... may still answer the description of 'community or social activities' of the persons holding native title to that area but it may be difficult (although not impossible) on the facts to show that the grant of the tenement, and

> the activities undertaken as a result, would be a proximate cause of any direct interference with carrying on those community or social activities because of the geographical distance—at [88].

Must the activities arise from registered native title rights and interests?

At [93], Deputy President Sumner asked whether the community or social activities must be 'manifestations of the *registered* native title rights and interests [i.e. in this case, those that appear on the Register of Native Title Claims]; or, alternatively the *claimed* native title rights and interests?' This was because in *Silver v Northern Territory* (2002) 169 FLR 1; [2002] NNTTA 18 at [58], Deputy President Sosso said the Tribunal's inquiry under s 237(a) was concerned with activities that are 'a manifestation of *claimed* native title rights and interests' (emphasis added) but at [45] said the Tribunal must deal with *registered* native title rights and interests. In this matter, there was some doubt as to whether the relevant community activities were a 'manifestation' of registered native title rights and interests in relation to the area concerned. This was because the duty to look after country via carrying on the relevant community activities seemed to be "reflected in the claimed native title right to 'speak for and make non-exclusive decisions about the area covered by the application", which did not appear to be registered in relation to the area concerned.

Two possible answers to the question were identified:

> [Paragraph] 237(a) should ... be read to embrace the all of the native title holders' community or social activities, provided [they] ... are a manifestation of the claimed native title rights and interests ... . On the other hand, if the expedited procedure does not apply so that the claimants have the right to negotiate, s 31(2) provides that the other negotiation parties cannot be found to have failed to negotiate in good faith with the native title party as required by s 31(1)(b) simply because [any of] those parties ... failed or refused to negotiate about 'matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties'. On this basis, the community or social activities must arise from the registered native title rights and interests—at [96].

None of the parties raised this issue. In those circumstances, Deputy President Sumner dealt with the issue 'on the basis of the best case (or most beneficial) scenario from the native title party's perspective', i.e. the relevant community or social activities must be 'a manifestation of the claimed native title rights and interests'—at [102].

Nature of the activities – physical aspect

According to the Tribunal, the evidence was that the community activities associated with 'looking after country' were essentially:

- discussing within the community the proposed activities of the grantee party;
- meeting, negotiating and if possible reaching agreement with the grantee party on how it conducts its exploration activity; and
- ensuring that the grantee party has complied with any obligations it has agreed to, while conducting its exploration activities and at the cessation of those activities—at [45].

The government party contended (among other things) that the native title party had not identified a physical dimension to the community activities, in the absence of which there would be no physical interference with those activities as required under s. 237(a). Deputy President Sumner surveyed the decisions on point before finding that:

> [S]ince the 1998 amendments [to the NTA], the Tribunal has always acted on the basis that, in a practical sense, the community or social activities encompassed by s 237(a) are essentially physical activities, even if they are carried out because of the spiritual relationship that a native title party has to the relevant land. In … [*Smith*] (at [29]), French J declined to decide whether DP Franklyn was correct to say in … [*Western Australia v Smith* (2000) 163 FLR 32] ... that s 237(a) 'is concerned with and limited to interference with the physical aspects of the carrying on of community and social activities of the native title holders' because the appellant was not relying upon any non-physical aspect ... in that matter. Since … [*Smith*], the Federal Court has not been called upon to deal with this issue and the Tribunal has continued with the approach described above—at [75].

In any case, the Tribunal accepted that: 'Meeting, negotiating, reaching accord and monitoring compliance with an agreement all have a physical dimension'—at [80].

Tribunal had to consider ss. 237(a) & (b)

While the focus of the inquiry was s 237(a), following French J in *Smith* at [23], the Tribunal must 'assess whether, *as a matter of fact*, the proposed future act is likely to give rise to the interference or disturbance referred to' in s. 237(a), (b) and (c) (emphasis added). On the basis of the material before it, the Tribunal was satisfied that 'it is not likely that there will be interference or disturbance of the kind mentioned' in ss. 237(b) and (c)—at [124] to [125].

Decision

At [113] to [114], Deputy President Sumner found that:

> The native title party's case appears to come down to saying that the grant of the exploration licence itself will require it, according to its traditional laws and customs, to take action involving discussions, negotiations and attempting to reach agreement with the grantee party and that the carrying on of these activities is likely to be directly interfered with by the grant of the tenement and whatever exploration the grantee party is permitted to do.
>
> I can accept that the native title party's traditional law and customs require it to take this action and respond to the proposed grant but do not think that this means that the capacity to carry on these activities is hampered or adversely affected in a direct way. The activities associated with looking after country, as relied upon in this matter, can still be carried on. For example, the native title party's own contention is that the relevant community activities include reaching agreement with the grantee party 'if possible' and, if such an agreement is reached, to ensure compliance with it. There would be no direct interference with carrying on this activity by the native title party if the future act was done.

Therefore, it was determined that the grant of the exploration licence was an act attracting the expedited procedure.

Future act conditions include lump sum payment

Jax Coal Pty Ltd/Birri People/Queensland [2011] NNTTA 46

DP Sosso, 17 March 2011

Issue

The National Native Tribunal determined that a lump sum payment and an employment package could be made conditions on the grant of a mining lease under a future act determination made pursuant to s. 38 of the *Native Title Act 1993* (Cwlth) (NTA). The issue

resolved was whether those conditions were compensation for the effect of the grant on native title. If they were, the Tribunal had no power to impose them. Deputy President Sosso decided the conditions should not be characterised as compensation. The Tribunal made it clear this decision turned on the facts of this case.

Background

During negotiations conducted in good faith as required by s. 31(1)(b) of the NTA, the native title party accepted the grantee party's offer. However, rather than entering an agreement, the native title party wanted the matter finalised via a Tribunal determination that the future act may be done subject to conditions made by consent under s. 38. In making such a determination, the Tribunal must (among other things) take any agreement reached during the negotiations into account—see s. 39(4).

However, as DP Sosso noted: 'the fundamental issue … is whether the form of the conditional determination sought by the grantee and native title parties is open to the Tribunal'. The State of Queensland contended a lump sum payment of $100,000 and a requirement to employ two members of the native title claim group should be characterised as compensation and that, as such, the Tribunal had no power to make these elements of the agreement conditions of the grant—at [31], [42] and [45].

Consent determination

The Tribunal noted that a practice has developed in Western Australia whereby, if an agreement could cannot be executed for technical or practical reasons, the Tribunal makes a future act determination under s. 38 with the consent of all the negotiation parties 'to facilitate the completion of the negotiations'. The request in this case was similar and 'provided the grantee and government parties agreed, there was, on its face, no impediment to the making of a consent determination of the type sought'. However, since the government party 'was not prepared to join' the other parties in seeking a consent determination, 'it was not possible to make a conditional determination applying the principles outlined' in *Monkey Mia Dolphin Resort Pty Ltd v Western Australia* (2001) 164 FLR 361; [2001] NNTTA 50 and *Foster v Copper Strike Ltd* (2006) 200 FLR 182; [2006] NNTTA 61—at [39] and [42].

Characterisation of the conditions

As was noted, the 'threshold issue' was whether the payment or benefit in question could be properly identified as 'compensation'—at [47], referring to *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) 232 FLR 169 [46]; [2009] NNTTA 49 at [196]. According to DP Sosso:

> The awarding of compensation is payment for a loss sustained or injury done ... by the deleterious impact of ... the future act on registered native title rights and interests. Consequently, a payment or benefit can be characterised as "compensation" if the primary reason for the payment or conferral of the benefit is an attempt to recompense those persons claiming or holding native title for the likely disruption and damage of the doing of the future act on the exercise of those persons' native title rights and interests—at [47].

It was found that:

> It is too broad a proposition that a payment of money agreed by the negotiation parties must invariably be characterised as "compensation". ... The primary question that must be asked is

> this: was the benefit agreed to primarily or calculated solely on the basis that it was a fair payment for the likely injurious ramifications of the doing of the future act on the native title party's registered native title rights and interests?—at [50]

The question was answered in the negative because:

- the 'uncontroverted material before the Tribunal' demonstrated that the proposed payment and the employment benefits 'flowed from broad ranging and vigorous negotiations';
- the Tribunal 'is not constrained by the nomenclature used by the parties' i.e. a reference to the payments as a 'compensation package' did not inhibit the weighing up of all the evidence and the reaching of a conclusion 'based on the facts as distinct from the terminology of the parties in the course of negotiations';
- in this case, the evidence indicated the financial and employment package put forward by the grantee party, 'and very reluctantly accepted by the native title party', was the 'price' that the grantee party was 'prepared to pay and the native title party was prepared to accept for the agreement of the native title party to the doing of the proposed future act'—at [52] to [54].

The Tribunal noted that:

> It would be entirely unrealistic and artificial to characterise what appear to be basic and less than amicable negotiations, as an attempt by them to rationally and objectively calculate a compensation package for the likely injurious affection to native title occasioned by the doing of the future act. The financial and employment package negotiated here, was ... a commercial settlement based on a range of factors, with native title being only one of those factors. The "right to negotiate" process provided the platform and opportunity to reach a settlement. … I have formed the view… that the composition of the package was almost totally unrelated to issues pertaining to injurious affection. In these circumstances, it is open to the Tribunal to make a conditional determination along the lines requested by the grantee and native title parties—at [54].

However, DP Sosso was careful to point out that determination 'should be read strictly in accordance with the facts before the Tribunal, and particularly the fact that the financial package was eventually agreed by the grantee and native title parties'. The situation would have been 'quite different if the parties had not agreed on the quantum of their deal. In such a circumstance a more forensic approach ... would be required'—at [55].

Decision

After considered the criteria specified in s. 39 of the NTA (to the extent required) and taking into account the parties' submissions, the Tribunal decided it was appropriate to make a determination that the act could be done subject to the conditions requested by the grantee and native title parties, including the lump sum payment and the employment package—at [61] to [89].

Future act must not be done

Seven Star Investments Group Pty Ltd/Western Australia/Freddie [2011] NNTTA 53

DP Sumner, 24 March 2011

Issue

In this case, the National Native Title Tribunal determined pursuant to s. 38 of the *Native Title Act 1993* (Cwlth) (NTA) that a future act (the grant of an exploration licence) must not be done. The grantee party's prior conduct and evidence that its proposed exploration methods were non-scientific (i.e. that special mystical knowledge would be used to look for an anomaly) were central to the decision. This is the first time the Tribunal has made such a determination in relation to exploration.

Background

In January 2008, notice was given under s. 29 of an intention to issue the licence. It included a statement that the government party considered the expedited procedure applied to the future act covered by the notice. Central Desert Native Title Services Limited (CDNTS), the native title party's representative, sent the grantee party an Exploration and Prospecting Agreement (EPA), indicating the native title party would withdraw its objection to application of the expedited procedure if the grantee party signed the EPA. Negotiations did not result in the execution of the EPA and the Tribunal dismissed the native title party's objection in September 2008. However, pursuant to s. 32(7), the government party withdrew its statement that it considered the act attracted the expedited procedure, thereby activating the right to negotiate process. On 30 May 2010, the grantee party made an application pursuant to s. 35 for a future act determination under s. 38.

The government party proposed the parties engage in mediation. However, CDNTS declined to participate because:

- the right to negotiate process had just commenced (a view the Tribunal saw as 'unnecessarily technical' given the expedited procedure negotiations were 'directly related to the grant of the proposed licence');
- as a result of the grantee party's behaviour throughout the expedited procedure process, it wished to mediate with the State alone;
- it wanted mediation to include consideration of whether the state was obliged to ensure the grantee party was 'a fit and proper entity with which to negotiate and ultimately to which a mineral tenement should be granted'—at [88].

The grantee party subsequently executed the EPA but included an additional clause. The native title party resolved not to execute the amended EPA.

Grantee party's prior conduct

The native title party put correspondence from the grantee party into evidence to support its contention that the grantee party's previous conduct was insulting and hostile to CDNTS. The grantee party removed Charles Ghaneson as a director because it was Mr Ghaneson who was in conflict with the CDNTS. Mr Ghaneson apologised in writing to CDNTS. However, in

contemporaneous proceedings before the Federal Court, Mr Ghaneson continued to make insulting remarks about CDNTS—at [74] to [80] and [106] to [108] and see *Freddy v Western Australia* [2010] FCA 1158 (summarised in *Native Title Hot Spots* Issue 34).

Section 39 criteria

The Tribunal (as it must) considered each criterion in s. 39 before making its determination.

Effect on enjoyment of registered native title rights and interests and on native title party's way of life, culture and traditions—ss. 39(1)(a)(i) and (ii)

The native title party contended the grantee party's failure to understand the native title party's cultural obligations had a significant effect on both the enjoyment of native title rights and interests and on the way of life culture and traditions of the native title party. The evidence indicated that the effect (if any) of the proposed exploration on the enjoyment of the native title party's native title rights and interests 'is not on its own an obstacle to a determination that the act may be done'—at [42].

However, in relation s. 39(1)(a)(ii), Deputy President Sumner found that:

> [I]f the grant is made in circumstances where the grantee party continues to behave in the manner it has to date, then the conflict between SSIG and CDNTS is likely to continue and have some effect on the native title party's tradition of looking after country. This is something to which I am entitled to give some weight—at [45].

Effect on development of social, cultural and economic structures—s. 39(1)(a)(iii)

The grantee party said the native title party would, among other things, benefit because 'unknown sites may possibly be discovered during the conduct of heritage surveys'. The Tribunal found expenditure on exploration 'would only be of minimal indirect benefit' and it was not clear how 'locating of sites would contribute to the development' of the relevant structures. The findings under ss. 39(1)(a)(i) and (ii) were repeated in relation to whether there would be 'any adverse effect on the cultural structures of the native title party'—at [46] to [48].

Freedom of access, freedom to carry out rites, ceremonies or other activities of cultural significance—s. *39(1)(a)(iv)*

There was limited evidence that the native title party accessed or carried out any rites, ceremonies or other activities of cultural significance over the relevant area. Further, the grantee party's contentions that on-site exploration would be 'limited in time and to a small area' were accepted. However, for the reasons given earlier:

> [T]he continuing conduct by the grantee party of the kind exhibited to date will have some effect on the native title party's freedom to carry out its activities of cultural significance including looking after sites of importance to them—at [49].

Sites of particular significance—s. *39(1)(a)(v)*

There was evidence that the area was within 'a network of … significant *tjukurrpa* (dreaming) sites'. The fact that the grantee party was willing to conduct a heritage survey, coupled with the Western Australian regulatory regime 'would have been adequate to deal with this criterion and minimise the possibility of there being interference to areas or sites of

particular significance' were it not for the grantee party's prior negotiating behaviour—at [52] to [54].

Interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of the land— s. 39(1)(b)
It was found regard could be had to the fact that 'the native title party does not want the [particular] grantee party involved in the use of the land' and that it was 'a matter to which some weight can be given if justified on the evidence'—at [56].

Economic or other significance—s. 39(1)(c)
Among other things, the native title party contended it was likely there would be a negative economic impact on the nation or the state:

> [B]y tying up an exploration area for up to 10 years by a company that has: no expertise in exploration; insufficient funding to properly explore for mineralisation; and an exploration strategy based solely on 'astrological' and 'mystical' activity, thus depriving other exploration companies from the opportunity of exploring the area—at [61].

However, the Tribunal accepted 'some limited economic benefit would be brought to the local area through expenditure on exploration activities'—at [63].

Not in the public interest—s. 39(1)(e)
Deputy President Sumner was satisfied the proposed exploration methods involved 'to a significant extent' locating drilling sites 'according to Mr Ghaneson's alleged special mystical knowledge'. Therefore, it was found that 'to an important extent' the grantee party's exploration activities 'will rely on the views of Mr Ghaneson, some of which involve what I can only describe as a non-scientific approach to exploration'. It was found that: 'Overall … taking account of the matters dealt with under s 39(1)(f) … the public interest is *not* served by the grant of the proposed licence' to the grantee party—at [71] to [72] (emphasis added).

Any other relevant matter - 39(1)(f)
The native title party contended the Tribunal must take into account the grantee party's prior conduct under s. 39(2)(f). It states that, in making a determination under s. 38, the Tribunal 'must take into account … any other matter that the … [Tribunal] considers relevant'. The native title party's evidence of intimidating remarks, threats of violence and inappropriate disrespectful remarks directed towards both the native title party and CDNTS was examined and regard was had to statements on the record from the grantee party, or persons acting for it, and the conduct of prior negotiations. It was found the grantee party's prior conduct must be taken into account under s. 39(1)(f)—[74] to [108].

Decision
After weighing all of the relevant factors, including the native title party's wishes 'in opposing the grant being made to this particular grantee party', the Tribunal found that, in this 'unique case', the grant of the tenement was not in the public interest because:

- the 'irretrievable breakdown in relations' between CDNTS and the grantee party meant there was 'real potential for further serious disputations and conflict in the future which will impact on the capacity of CDNTS to act for the Wiluna claimants and on the claimant's capacity to carry out their cultural obligations'; and

- the proposed exploration methodology has no rational or scientific basis—at [117] and [119].

Straits Exploration v The Kokatha Uwankara Native Title Claimants [2011] SAERDC 2

Tilmouth J, 14 January 2011

Issue

Straits Exploration (Australia) Pty Ltd and Kelaray Pty Ltd (joint venturers) applied for a determination under Part 9B of the *Mining Act 1971* (SA) (Mining Act) permitting mining operations in relation to native title land subject to an exploration licence held by Kelaray Pty Ltd. The Environment, Resources and Development Court of South Australia (ERD Court) determined those operations may not be conducted. It is the first time the ERD Court has refused to allow exploration to proceed. The refusal was essentially because of the importance of the area to the Kokatha people and the court's dim view of the behaviour of one of the joint venturers in its dealings with the Kokatha people.

Appeal proceedings

Straits are appealing this decision—see *Straits Exploration v The Kokatha Uwankara Native Title Claimants* [2011] SASCFC 9, summarised in *Native Title Hot Spots* Issue 34.

Alternative right to negotiate regime in South Australia

In South Australia, pursuant to ministerial determinations made in 1995 under s. 43 of the *Native Title Act 1993* (Cwlth) and the *Environment, Resources and Development Court Act 1993* (SA), the ERD Court is the arbitral body for right to negotiate applications involving mining tenements other than gas and petroleum tenements. The Mining Act contains provisions dealing the right to negotiate in relation to accessing 'native title land', defined as 'land in respect of which native title exists or might exist'. Under Part 9B of the Mining Act, the exploration licence holder wanting to conduct exploration activities on native title land decides whether those activities will 'affect native title' and, if so, gives notice in under s. 63M of the Mining Act to native title parties. Any registered native title claimant at the time notice is given is a native title party, as is any applicant for a claim that is registered within two months of the date of the notice. The licence holder must negotiate in good faith 'and accordingly explore the possibility of reaching an agreement' with the native title parties for at least four months. If no agreement is reached, s. 63S provides that any party to the negotiations or the relevant minister may apply to the ERD Court for a determination that either mining operations may not be conducted on the native title land or that those operations may be conducted subject to conditions determined by the ERD Court. The criteria utilised by the ERD Court in making its determination are similar to those found in s. 39 of the *Native Title Act 1993* (Cwlth) (NTA).

Background

The joint venturer's proposed mining operations consisted of a drilling program and the construction of camp facilities and storage areas. The Kokatha people (who had a claim entered on the Register of Native Title Claims over the relevant area at all relevant times) were opposed to the conduct of these operations because the area that would be affected was

of 'enormous religious significance' to both them and the wider Western Desert People—at [11] and [12].

Straits applied to the Minerals and Energy Resources Department for approval to carry out exploration operations, which was given in September 2007. Drilling commenced in October 2007. However, none of the arrangements relied upon in its application to the Minister was found to be an agreement for the purposes of Part 9B of the Mining Act. Further, Straits had on file correspondence dating back to 2004 that stated that:

> Lake Torrens is a highly significant area to the Kokatha people and the report from a previous clearance undertaken by the Kokatha in this area indicates that the Kokatha have excluded Lake Torrens and its surrounds from exploration.

On 9 December 2007, a heritage survey was conducted by Dr Neil Draper and members of the Kokatha over four potential drill sites and related access tracks near Andamooka Island. His report noted the Kokatha were not involved in previous cultural heritage surveys over the area and emphasised that Andamooka Island was a place of high cultural significance to them. The covering e-mail in which Dr Draper sent his report to Straits stated that none of the four proposed sites were cleared for drilling because of the impact this would have on the site. Despite this, Straits continued drilling until 25 February 2008. Further, Straits did not conduct any searches of the state's register of sites until prompted to do so during these proceedings.

In late 2009, Straits initiated the consultation process under the Part 9B of the Mining Act. During those consultations, Straits applied for approval to damage, disturb or interfere with an Aboriginal site of significance for the purposes of exploration operations under s. 23 of the *Aboriginal Heritage Act 1988* (SA) (AHA). In early January 2010, the Kokatha people's legal representative confirmed that any discussions in relation to an agreement under Part 9B should be deferred until after the relevant Minister's decision on the s. 23 application.

Straits' exploration program received approval from the relevant Minister in July 2010, which meant it could lawfully 'damage, disturb or interfere with any Aboriginal sites, objects or remains that may exist on Lake Torrens and a portion of Andamooka Island designated for mining exploration activity' pursuant to s. 23 of the AHA. Despite this, the Kokatha maintained Straits had no authority to affect their native title rights and interests in the absence of an agreement pursuant to Part 9B of the Mining Act. They sought judicial review of the s. 23 decision. Judgment is pending in those proceedings.

Straits applied to the ERD Court on 2 August 2010 seeking a determination pursuant to s. 63S(2) of the Mining Act that they may conduct exploratory mining operations, subject to conditions determined by the court. Judge Tilmouth, in making his determination on Straits' application, considered each of the requirements of s. 63T of the Mining Act in turn.

Effect of the proposed mining operations on 'native title in the land': s. 63T(1)(a)(i)

It was accepted that s. 63T(1)(a)(i) was not an invitation to 'engage in a determination of native title'. Rather, the effect of the proposed exploratory mining operations on claimed and registered native title rights and interests that were 'fairly open or arguable' according to the evidence given had to be considered. While accepting registered rights and interests should be given greater weight, Tilmouth J held that 'wider claimed rights were not to be ignored

where there was credible evidence to support them'—at [121], [122] and [127], referring with approval to decisions of the Tribunal in relation to s. 39(1)(a)(i) of the NTA, pursuant to which the Tribunal must consider 'the effect of the act on the enjoyment by the native title parties of their registered native title rights and interests'.

The right to possession, occupation, use and enjoyment to the exclusion of all others (exclusive possession) was claimed by the Kokatha but was not registered. However, the right to maintain and protect sites and places of significance was registered. Tilmouth J was not prepared to limit his consideration to the registered right because this would 'pre-empt the function of the Federal court and widen the inquiry beyond its proposer limits'. It was sufficient to:

> [R]ecord for the present that it would be open to the Federal Court to accept an existing right of exclusive possession in the area around Crombie Ridge and Lake Torrens, on the basis of the limited evidence given in this proceeding—at [131].

After considering the evidence and submissions in relation to the effect of the various dealings with the area concerned, it was found that:

- the creation of Lake Torrens National Park and 'the nature of the uses and reservations thereunder' were relevant but 'outstanding questions of extinguishment' were not;
- similarly, the effect of the grant of a pastoral lease over a portion of the area concerned was relevant to the inquiry but questions of any extinguishment that may have been brought about by that grant were not—at [142] and [146].

His Honour was satisfied that there was:

> [A] sound credible and acceptable body of evidence … to the effect that Lake Torrens (including Andamooka Island) is highly significant to the *Kokatha* and that this is acknowledged by the wider Western Desert communities, particularly their *Yankunytjatjara* neighbours—at [154].

That evidence showed:

- the relevant area was 'closely associated with dreaming stories (the *Tjukurpa*)' and specifically involved 'a closely guarded and dangerous form of senior initiated mens' [sic] law, the *Wati Wilyaru Tjukurpa*';
- according to Kokatha laws and customs, 'only senior *Wati* may go onto the lake, as it is an historical entity of major significance to them';
- the *Kokatha*'s opposition to exploration lay 'much deeper than compensation, or money, which they do not see "as the issue", or jobs for their people';
- particular areas of the lake in the vicinity of the proposed drill sites were regarded 'as the most important and sacred of places in the whole of their country';
- the effect of the proposed mining operations struck 'at the heart' of Kokatha beliefs and 'cut deep into their religious and spiritual beliefs'; and
- the exploration would 'result in significant physical, spiritual and cultural consequences' which were 'potentially dire for the senior *Wati* entrusted with the care and protection' of the lake—at [155] to [157].

Tilmouth J held that the drill holes 'constituted a fundamental irretrievable violation of the combined *Wati Wilyaru Tjukurpa*'. Despite evidence that there would be 'extensive efforts to minimise damage' and Straits' intention to co-operate on access, the court concluded that the

impingement on native title would be 'more than of nuisance value'. It would 'impinge on the [Kokatha's] capacity to exclude others from the most significant of sites' and, in a spiritual sense, 'would be quite dramatic'. This counted against approval of exploratory mining operations—at [163] to [164] and [256].

Effect on the way of life, culture and traditions: s. 63T(1)(a)(ii)
On the basis of the evidence, it was found that the drilling would have 'much more than superficial effects'. According to Tilmouth J: 'It is not to the point that these consequences actually materialise or not'. It was enough that the Kokatha 'genuinely believe these things will happen'. Therefore, the effect of the proposed mining operation on the spiritual life, culture and traditions of the Kokatha was 'not insubstantial'. His Honour was of the view that the strength of Kokatha culture and traditions, in conjunction with the particular location, was 'far too important to permit any lesser conclusion'. This finding counted against approval—at [178] and [256].

Effects on the development of the social, cultural and economic structures: s. 63T(1)(a)(iii)
The effect of the proposed mining operations on the development of the social and cultural structures of the Kokatha was 'very much bound up' with the previous two and so it was 'difficult to disentangle this criteria from the central importance of the area' to the Kokatha. These considerations counted against approval. There was no evidence as to the effect on economic structures—at [179] and [256].

Effect on freedom of access, and to carry out rites and ceremonies: s. 63T(1)(iv)
Judge Tilmouth did not accept that freedom of access by the Kokatha or other Western Desert people 'was already appreciably compromised or inhibited' by the creation of Lake Torrens National Park, by the power of the relevant Minister to approve access, prospecting, exploration and mining and by the grant of the pastoral lease. There was 'simply no evidence' as to the effect of these acts and, in any case, the right of access was 'largely preserved by statutory reservations'—at [184] and [185].

There was evidence that an access track happened 'to pass very close to the northern half of Crombie Ridge'. While satisfied that the Kokatha would be free to access the area to carry out rites, ceremonies or other culturally significant activities, they would not have the 'necessary privacy … especially near Crombie Ridge'. It was found that access to the area was for 'practical purposes denied unless privacy is guaranteed' given the ceremonies that had to be performed could only take place if 'seclusion was guaranteed'. His Honour concluded that drilling operations would 'significantly impinge freedom of access to the most significant' of all Kokatha sites, 'consequently compromising their capacity to carry out rites, ceremonies and other activities of cultural significance to them'. This finding counted against approval—at [191] to [192] and [256].

The effect on areas or sites of particular significance: s. 63T(1)(v)
Judge Tilmouth held that, from a subjective point of view, the evidence demonstrated the site in question 'is of much more than special significance'. Tilmouth J referred with approval to findings of the Tribunal as to what is means for an area or site to be of 'particular significance'. His Honour held that this counted against approval—at [193] to [196] and [256].

Counsel for the Kokatha argued that s. 63T(1)(v) was a 'free standing' provision, 'having a force of its own'. Tilmouth J rejected this, noting it 'stated the position too widely'. However, his Honour was satisfied it did not carry 'less weight' than the other criteria in s. 63T(1) 'simply because it is confined to a particular area or site of particular significance'. It 'all depends on the nature and the quality of the evidence … as to particular significance weighed according to the other evidence … as against all the other relevant matters'—at [197] and [205], referring to the Tribunal's decision in *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) FLR 169; [2009] NNTTA 49, summarised in *Native Title Hot Spots* Issue 30.

The effect on the natural environment: s. 63T(1)(vi)

Judge Tilmouth held that, given the nature of Lake Torrens, the proposed rehabilitation activities and Straits undertakings (and absent 'accidents or unexpected contingencies'), the effect of the drilling operations would 'ultimately have minimal impact on the natural environment' and this favoured approval—at [207], [210] and [256].

Any assessment of the effect on the natural environment made by the court or other bodies: s. 63T(1)(b)

His Honour considered approvals by the Minister for Environment, Conservation, Mineral Resources and Development and the Minister for Aboriginal Affairs and Reconciliation under s. 23 of the Aboriginal Heritage Act (which is subject to an application for judicial review) favoured approval of mining operations—at [221] to [215] and [256].

The interests, proposals, opinions or wishes of native title parties in relation to management, use or control: s. 63T(1)(c)

Judge Tilmouth held that, 'viewed collectively', the Kokatha's 'interests, proposals, opinions or wishes in relation to the management, use or control of the land concerned' (as expressed in the evidence) conveyed 'a clear, consistent, longstanding and explicable message of strong opposition to mining activities in the Lake Torrens vicinity' that weighed 'significantly' in favour of refusing the application—at [219].

The economic or other significance to Australia and the State: s. 63T(1)(d)

Justice Tilmouth held that 'the proposed act of drilling' would have 'little economic significance'. Further, while there was 'potential for a larger mine further down the track' and recent results were said to be very encouraging, when the evidence was 'stripped to its essentials' it was 'near impossible to measure the potential National or State dimensions of the project, longer term'. His Honour concluded that the 'economic or other significance to South Australia or to the Nation, is presently rather slight' but, insofar as it was of any importance, it favoured approval—at [226], [236] and [255].

The public interest in the mining operation proceeding: s. 63T(1)(e)

The clear public interest in developing and exploiting mineral resources, 'especially in the current economic climate', was balanced against the public interest in preserving both 'prospective native title in land' and the status quo 'pending resolution of the native title claim', a conclusion that was 'further reinforced by the right to negotiate process'. There was 'a not insubstantial public interest in testing and assessing' the potential of the Lake Torrens anomaly. However, 'as against this', there is:

> [A] substantial public interest in protecting the *Kokatha* culture and interests by preventing undue intrusions upon their capacity to practice in peace their law and ceremonies on a site most sacred to them—at [237] to [239]. .

It was found the public interest 'cuts both ways, but in the wash leans towards exploration, if only because the Lake Torrens anomaly remains a tantalising unmasked mystery'—at [255].

Other matters the court considers relevant: s. 63T(1)(f)

A range of other matters, largely concerning the behaviour of Straits, were considered relevant, including that:

- consent to drill was not obtained prior to Straits undertaking drilling operations;
- Straits 'deliberately, or recklessly not caring of the implications, completed the planned drilling cycle to obtain the samples necessary to consider if it should drill still further', while giving 'the distinct impression' to Dr Draper 'that drilling was not ongoing';
- there was no satisfactory explanation for drilling proceeding after 9 December 2007 and it was 'difficult to place any confidence in the capacity of the applicants to comply with legal requirements in the future'—at [248], and [249] to [253].

It was said that:

> The court takes a dim view of these events ... . Straits was determined to proceed holding express knowledge of Kokatha opposition and in the face of reports commissioned by it, regarding the necessity of further negotiations with them. Bluntly stated there were no agreements satisfying Part 9B of the Mining Act—at [250].

Justice Tilmouth also considered 'misstatements' in the Declarations of Environmental Factors before the relevant Minister, concluding that 'at their core, was the unmistakable representation' that there were 'no Aboriginal heritage issues of any concern that should trouble' the government. They were 'incomplete at best' and 'decidedly misleading' at worst—at [254].

Decision

His Honour determined that the mining operations may not be conducted essentially because:

> In the final analysis there is a geological anomaly below Lake Torrens is worthy of further investigation. It is marginally in the public interest to do so. The potential has been overstated, at least on the basis of the relatively scant material available to the court. ... . The extreme significance of the area to the Kokatha has not been sufficiently appreciated and their struggle to have their views considered, have not been accorded adequate recognition, to date. The fundamental shortcomings of the applicants in the field, the failure to secure adequate consents and the posture of avoiding scrutiny and accountability for precipitous decision making, tell heavily against the proposed mining operations going ahead—at [263].

Straits Exploration v The Kokatha Uwankara Native Title Claimants [2011] SASCFC 9

Doyle CJ, White, Peek JJ, 8 March 2011

Issue

The issue before the Full Court of the Supreme Court of South Australia was whether to grant Straits Exploration (Australia) Pty Ltd (Straits) permission to appeal under s. 30 of the *Environment, Resources and Development Court Act 1993* (SA), which provides that an appeal lies as of right on a question of law and with the permission of the court on a question of fact.

Background

Straits applied for permission to appeal against judgment given by the Environment, Resources and Development Court (ERD Court) in *Straits Exploration (Australia) Pty Ltd v The Kokatha Uwankara Native Title Claimants* [2011] SAERDC 2, summarised in Native Title Hot Spots Issue 34. The only ground for which permission to appeal was sought and granted was Ground 10, which concerned criticisms made by the primary judge as to of the conduct of Straits. It was granted because considerable weight appeared to have been given to this issue and it might have 'tilted the scales' against Straits. The Full Court was influenced by the primary judge's finding that Straits was in breach of its exploration licence, a factual finding that might have 'on-going significance'. It was also held that this finding led the primary judge to conclude that it was 'difficult to place any confidence in the capacity of the applicants to comply with legal requirements in the future', another 'significant [factual] finding'—at [17].

Decision

Permission to appeal on four grounds (not noted here) was refused. Permission to appeal on Ground 10 was granted.

Determination of native title

Lennon v South Australia [2011] FCA 474

Mansfield J, Decision date

Issue

The main issues before the Federal Court were whether to make a determination recognising native title exists under the *Native Title Act 1993* (Cwlth) (NTA) and is held by the Antakirinja Matu-Yankunytjatjara Native Title Claim Group. The court decided it was within power and appropriate to do so. The determination itself is not summarised here.

Background

The Antakirinja Matu-Yankunytjatjara (AMY) application was made in 1995 and amended in October 2009 to avoid an overlap with the Arabunna Peoples' claim. Most of the area claimed was subject to pastoral leases 'over which there has been partial extinguishment of native title'. The town of Coober Pedy was within the external boundary of the application area—at [54].

Section 87

Section 87 was relied upon for the consent determination because it covered the whole AMY application area. The court was satisfied the pre-conditions to the making of the proposed orders were met. Therefore, Justice Mansfield considered whether the orders sought were within its power and whether it was appropriate to make them. On the basis of the evidence provided, the court was satisfied that the requirements of ss. 223 and 225 of the NTA were satisfied. In particular, his Honour was satisfied that:

- 'the consent of the State and the other respondent parties to the proposed determination is a fully informed and conscientious one';
- the 'level of detail provided by the applicant to identify the native title claim group and its society satisfies the requirements' of the NTA;
- 'contemporary AMY society is directly linked to the native title holders at sovereignty';
- a 'not insignificant number of the claimants are still actively engaged in and affected by their traditions' and 'adhere to, and actively participate in those traditions' and it is 'by those traditions that connection to country is established';
- there was 'sufficient evidence of continued connection to the claim area by the claim group's laws and customs' despite 'significant interaction of claimants with the dominant Anglo-Australian society';
- AMY People 'practise all of the rights and interests included' in the proposed determination—at [14] to [42].

Further, among other things, it was noted that:

- all relevant interest holders in the area had an opportunity to take part in the proceeding;
- all but three 'minor' respondent parties had 'independent and competent legal advice in the proceeding';
- the determination area contains 'a detailed description of the claim area' and, while no areas 'are specifically excluded ... surrender of certain areas will be included in the separate ILUA negotiations'—at [49] to [50].

His Honour had 'no doubt that it is appropriate to make a final determination over the Determination area on the basis of the evidence presented by the applicant'—at [50].

Native title holders

In the determination, the native title holders are described as follows:

> Under the relevant traditional laws and customs of the Western Desert Bloc, the native title holders comprise those Aboriginal people who have a spiritual connection to the Determination Area and the Tjukurpa associated with it because:
>
> (a) the Determination Area is his or her country of birth (also reckoned by the area where his or her mother lived during the pregnancy); or
>
> (b) he or she has had a long-term association with the Determination Area such that he or she has traditional geographical and religious knowledge of that country; or
>
> (c) he or she has an affiliation to the Determination Area through a parent or grandparent with a connection to the Determination Area as specified in sub-paragraphs (a) or (b) above;

> and are recognised under the relevant Western Desert traditional laws and customs by other members of the native title claim group as having rights and interests in the Determination Area.

According to Mansfield J, this not only complies with s. 225(a) (because it defined 'the group of native title holders and the criteria by which they have group membership' and reflected 'the evidence about relevant ancestors through whom individuals hold rights and interests in land'), it also fulfils the requirements of s. 61(4) because 'it is possible to ascertain whether any particular individual is within the native title claim'—at [43].

Comment - ss. 61(4)(b) and 190B(3)(b)

At [43], Mansfield J appears to be referring to s. 61(4)(b), which relevantly provides that a claimant application must 'describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons' i.e. the persons 'in a native title claim group' who authorised the making of the application. Paragraph 190B(3)(b) (one of the 'merit conditions' of the registration test) is on similar (but not identical) terms. It provides that the Registrar '*must be satisfied that* ... the persons in ... [the native title claim group] are described sufficiently clearly so that it can be ascertained whether any particular person *is in that group*' (emphasis added). If a claim group description is used that is similar to the definition of the native title holders in this matter, his Honour's findings indicate there would need to be 'evidence about relevant ancestors through whom individuals hold rights and interests in land' in order for that description to satisfy s. 190B(3)(b).

Comment - generic exclusion of extinguishment areas, liberty to apply

Schedule 3 is a list of the 'areas which have been excluded' from the determination area 'because native title has been extinguished'. However, this is mostly done by way of 'the generic exclusion by the applicant from the application of any area over which native title has been extinguished'. Extinguishment via public works is also provided for by way of a generic statement that 'native title to be wholly extinguished over public works constructed, established or situated, or commenced to be constructed or established, prior to 23 December 1996'. The effect of public works constructed, established or situated after 23 December 1996 is left to 'Part 2 Division 3' of the NTA 'to determine'. The same is true in relation to extinguishment via the construction of improvements on a pastoral lease up to the date of the determination—at [44], [54] and [56].

The parties have liberty to apply on 14 days notice to:

- establish the precise location and boundaries of any public works and adjacent land and waters for the purposes of s. 251D of the NTA (i.e. to determine the extent of extinguishment);
- determine the effect on native title rights and interests of post-23 December 1996 public works;
- determine whether a particular area is a 'house, shed or other building or airstrip or any dam or other stock watering point constructed pursuant to' a pastoral lease included in the determination area;
- determine whether a particular area is one of the 'generic' areas excluded from the determination area pursuant to Schedule 3 because native title is extinguished.

The town of Coober Pedy is within the boundaries of the determination area. Save for a few specific areas (such as public roads), the tenures within the town that are excluded from the determination area are not identified. At [54], his Honour commented that there was no need 'to inquire further into that question' (i.e. extinguishment within the town) at this stage because 'Coober Pedy is to be dealt with in a separate ILUA', presumably one dealing with surrender mentioned at [50].

This 'generic' approach to extinguishment may conflict with the comments made by Justice North in *Mullett v Victoria* [2010] FCA 1144, where liberty to apply in relation to areas where native title was extinguished by certain 'acts and facts' or by an 'Unidentified Extinguishing Public Work' was sought. His Honour was prepared to make the order in that case because of 'certain special circumstances'. However, North J noted that orders contemplating the possibility of further applications to resolve extinguishment issues 'are undesirable because they lack the finality which should be achieved when a determination is made'—at [29].

Decision
For the reasons summarised above, it was found that the determination was appropriate and 'should be made in this proceeding'. Orders were made accordingly. In so doing, the court recognised 'once and for all the native title rights and interests of the Antakirinja Matu-Yankunytjatjara People in this area'—at [57].

Nelson v Northern Territory [2010] FCA 1343

Reeves J, 8 December 2010

Issue
The main issue was whether the Federal Court should make a determination by consent pursuant s. 87 of the *Native Title Act 1993* (Cwlth) recognising non-exclusive native title in relation to the area subject to a perpetual pastoral lease referred to as Newhaven. Justice Reeves decided to do so because the orders sought were within power and it was appropriate to make them but, by agreement, the determination will not take effect until a prescribed body corporate determination is made under s. 57(2).

Background
The claimant application relevant to this determination, which covered about 2,160 square kilometres, was filed in December 2000. On 13 November 2010, an agreement between the parties was filed in the court and an order sought under s. 87 in the terms agreed by the parties.

Appropriate to make orders – free and informed consent
Subsection 87(1A) provides that the Court may, 'if it appears to the Court to be appropriate to do so, act in accordance with' (in this case) s. 87(2) which in turn provides that:

> If the agreement is on the terms of an order of the Court in relation to the proceedings, the Court may make an order in, or consistent with, those terms without holding a hearing or, if a hearing has started, without completing the hearing.

Reeves J noted that this confers an unfettered discretion on the court provided other pre-conditions are met and it is exercised judicially. In so doing, the court must 'have regard to

the objects' of the NTA and 'one of the most important' was 'the resolution of disputes by negotiation an agreement, rather than litigation'. According to his Honour:

- 'the critical issue' was 'whether the existence of a free and informed agreement is founded in fact';
- the court would 'infer the existence of the native title that is at the heart' of that agreement if 'the material filed ... in support of the consent determination establishes a free and **informed** agreement';
- the emphasis is the word 'informed' because 'the process the ... government respondent party follows to inform itself is critical to this issue'—at [7], [10] to [11], emphasis in original.

'Connection' assessment by State party and other critical factors

His Honour acknowledged the difficulties a State party faced in striking the right balance between 'protecting the community's interests' and ensuring it 'takes a flexible approach ... aimed at facilitating negotiation and achieving agreement'. However, since the 'central issue' under s 87 is 'whether there exists a free and informed agreement between the parties', the way in which the State party assessed 'the underlying evidence as to the existence of native title, is critical'. Other critical factors include whether:

- the parties have independent and competent legal representation;
- the terms of the proposed order are unambiguous and clear; and
- the agreement has been preceded by a mediation process—at [13] to [15].

Connection in this case

The proposed determination area was surrounded by Aboriginal Lands Trust lands and is in 'a remote part' of the territory. His Honour noted that:

> The anthropological material produced for the land claims adjacent to the determination area as well as the historical ethnographic material of Baldwin Spencer and Frank Gillen, Norman Tindale, Ted Strehlow and others was studied and analysed by Dr Sackett and Ms Meltzer for the current claim. Importantly, the anthropologists also conducted fieldwork with claimants in order to gain an understanding and formulate expert opinions on the claimants' laws and customs—at [16].

Both the steps taken by the parties and the fact that all had 'competent legal representation' indicated to his Honour that 'their agreement is free and informed'. Further, Reeves J was satisfied that 'the terms of the proposed orders are unambiguous and clear'—at [17].

Section 94A

Section 94A requires that any order in which the court makes a determination of native title must set out 'details of the matters mentioned' in s. 225. Reeves J was satisfied that the proposed determination contained these details and, in addition, that the native title rights and interests described therein were all 'capable of being recognised by the common law of Australia'—at [30].

Decision

The court made an order determining that, under the laws of Australia: '[N]ative title exists according to the traditional laws and customs of the claimants' society, and is held by the five landholding groups'—at [33].

Conditional on determination of prescribed body corporate
The determination is ineffective until a prescribed body corporate is determined by the court. Upon the determination taking effect, native title is not to be held in trust—at [31].

Mullett v Victoria [2010] FCA 1144

North J, 22 October 2010

Issue
The main issue in this case was whether the Federal Court should make a determination of native title by consent pursuant s. 87 of the *Native Title Act 1993* (Cwlth) (NTA) recognising the Gunai/Kurnai people as the holders of native title in relation to parts of the Gippsland region in Victoria. Justice North decided to do so because the orders sought were within power and it was appropriate to make them.

Background
Two claimant applications were filed in 1998 and 2009 respectively on behalf of the Gunai/Kurnai people seeking recognition over around 8,000 specific parcels. The claim group in both applications consisted of the Gunai/Kurnai people being the descendants of 25 named apical ancestors. Some evidence was heard in support of the applications, followed by negotiations that resulted in an agreement. The parties subsequently sought orders reflecting that agreement, including a determination recognising the existence of native title, pursuant to s. 87 of the NTA.

Should orders be made?
The first and second conditions for s. 87 were met because the rights and interests included in the proposed determination were 'recognisable by the common law of Australia, and there is no other determination in existence over the determination area'. As to the third, Justice North noted that:

> The primary consideration ... is ... whether there is an agreement and whether it was freely entered into on an informed basis. ... The Court will usually need to be satisfied that the State party has taken steps to satisfy itself that there is a credible basis for an application—at [7].

In this case:

> [I]t is clear that the State has taken an active role in the proceeding in the interests of the Victorian community generally, and has conducted a very thorough investigation into the validity of the application—at [20].

Relevance of background negotiations leading to terms of determination
The submissions explained how the wording of certain clauses in the determination had been agreed upon 'to accommodate the common ground' where the parties otherwise had disagreed. North J found that:

> The construction of a consent determination should not be governed by extraneous materials such as explanations for the wording contained in submissions to the Court. Consequently, the background negotiations which gave rise to the form of words ultimately chosen is of limited relevance to an application under s 87—at [25].

Extinguishment issues should not be left for later resolution as a rule

The consent orders sought included liberty to apply in relation to areas where native title was extinguished by certain 'acts and facts' or by an 'Unidentified Extinguishing Public Work. This raised 'a different issue'. North J was prepared to make the order sought in this case because 'it responds to certain special circumstances', including that:

- the tenure analysis was 'particularly daunting and time consuming', i.e. over 8,000 individual parcels of land were involved;
- the agreement came after a long and complex negotiation and so, after 'such a long and difficult road', it would be 'a disproportionate response' for the court to refuse to make the order—at [29].

However, his Honour noted that:

- orders that 'contemplate the possibility of further applications ... to resolve' outstanding extinguishment issues 'are undesirable because they lack the finality which should be achieved when a determination is made';
- 'the form of order made in this case should not be regarded as a precedent in future applications for determinations of native title'—at [29].

Prescribed body corporate

Native title is to be held on trust by the Gunai/Kurnai Land and Waters Aboriginal Corporation, a body corporate 'which, on making the determination naming it as the holder of native title, will be a prescribed body corporate' for the purposes of s. 56—at [31], referring to s. 59 and reg 4 of the *Native Title (Prescribed Bodies Corporate) Regulations* 1999 (Cwlth).

Decision

North J was satisfied that the requirements of the NTA had been met and that the court should make the orders sought by the parties. According to his Honour:

> Today is a day of tremendous joy for Gunai/Kurnai people. ... . The successful outcome is a testament to the determination, persistence, energy and belief in, and commitment to, the tradition and living heritage of the Gunai/Kurnai people.

As noted, the determination relates to 45,000 hectares of Crown land, i.e. almost 20% of the Crown land in Victoria.

Negotiation in good faith – conflict of interest

Fortescue Metals Group Ltd/Western Australia/Taylor [2011] NNTTA 66

Member O'Dea, 15 April 2011

Issue

In these right to negotiate proceedings, the native title party contented the grantee party had not negotiated in good faith as required pursuant to s. 31(1)(b) of the *Native Title Act 1993* (Cwlth) because the grantee party's legal representative had a conflict of interest. The National Native Title Tribunal found that the grantee party had negotiated in good faith.

Background

Yamatji Marlpa Aboriginal Corporation (YMAC), the representative body for the relevant area, was the native title party's legal representative. The native title party was the registered native title claimant for an application made on behalf of the Njamal People. Sukhpal Singh was engaged by Fortescue Metals Group Limited (FMG), the grantee party, as a land access lawyer. However, between November 2005 and September 2008, Mr Singh was employed by YMAC as Senior Legal Officer and then as Deputy Principal Legal Officer. The native title party contended that:

- during his employment at YMAC, Mr Singh acted for the native title party in various matters, including another FMG project;
- Mr Singh's involvement as a negotiator on behalf of FMG in this matter, in circumstances where he had a 'clear' conflict of duty and interest, 'amounted to a failure on the part of the grantee party to negotiate in good faith';
- Mr Singh previously acted for the native title party and as a result possessed confidential and privileged information;
- this prejudiced the Njamal People's ability to engage in negotiation on a fair and reasonable footing.

The Tribunal noted it must focus on whether or not there had been negotiation in good faith and the critical issue therefore was the conduct of the grantee party, not Mr Singh's behaviour. Member O'Dea reviewed the case law on the duty of loyalty and the duty of confidentiality that continues after a legal practitioner-client relationship ceases where a practitioner has obtained confidential information—at [29] and [56] to [65].

Decision

The Tribunal held (among other things) that:

- although there was evidence Mr Singh acted on behalf of Njamal in relation to Pilbara-wide negotiations with another mining company, no evidence was adduced that identified any specific circumstance where Mr Singh was shown to have acted for the native title party in relation to Njamal;
- where confidential information has been identified, the principles discussed in the case law were pertinent to the native title party's contentions;
- however, no confidential materials were identified as being in Mr Singh's possession and nor was any information that was at risk of disclosure by Mr Singh to the grantee party identified;
- it could not be concluded that the grantee party acted unreasonably by involving Mr Singh in the negotiations;
- the indicia often applied by the Tribunal in relation to good faith do not include the question of a breach of a duty of confidentiality of a solicitor to one of the parties participating in the negotiations—at [50], [55], [62], [70] and [75] and [70]. The indicia referred to can be found in *Western Australia v Taylor* (1996) 134 FLR 211; [1996] NNTTA 34.

Therefore, it was found that the grantee party had negotiated in good faith as required s. 31(1)(b).

Section 169 appeal filed
The native title party has filed an appeal under s. 169 seeking to have the Tribunal's decision set aside.

Future act determination – compulsory acquisition

Western Australia/Gordon/Pilbara Livestock Depot [2010] NNTTA 152

Sumner DP, 23 September 2010

Issue
In this future act matter, the National Native Title Tribunal was asked to make a determination in relation to the compulsory acquisition of land situated near the town of Port Hedland under s. 165 of the *Land Administration Act 1997* (WA) (LAA) to enable the issuing of a lease for the purpose of 'Stock Holding Yards'. As not all of the non-native title interests were going to be acquired, the Tribunal found the acquisition was subject to s. 24MD(3)(a) and so the non-extinguishment principle in s. 238 would apply to the acquisition.

Background
Notice of the State of Western Australia's intention to compulsorily acquire the land was given in accordance with s. 170 LAA and s. 29 of the *Native Title Act* 1993 (NTA) on 22 November 2006. The area concerned was also subject to a non-exclusive pastoral lease (as defined in s. 247B of the NTA) held by BHP Direct Reduced Iron Pty Ltd and was being used as stock holding yards pursuant to a sub-lease. It was completely overlapped by miscellaneous licence held by Fortescue Metals Group Ltd. The purpose of the proposed compulsory acquisition was to enable a lease for the purpose of 'stock holding yards' to issue over the area to Christopher and Carey Rae Paterson trading as Pilbara Livestock Depot (the grantee party).

The compulsory acquisition of native title rights and interests was covered by s. 26(1)(c)(iii) of the NTA, i.e. the area concerned was being acquired in order to grant rights to someone other than the government party but not for the purpose of providing an infrastructure facility. The area was landward of the mean high water mark and it was not within a 'town or city' as defined in s 251C: see ss. 26(2)(f) and (3). Therefore, it was a future act to which Pt 2, Div 3, Subdiv P applied and it attracted the right to negotiate.

On a date more than six months after the notification day specified in the s. 29, the state applied to the Tribunal pursuant to ss. 35 and 75 of the NTA for a future act determination under s. 38 because there was no agreement as to the doing of the future act. The native title party argued the Tribunal had no power to deal with the application because the grantee party had not negotiated in good faith (see ss. 31(1)(b), 36(2) of the NTA). The Tribunal rejected this argument—see *Western Australia/Gordon/Pilbara Livestock Depot* [2010] NNTTA 55).

No invalidity for failure to comply with s. 24MD(2)(b)
The native title party then contended the Tribunal was not empowered to deal with the application because of a failure to comply with s. 24MD(2)(b), i.e. because not all non-native title rights and interests in the land would be compulsorily acquired. The notice of

acquisition stated that rights held pursuant to the miscellaneous licence would not be acquired.

The Tribunal noted Chief Justice Gleesons's comment in *Griffiths v Minister for Lands, Planning & Environment* (2008) 235 CLR 232; [2008] HCA 20 at [3] that:

> The evident concern of these ... conditions of the operation of the substantive provisions of s. 24MD(2) relating to extinguishment of native title rights and interests, and compensation, is to avoid racial discrimination.

Deputy President Sumner found (among other things) that:

- the compulsory acquisition would need to proceed in accordance with s. 24MD(3) because, since there was not a compulsory acquisition of 'the whole, or the equivalent part of all non-native title rights and interests', s. 24MD(2) did not apply;
- if the compulsory acquisition was done in accordance with s. 24MD(3), there was no question of it being a discriminatory acquisition because native title was not extinguished, i.e. s. 24MD(3)(a) applies the non-extinguishment principle found in s. 238 to such an acquisition—at [39] to [43].

It was noted that the Tribunal's conclusions on the interpretation of s. 24MD were supported by Justice Mildren's comments in *Minister for Lands, Planning & Environment v Griffiths* (2004) 14 NTLR 188; [2004] NTCA 5 at [74].

Absence of a current notice of intention to take

The original notice of intention to take (NOITT) given under s. 170 of the LAA had expired pursuant to the provisions of the LAA. The native title party contended that, unless there was a valid NOITT, the government party could not be proposing to take any interest in land and, therefore, that there was no proposed future act to attract the Tribunal's jurisdiction. The Tribunal found it had before it both a valid s. 29 notice and clear statements from the government party about the nature of the future act which confirmed the information contained in the s. 29 notice. Therefore, the Tribunal could proceed to hold an inquiry and make a future act determination—at [50].

Whether notice was invalid due to the misstated purpose in the NOITT

The native title party contended the NOITT was invalid because it did not comply with s. 171(1)(c) of the LAA, alleging the information in the NOITT was not accurate, particularly with respect to its purpose. It was contended that, without a valid NOITT, there could be no taking order and without the possibility of a taking order, there could be no future act. The Tribunal found it was concerned with the validity of the notice under s. 29 of the NTA and, on the basis of the clear statements of intention made by the government party, the purpose of the proposed compulsory acquisition did not extend beyond the purposes stated in that notice—at [53].

Failure to negotiate in good faith – whether to re-open the issue

The native title party sought to re-open the issue of whether the grantee party had negotiated in good faith on the basis that the information provided during the negotiations was false or misleading and the grantee party did not, therefore, act honestly and reasonably during negotiations. These contentions concerned the extent to which the grantee party proposed to expand its operations and the nature and profitability of those operations. The

Tribunal held that, as the expansion plans were not contemplated by the future act and would not be permitted by the lease, and there was no proposal to grant freehold to land, the statements did not mislead the native title party during the negotiations—at [58].

Decision
After considering the requirements of ss. 39(1) and 39(2) of the NTA, DP Sumner made a determination that the future act, (i.e. the compulsory acquisition of the whole of lot 3003 on deposited plan 46738 for the purpose of enabling the issuing of a lease for the purpose of 'Stock Holding Yards') may be done.

Replacement of the applicant

Roe v Western Australia (No 2) [2011] FCA 102

Gilmour J, 15 February 2011

Issue
The Federal Court was asked to make an order under s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA) to replace the current applicant for the Goolarabooloo/Jabirr Jabirr (GJJ) claimant application. Joseph Roe, one of the two people who would be replaced, challenged to the validity of the GJJ claim group meeting that resolved to seek replacement of the applicant and the right of some of those comprising the proposed replacement applicant to be members of the GJJ claim group. The court did not accept these objections and exercises its discretion to replace the applicant. Mr Roe's application for leave to appeal was dismissed in *Roe v Western Australia* [2011] FCA 421, summarised in *Native Title Hot Spots* Issue 34.

Background
The GJJ claim is the only registered claimant application in relation to an area that is subject to several notices of compulsory acquisition issued by the State of Western Australia. These were issued in connection with the proposed Browse liquefied natural gas project at James Price Point on the Dampier Peninsula north of Broome. Therefore, those who are the applicant for the GJJ application are also the registered native title claimant (RNTC) for the area subject to the notices. The RNTC is entitled to procedural rights under the future act regime found in Pt 2, Div 3 of the NTA, including (in respect of some areas affected by the notices of acquisition) the right to negotiate.

However, the relationship between the persons who jointly comprised the 'current applicant' for the GJJ application (Mr Roe and Cyril Shaw) had become unworkable, rendering them incapable of discharging their duties and functions as the applicant (in the proceedings before the court) and the RNTC (in the future act matters). Mr Shaw consented to being replaced but Mr Roe did not. On 3 August 2010, a meeting of the native title claim group resolved to replace the current applicant and authorised six people to be the replacement applicant (the 3 August meeting). The meeting voted 112 for and 37 against replacing Mr Roe and Mr Shaw with six other people (i.e. the replacement applicant), with the vote for including Mr Roe in the replacement applicant was 109 against and 7 for. The replacement applicant then applied under s. 66B(1) for an order under s. 66B(2) that the current applicant be replaced (the s. 66B application).

The six people comprising the replacement applicant are also the people comprising the applicant in a claimant application made on behalf of the Jabirr Jabirr People which wholly overlaps the GJJ claim.

Mr Roe submitted that the court should not make the order sought under s. 66B(2) because the replacement applicant:

- had failed to show that those who resolved at the 3 August meeting to replace the current applicant were members of the GJJ claim group;
- had a conflict of interest and duty because the replacement applicant was constituted by the same people who comprise the applicant in the Jabirr Jabirr People's competing, overlapping application.

Status of those who voted to replace the applicant

Justice Gilmour was satisfied on the evidence that:

- the representative body for the area, Kimberly Land Council Aboriginal Corporation (KLC) had taken 'considerable steps to identify and record the details of the members of the GJJ claim group';
- 'as a whole', the GJJ claim group list was 'created and maintained' by the KLC in a 'competent manner' and the list was 'sufficiently accurate and reliable in the present context';
- on the evidence, all those who attended the 3 August 2010 meeting and voted were members of the GJJ claim group for the purposes of s. 66B of the NTA—at [42], [50],[112].

Discretion under s. 66B(2)

Mr Roe submitted that the replacement applicant had a conflict of interest because it was comprised of the same six persons who are jointly the applicant for the Jabirr Jabirr claim. In his view, the court should dismiss the GJJ application on the ground that:

> [T]here is now no commonality of interest as between the Goolarabooloo peoples and the Jabirr Jabirr peoples in vindicating the common or group rights and interests claimed in the substantive application on behalf of the descendants of the apical ancestors listed in the GJJ ... application—at [120].

Gilmour J noted that:

- the Jabirr Jabirr applicant was authorised by the Jabirr Jabirr claim group to do 'all that they could to have the GJJ claim dismissed' but, despite this, did not accept Mr Roe's open offer to dismiss the GJJ claim made twice in December 2010;
- importantly, the Jabirr Jabirr claim is unregistered and 'cannot be registered' because of s. 190C(3), i.e. it covers the same area as the GJJ application and 'has in common some of the same native title claimants';
- as the Jabirr Jabirr claim is unregistered, the Jabirr Jabirr claimants 'currently have no procedural rights under the NTA';
- it was likely this would also be the case if a Goolarabooloo family claim was lodged, i.e. it would not be registered—at [115] and [117].

Mr Roe accepted dismissal of the GJJ application would mean the loss of all procedural rights currently available under the NTA but pointed to 'other avenues ... to protect the interests of the respective claimant groups', e.g. a challenge to the validity of the compulsory acquisition notices.

His Honour noted that the replacement applicant did not 'downplay' the fact that the s. 66B application reflected a contest between competing groups within the claim group. However, Gilmour J held (among other things) that:

- it would be premature to conclude that there was no commonality of interest between the competing claim groups, i.e. GJJ and Jabirr Jabirr;
- the rights and interests of all of the Goolarabooloo and Jabirr Jabirr claimants would be dealt with by way of evidence in the substantive native title proceedings;
- a motion was passed at the 3 August meeting that any agreement affecting the GJJ claim area must not be made unless authorised by the GJJ claim group, which includes Mr Roe and his family—at [134], [137], [139] to [141].

Decision

Justice Gilmour held that the discretion under s. 66B(2) should be exercised in favour of the replacement applicant, subject to the undertaking and concession made in these proceedings that there would be no overlap between the 'joint applicant' for the GJJ and the Jabirr Jabirr claim—at [142] and [156].

As a result, the order was that only three of those authorised to be the replacement applicant replace Mr Roe and Mr Shaw. This was permissible because it was the six who constituted the replacement applicant who were authorised 'or such of them who remain ready willing and able to act in respect of the GJJ claim in the future'. His Honour took this to mean that:

> [I]f any member authorised to act in respect of the GJJ claim became, for whatever reason, unable or unwilling to act then the remaining members would constitute the duly authorised applicant without the need for further authorisation by the claim group'—at [149].

Roe v Western Australia [2011] FCA 421

Siopis J, 29 April 2011

Issue

The issue before the Federal Court was whether to grant leave to appeal from a decision of the court to replace the persons comprising the applicant to a native title claimant application under s. 66B of the *Native Title Act* 1993 (Cwlth)(NTA). Leave was refused.

Background

The background to this matter is provided in the summary of *Roe v Western Australia (No 2)* [2011] FCA 102, summarised in *Native Title Hot Spots* Issue 34. Mr Roe sought to demonstrate that:

- the decision of the primary judge was attended with sufficient doubt to warrant the grant of leave to appeal;
- Mr Roe would suffer a substantial injustice if leave was refused.

Sufficient doubt

Mr Roe contended that the primary judge 'failed to recognise and deal with the gravamen of his complaint', namely that there existed 'so wide a division and divergence of interest' between the Goolarabooloo and Jabirr Jabirr people that the joint Goolarabooloo and Jabirr Jabirr claim (GJJ claim) could not be pursued by the replacement applicant on behalf of the

GJJ claim group as a whole because the replacement applicant had a conflict of interest—at [21].

Justice Siopis held that the primary judge:

- did not misapprehend Mr Roe's contention, nor did he fail to deal with it;
- acknowledged the intergroup divisions, found that they were 'not uncommon' in native title claim proceedings and were not 'inevitably inimical to the pursuit of a joint native title claim on behalf of a group comprising' of both Goolarabooloo and Jabirr Jabirr peoples;
- correctly held that the question of the existence of native title rights was a matter for trial;
- acknowledged the question of conflict of interest arose given that the replacement applicant was comprised of the same people as comprise the applicant for the Jabirr Jabirr application;
- considered the prospect of such a conflict of interest 'actually impinging upon the capacity and willingness' of the replacement applicant to carry out the functions of the applicant in respect of GJJ claim to the benefit of that claim as a whole;
- specifically considered the prospect of the conflict of interest materialising so as to detrimentally affect the vindication of the rights of the claim group as a whole;
- decided that the prospect of this happening was limited and insufficient to justify the exercise of the discretion to withhold making the orders under s. 66B(2) of the NTA—at [22] to [24] and [26].

Siopis J held that these findings were open to the primary judge – at [25], [26] and [33].

Substantial injustice

Mr Roe argued that he would suffer a substantial injustice as a member of the GJJ claim group because the rights of that group as a whole 'would not be properly vindicated' if the s. 66B(2) order was not set aside. This argument was rejected because Mr Roe has 'no authority to complain on behalf of the GJJ claim group' about the replacement applicant's capacity to act as the applicant:

> [I]n circumstances where these persons were, at an authorisation meeting of the GJJ ... group, appointed to act as the applicant to replace the current applicant which comprised Mr Roe and another person—at [40].

It was noted that:

- the NTA 'contemplates that issues relating to the capacity or authority of the ... applicant ... are to be determined [by] ... the native title claim group';
- Mr Roe and Mr Shaw would have remained the current applicant, despite this being 'quite contrary to the expressed wishes of the GJJ claim group' if the primary judge had not made the s. 66B(2) order to replace them and the 'impasse arising from the dysfunctional relationship between Mr Roe and Mr Shaw would have continued'—at [41].

Decision

Siopis J dismissed the application for leave to appeal.

Dann v Western Australia [2011] FCA 99

Barker J, 14 February 2011

Issue

The issue before the Federal Court was whether to order that the 'current applicant' for a claimant application be replaced pursuant to an application made under s. 66B(1) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

The group of people comprising the 'current applicant' moved for orders that they be replaced by another group of persons, apparently in accordance with the resolutions made at a community meeting on 11 March 2010 where it was decided to elect a replacement applicant with a single representative from each of the native title claim group's apical ancestors. One of the persons who comprised the current applicant opposed the inclusion of three persons who were to comprise the replacement applicant. It was also argued that the notice of the community meeting was flawed because it incorrectly indicated that more detail about the meeting was included in an attached agenda when no agenda was, in fact, attached.

Objection to members of the replacement applicant

Justice Barker held that:

- to the extent that objections to particular persons being members of the replacement applicant relied upon genealogical submissions, they were matters that should be worked out, if necessary, at a final hearing of the application;
- it was sufficient to proceed to a final hearing on the genealogical opinion provided by the representative body that all relevant replacement applicant members were appropriately connected;
- objections concerning other persons being members of the replacement applicant, on the grounds of process and procedure leading up to the meeting on 11 March 2010, were 'weakly founded';
- the resolution of the community meeting held on 11 March 2010 was not defective for failing to describe 'more amply' the names of a particular person or persons who might be nominated as a replacement applicant;
- the question of authorisation of the claim group was fairly and squarely raised as an agenda item in the notices—at [41] and [46] to [47].

Decision

An order was made under s. 66B(2) to replace the current applicant with the group of people chosen at the community meeting on 11 March 2010.

Doctor v Queensland [2010] FCA 1406

Collier J, 15 December 2010

Issue

The issue before the Federal Court was whether to replace the current applicant for a claimant application pursuant to s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

At a meeting of the Bigambul People held in June 2010 (the authorisation meeting), a resolution was passed authorising the replacement of four of the seven people who constituted the 'current applicant' on a claimant application made on their behalf. One of the four people constituting the 'current applicant' had refused to sign an ILUA. All four (referred to as the dissenting applicants) opposed the application to remove them.

At [33], Justice Collier adopted the summary of the issues by those making the s. 66B(1) application:

- was the authorisation meeting properly conducted and, in particular, was the will of the meeting 'corrupted' by the activities of individuals who wanted to replace the current applicant?
- were those in attendance members of the claim group and thereby authorised to vote on resolutions?
- were those in attendance representative of the claim group?
- was there a requirement that the 'replacement' applicant represent the composition of the claim group and, if so, was it less representative than the current applicant?

Her Honour was satisfied on the evidence that the authorisation meeting was properly conducted and that the will of the meeting was not corrupted by the activities of individuals who wanted to replace the current applicant. Collier J was not satisfied that there was actual attendance by persons who were not Bigambul people. Further, the NTA does not require that there be sufficient representatives of all the apical ancestors at an authorisation meeting. Nor is there any requirement in the NTA that the applicant be comprised of representatives from each of the family groups within the claim group—see [35] to [67], where her Honour cites with approval *Coyne v Western Australia* [2009] FCA 533 at [22] to [26].

Comment – only applies if no traditionally mandated decision making process

This decision, and the cases referred to by her Honour, all relate to circumstances where the claim group does not have a process mandated by traditional law and custom for making decisions like who should be authorised to make a claimant application, i.e. this reasoning does not necessarily apply if s. 251B(a) is relied upon.

Decision

The court was satisfied that the native title claim group resolved with significant majorities at a properly convened and conducted authorisation meeting:

- to no longer authorise the current applicant; and
- to authorise a new applicant in respect of the native title claim.

The court exercised its discretion to make an order to replace the current applicant pursuant of s. 66B(2) notwithstanding the deficiencies in the notices of meeting or any irregularities in relation to the conduct of the meeting.

Coyne v Western Australia [2010] FCA 1052

Siopis J, 25 June 2010

Issue
The issue was whether the applicants for the Wagyl Kaip and the Southern Noongar claimant applications should be replaced pursuant to an application made under s. 66B(1) of the *Native Title Act 1993* (Cwlth) (NTA).

Background
The application to replace those who comprised the 'current applicant' was made because one person included in both applicant groups had died. In *Coyne v Western Australia* [2009] FCA 533, Justice Siopis considered the effect of resolutions passed at an authorisation meeting held in Albany on 1 December 2007 for the same native title claims. The terms of the authorisation resolutions were that certain people would act as the applicant 'or such of them as are eligible to act as an applicant and who remain willing and able to act in respect of the application in the future'. It was found that if the original authorisation is in these terms, then no further authorisation is necessary for those who remain to act as 'the applicant' if one or more of the persons authorised to comprise the applicant subsequently dies—at [3] to [5].

Comment – only applies if no traditionally mandated decision making process
This decision relates to circumstances where the claim group does not have a process mandated by traditional law and custom for making decisions like who should be authorised to make a claimant application, i.e. this reasoning does not necessarily apply if s. 251B(a) is relied upon.

Decision
In these circumstances, Siopis J made orders to replace the applicant for each application.

MB (Deceased) v Western Australia [2010] FCA 1110

Siopis J, 25 June 2010

Issue
The issue before the Federal Court was whether to replace the current applicant in a claimant application with a new applicant pursuant to an application made under s. 66B(1) of the *Native Title Act 1993* (Cwlth)(NTA).

Background
At a meeting of the Yued People claim group held on 22 November 2008 (the authorisation meeting), a resolution was passed authorising the replacement of the current applicant with six claim group members (the authorised persons), only one of whom (Joe Narrier) was included in the group comprising the current applicant. Mr Narrier subsequently indicated

he was no longer willing to be one of the persons who comprised the applicant. The other five who were authorised at the meeting then made an application under s. 66B(1) to replace the current applicant.

Authorisation
Justice Siopis was satisfied on the evidence that:

- the process undertaken by the South West Aboriginal Land & Sea Council ensured the authorisation meeting 'could properly be classified as a sufficiently representative meeting' of the claim group and that the it was competent to make decisions on behalf of that group in relation to authorisation;
- there was no traditional decision-making process as described in s. 251B(a) within the Yued People – at [6] and [7].

As the court noted, the resolution passed at the authorisation meeting:

- indicated that the replacement applicant would comprise the authorised persons 'or such of them who remain willing and able, to act in respect of the application in the future';
- made it clear 'for the avoidance of any doubt' that, if one or more of the authorised persons ceased to be willing and able to act, the other named persons or person would remain authorised to act as the applicant—at [9].

Decision
The court ordered that the five authorised persons who made the s. 66B(1) application jointly replace the current applicant.

Evidence of authorisation - s. 84D(1)

Corunna v Western Australia [2010] FCA 1113

Siopis J, 14 October 2010

Issue
The Federal Court was asked to make an order under s. 84D(1) of the *Native Title Act 1993* (Cwlth) (NTA) requiring those who made a claimant application to produce evidence that they were duly authorised to do so. The court made orders accordingly.

Background
The relevant application was filed on behalf of the Swan River People over part of the Perth metropolitan area and its adjacent waters (SRP application). Trevor Walley asserted he was a member of the claim group described in the application and subsequently sought:

- an order under s. 84D(1) that those making the application produce evidence of their authorisation; and
- an order that the application be dismissed pursuant to s. 84C because it did not comply with s. 61 of the NTA, i.e. the persons who made the application were not authorised to do so.

Standing

An application for an order under s. 84D(1) may be brought by a member of the claim group. Here, the order was sought as a preliminary to seeking summary dismissal pursuant to s. 84C for want of authorisation.

Justice Siopis thought seeking evidence as to authorisation 'in the context of an existing application for summary dismissal ... is obviously an important consideration in relation to the utility of the making of an order' under s. 84D(1). However, an application for strike-out under s. 84C can only be made by a party to the proceeding and Mr Walley was not a party. Therefore, his notice of motion seemed incompetent 'insofar as it seeks ... summary dismissal' pursuant to s. 84C. The same difficulty arose in relation to s. 31A of the *Federal Court of Australia Act* 1976 (Cwlth) and O 21 r 5 of the Federal Court Rules. The position was less clear in relation to the court's powers under s. 84D(4)(b) of the NTA. However, in 'the interests of case management', the merits of the argument were considered because:

- the court was empowered by s. 84D(2)(a) to make the order on its own motion;
- the court's jurisdiction was properly invoked by Mr Walley which allowed the court 'to act on its own motion';
- it could not be said that Mr Walley's claim 'is colourable';
- in any case, the State of Western Australia was likely to seek an order under s. 84D(1)—at [24].

Orders under s. 84D(1)

Mr Walley said (among other things) the SRP application was brought on behalf of a subgroup of those who hold native title to the claim area. In the absence of rebutting evidence from the applicant, Siopis J held that:

- there was a real issue as to whether there were other persons who claim native title over the SRP application area who were excluded from the claim group as defined in the SRP application;
- the evidence on authorisation demonstrated individual persons had been authorised by family groups within the nominated claim group and then each of the persons comprising the applicant authorised in this way then authorised each other to bring the SRP application;
- the method of authorisation described gave rise to an issue as to whether there was authorisation within the meaning of s. 251B;
- the SRP application did not appear to disclose that there had ever been authorisation of the persons jointly comprising the applicant by all the members of the native title claim group;
- section 251B contemplates authorisation of the persons jointly comprising the applicant by all the persons in the native title claim group—at [33] and [37] to [39].

Decision

The persons comprising the applicant were ordered to provide all the evidence on which they relied to establish that they were authorised to make the SRP application within the meaning of s. 251B of the NTA.

Ashwin v Western Australia (No 2) [2010] FCA 1472

Siopis J, 23 December 2010

Issue

The State of Western Australia sought dismissal of a claimant application made pursuant to s. 61 of the *Native Title Act 1993* (Cwlth) (NTA) on behalf of the Wutha People for lack of authorisation. Part of the application had been partially dismissed for want of authorisation in *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 (*Wongatha*, summarised in *Native Title Hot Spots* Issue 24). However, Justice Siopis declined to dismiss the remainder of the Wutha application, relying on the discretion available under s. 84D(4), which was inserted into the NTA after *Wongatha*. It allows the court to decide whether a defect in authorisation determines 'the fate of that application'—at [12].

Background

The state sought to have the remainder of the Wutha application struck out pursuant to s. 84C of the NTA or dismissed pursuant to O 20 r 2(1) of the *Federal Court Rules*. According to his Honour, the state contended (among other things) that the Wutha claim was bound to fail because the findings on the lack of authorisation and the order to partially dismiss the claim made in *Wongatha* gave rise to an issue estoppel—at [2].

Section 84D introduced 'a new statutory regime'

Siopis J noted that, if a claimant application is not authorised in accordance with the NTA, s. 84D(4) provides that the court may, 'after balancing the need for due prosecution of the application and the interests of justice' either 'hear and determine the application, despite the defect in authorisation' or 'make such other orders as the court considers appropriate'—at [11].

Therefore:

> [I]t does not axiomatically follow from a determination that a native title claim has not been lawfully authorised, that the claim must ... be dismissed. Rather, such a finding gives rise to the further question of whether it is in the interests of justice to proceed to hear the native title determination application, notwithstanding the defect in authorisation—at [12].

Effect on *stare decisis*

The court rejected the state's argument that interpreting s. 84D to allow the court to come to a different conclusion on authorisation would undermine 'the final decision of Lindgren J and, thereby, undermine the doctrine of *stare decisis*'. According to Siopis J:

- the finality of Lindgren J's decision was not undermined because (subject to any appeal) it remained 'binding in respect of what it decided';
- in any event, it is 'the prerogative of Parliament to make or change the law' and the court then giving effect to the new statutory regime does not undermine the doctrine of *stare decisis*—at [16] to [17].

Section 84D available

Among other things, the state contended that s. 84D only operated where the court that was to make the final determination also made the finding there was a defect in authorisation.

Since the finding as to authorisation had been made by Lindgren J, the state argued s. 84D was not available. Siopis J rejected this contention, finding that:

> [T]he determination in respect of any defect in authorisation ... in this proceeding will be made ... under a different statutory regime to that which prevailed when Lindgren J made his decision. The consequence is that this Court is not, and will not be, bound to reach the same result—at [22].

Issue estoppel

The state relied on *Quall v Northern Territory* (2009) 180 FCR 528; [2009] FCAFC 157 (summarised in *Native Title Hot Spots* Issue 31), where the Full Court upheld a decision to summarily dismiss a claim on the grounds of issue estoppel. Siopis J distinguished *Quall* because it was not defective authorisation that gave rise to an issue estoppel and, in any case, the 'new statutory regime' introduced by s. 84D 'changed the law in respect of authorisation', which was not the case in *Quall*—at [24] to [25]. Note that subsequently, a differently constituted Full Court expressed doubts about whether issue estoppel had 'any field of operation' in relation to an application for a determination of native title: see *Dale v Western Australia* [2011] FCAFC 46 at [88], summarised in *Native Title Hot Spots* Issue 34.

Decision

The state's application was dismissed. The parties will be heard on the directions for trial on whether the Wutha claim was duly authorised and, if not, whether it should be dismissed on that account—at [27] to [28].

Appeal against dismissal

Dale v Western Australia [2011] FCAFC 46

Moore, North and Mansfield JJ, 31 March 2011

Issue

These appeal proceedings dealt with whether a claimant application should have been dismissed:

- on the grounds of an issue estoppel; and
- for substantially similar reasons to those supporting issue estoppel, because the application was an abuse of process.

The Full Court dismissed the appeal because it would have been an abuse of the court's process to allow the application to proceed.

Background

A determination of native title was sought on behalf of the Wong-Goo-TT-OO (WGTO) in a claimant application made in 1998. It covered part of the Pilbara region in Western Australia, including various town sites. When it was made, parts of the area it covered were subject to other claimant applications, including one made on behalf of the Ngarluma and Yindjibarndi peoples (NY). Subsection 67(1) of the *Native Title Act 1993* (Cwlth) (NTA) requires the court:

> [T]o make such orders as it considers appropriate to ensure that to the extent that native title determination applications cover the same area, they are dealt with in the same proceedings.

This meant that, in considering the NY claim, the court was required to (and did) deal with (among others) the WGTO application but only to the extent that the area it covered overlapped with the area covered by the NY application.

Justice Nicholson delivered the substantive decision on native title in *Daniel v Western Australia* [2003] FCA 666 (*Daniel*, summarised in Native Title Hot Spots Issue 6). Final orders were made in 2005, including a determination of native title recognising the Ngarluma People and the Yindjibarndi People as each separately holding native title to certain areas that had been subject to their joint claim—see *Daniel v Western Australia* [2005] FCA 536. As a result, the Ngarluma People were recognised as holding native title in relation to the area surrounding the town sites of Wickham, Point Samson, Karratha and south of the Burrup Peninsula. However, the town sites themselves were expressly excluded from the NY application. (The Ngarluma People have since filed a claimant application over those areas.) Those town sites were covered by the WGTO application. Therefore, since the WGTO application was dismissed only to the extent of any overlap with area covered by the NY application, the WGTO application remained on foot over the town sites not covered by the NY application.

The WGTO unsuccessfully appealed against judgment: see *Dale v Moses* [2007] FCAFC 82, summarised in Native Title Hot Spots Issue 25. The remainder of the WGTO claimant application was dismissed in *Dale v Western Australia* [2009] FCA 1201 (summarised in Native Title Hot Spots Issue 31). The decision to dismiss was based on findings concerning WGTO in *Daniel*. The court accepted the State of Western Australia's argument that the conclusion in those proceedings that the WGTO was not, and had never been, a 'society' for the purposes of s. 223(1) raised an issue estoppel. The state's motion for summary dismissal was allowed and the WGTO application was dismissed. The case summarised here was an appeal by WGTO against that judgment.

Issue estoppel doctrine may not apply in native title proceedings

Justices Moore, North and Mansfield held, in this instance, that it was not necessary for them to resolve the legal question about whether issue estoppel had any field of operation in applications for native title determinations. However, their Honours entertained real doubts as to its applicability—at [88].

Among other things, the court pointed out that s. 67(2) of the NTA provides that, to the extent of any overlap in area, orders must be made to ensure that native title determination applications are dealt with in the same proceedings. The effect of such an order:

> [W]ill typically be to create separate proceedings concerning a particular area with respondents which are only a subset of the respondents to the initial application or applications on which the order operates. Any determination made concerning the area will bind the world at large. It is, in effect, a judgment *in rem*: see *Wik Peoples v Queensland* [1994] FCA 967; (1994) 49 FCR 1. The determination will bind persons beyond parties to the proceedings. Because of the special characteristics of a judgment *in rem*, it operates outside the usual field of operation of the principle of issue estoppel requiring, as the latter does for its engagement, that the same parties (or their privies) were parties in the proceedings in which the issue was earlier determined. That is, a judgment *in rem* involves the determination of the status of the person or thing and binds the world at large and not simply the parties to the litigation—at [92].

Decision
The court held that:

- the primary judge was correct to dismiss the application;
- the WGTO essentially sought to have the same issue as determined in *Daniel* determined differently in the WGTO claimant application;
- the attempt to do so constituted an abuse of the court's process—at [88], [111] and [114].

Dismissal – ss. 94C, 190F(6), want of prosecution

Thomas v Western Australia [2011] FCA 346

McKerracher J, 12 April 2011

Issue
The issue in this case was whether the Federal Court should, of its own motion, dismiss the Mantjintjarra Ngalia claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). It was decided the application should not be dismissed because there was a real chance of it being amended in such a way as to lead to it being registered.

Background
The application concerned was made in March 1996. It was not amended to comply with the registration test criteria introduced into the NTA by the 1998 amendments. On 23 April 1999, pursuant to s. 190A of the NTA, the Native Title Registrar's delegate decided the application must not be accepted for registration because it did not satisfy all of the conditions, in particular ss. 190C(2) and 190C(4). In 2007, part of the original application was dismissed by Justice Lindgren in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (*Wongatha*, summarised in *Native Title Hot Spots* Issue 24).

When the *Native Title Amendment Act 2007* (Cwlth) commenced, the remainder of the application had to be retested. The original application overlapped with the former Wongatha application. No amendments were made between 1998 to 2007 because of the operation of s. 190C(3), which prevents registration of overlapping applications where there are common claimants.

In February 2008, after the dismissal of the Wongatha application in *Wongatha*, the remainder of the Mantjintjarra Ngalia application was amended to reduce the area it covered. In September 2009, the Registrar's delegate decided the amended application must not be accepted for registration because it did not satisfy all of the conditions of the test. The court then considered whether the application should be dismissed pursuant to s 190F(6). The applicant resisted dismissal, submitting details of a legal and research strategy being undertaken by the Goldfields Land and Sea Council (GLSC) in relation to the application. The GLSC advised the court it had instructions to assist the Mantjintjarra Ngalia people to file a new application and, subject to certain conditions acceptable to the current claimants, leave to discontinue this application would then be sought.

Justice McKerracher cited *Strickland v Western Australia* [2010] FCA 272 (summarised in *Native Title Hot Spots* Issue 32) in explaining the court's discretionary power under s. 190F(6). The principles set out in *George v Queensland* [2008] FCA 1518 (summarised in *Native*

Title Hot Spots Issue 29) on the proper application of s. 190F(6) were adopted. His Honour accepted that, in this case, there had been 'some steps toward genuine advancement of the claim' and that 'much of the previous delay was beyond the control of the applicant'. Since there was now 'a positive plan and strategy', the court also accepted that there was' a real chance the shortcomings identified in the past' could be overcome, leading to registration—at [15].

Decision
The application was not dismissed because the court found there was a real chance that the application could be amended in such a way as to lead to a different registration test outcome—[15] and [18].

Champion (No 2) v Western Australia [2011] FCA 345

McKerracher J, 12 April 2011

Issue
The issue was whether the Federal Court should, of its own motion, dismiss the Kalamaia claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). The motion to dismiss was adjourned for eight months based on assurances that mediation conducted by the National Native Title Tribunal on the principle issue preventing registration was progressing well.

Background
In July 1999, March 2001, August 2007 and December 2009, the Native Title Registrar's delegate decided pursuant to s. 190A of the NTA that this application, in its original and then in its various amended forms, must not be accepted for registration because it did not satisfy all of the conditions of the registration test.

Operation of s. 190F(6)
Justice McKerracher cited *Strickland v Western Australia* [2010] FCA 272 (summarised in *Native Title Hot Spots* Issue 32) in explaining the court's discretionary power under s. 190F(6) to dismiss an unregistered claimant application. The principles set out in *George v Queensland* [2008] FCA 1518 (summarised in Native Title Hot Spots Issue 29) on the operation of s. 190F(6) were adopted. His Honour commented that:

- if the court considers the application has been, or is likely to be, amended in a way that would lead to it being registered once considered by the Registrar, it would be appropriate to await the outcome of the reapplication of the test before considering whether to dismiss the application;
- pursuant to s. 190F(6)(b), the court may also consider any 'other reason' why an application should not be dismissed;
- the Explanatory Memorandum to the Native Title Act Amendment Bill 2006 at [4.331] referred to what became s. 190F(6)(b) and stated it would 'ensure that applications are not dismissed where there is good reason for a claim remaining in the system, despite being unregistered'—at [9].

Submissions
The applicant submitted (among other things) that the application should not be dismissed because:

- the principal reason for failing the test (which largely related to common membership with an overlapping claim group) was the subject of mediation in Tribunal;
- there was a real chance this would result in the claim group being reconfigured in an amended application that would satisfy all the registration test conditions;
- the mediation process was 'any other reason' for not dismissing the application for the purposes of s. 190F(6)(b).

Decision
McKerracher J accepted that the Tribunal's mediation process, which the court was assured was progressing positively, provided 'any other reason' not to dismiss the application at this point. The motion for dismissal was adjourned for eight months—[17] to [18].

Bell v NSW Minister for Lands [2010] FCA 1056

Jagot J, 29 September 2010

Issue
The Federal Court had to decide whether an unregistered claimant application should be dismissed under s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA).

Background
The Native Title Registrar's delegate found the claim made in the Ngunawal People's claimant application must not be accepted for registration because (among other things) it did not meet all of the s. 190B(5) conditions. The court was notified of this as required under s. 190D(1) and then asked for submissions on whether it should be dismissed pursuant to s. 190F(6). The applicant then sought leave to amend. The NSW Minister for Lands submitted the court should dismiss the claim under s. 190F(6) because:

- the proposed amendments did not remedy the relevant deficiencies;
- there were continuing substantive difficulties with the proposed amended application.

The applicant did not respond but, instead, indicated a wish to withdraw the application.

Decision
Justice Jagot was satisfied that the power in s. 190F(6) was available and dismissed the application because it:

> [I]is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar. The same circumstances provide the basis for my opinion that there is no other reason why the application should not be dismissed—at [11].

Hill v Queensland [2011] FCA 472

Logan J, 3 May 2011

Issue

The issue was whether a claimant application should be dismissed for want of prosecution. The court decided not to do so but made orders that certain 'milestones' must be achieved, with the court to closely monitor compliance, and self-executing orders for dismissal if those milestones are not achieved.

Background

The applicant was ordered to show cause why an application under s. 61(1) of the *Native Title Act 1993* (Cwlth) made on behalf of the Yirendali People Core Country Claim should not be dismissed due to the applicant's failure to 'prosecute the application with due diligence'. The application was filed in December 2006. When filed, it was 'particularly well supported ... by details of prior anthropological research'. The application passed the registration test in August 2007. However, 'nothing ... which takes the evidence in the claim beyond the work apparent in' the material as filed in 2006 was filed—at [1] to [5].

When the applicant was ordered to show cause on 25 March 2011, there was also a direction made that a supporting affidavit be filed by 7 March 2011. That affidavit was not filed but, on 24 March 2011, one of the persons who comprise the applicant filed an affidavit in which he apologised for the failure to comply and stated the applicant had engaged lawyers, the matter would be progressed using funds from future act activity and public funds would also be sought and the applicant intended to retain a named historian and a named anthropologist to prepare various reports.

Due diligence required

The power to make orders under O 35A of the *Federal Court Rules* to dismiss the application for default was available but whether to do so was 'a matter for the exercise of judicial discretion'. Justice Logan noted that cases where claimant applications were dismissed for default often 'also [had] an apparent want of any prospect' of the application succeeding. In this case, material before the court gave 'cause for thinking that there may be something in this case'—at [10] to [11].

However, Logan J noted that:

> Parliament has conferred a considerable privilege on those who have not yet vindicated a claim for native title by allowing [future act] agreements to be made. The price of that privilege ... is the prosecution of a native title claim in this Court. If it is not prosecuted with due diligence, it should be struck out for the privilege Parliament has conferred is being, or at least may be, abused—at [14].

His Honour commented that, in this case:

> There is a lamentable lack of diligence evident in the litany of unobserved steps in work plans. But for the prospect that there is something in this claim ... I would regard it ... as a case which called for dismissal. I am influenced not to do that by what seems ... to be ... an understanding of the need to prosecute ... which hitherto has not been evident—at [16].

Co-operation expected

Given the material filed originally, his Honour thought this 'may well be a case ... where ... evidence can be secured in a co-operative fashion'. Logan J ordered that: '[T]he case to be managed intensively by the [Federal Court] Registrar'. Other orders as proposed by the state directed at achieving certain milestones (e.g. provision by a particular date of reports and final connection material) were also made. Any slippage must be 'highlighted ... in advance by evidence in conjunction with an application for variation of the dates concerned' and respondents given 'notice and evidence of particular difficulties' should respond 'co-operatively'. Given the history of non-compliance, Logan J made 'self-executing default dismissal orders', i.e. dismissal will occur if a particular milestone is not achieved unless 'it looks likely, for good reason, that it may not be achievable', in which case is was 'extremely important' that the applicant draw this to the attention of the other parties and the court via an application to vary—at [18] to [19] and [21].

Can dismissed claim be brought again?

While acknowledging that whether a claim dismissed for want of prosecution can be brought again was a moot point, his Honour:

> [E]xpressly reserve[d] whether, in this particular case, in the event that circumstances arise where it is appropriate to vacate the self-executing part of the order whether, nonetheless, an order of dismissal ought to be attended with a requirement for the case not to be brought again without leave of the Court—at [24].

Decision

Logan J was satisfied that, in the circumstances of this case, the application should not be dismissed 'forthwith' but rather, that orders of the kind outline above should be made—at [26].

Comment on the perceived tension in NTA

His Honour noted that, under the NTA, native title 'can only be determined by an exercise of Commonwealth judicial power', which requires the making of an application that is then 'prosecuted with due diligence' by the applicant. His Honour went onto say that:

> A condition precedent to the further prosecution of any native title claim is the successful passage of what is known as the registration test. Passage of that test, though, does give rise to an ability to negotiate indigenous land use agreements [ILUAs]. Herein, in my opinion, lies the inherent tension in the Native Title Act—at [12].

With respect, a claimant application need not pass the registration test in order to progress. In certain circumstances, failing the test may lead to an application being dismissed pursuant to s. 190F(6). However, this is not an inevitable outcome, e.g. *Champion (No 2) v Western Australia* [2011] FCA 345 and *Thomas v Western Australia* [2011] FCA 346, both summarised in *Native Title Hot Spots* Issue 34. Further (and again with respect), a registered claim is not required in order to facilitate the negotiation of an ILUA. Both an area agreement ILUA and an alternative procedure agreement ILUA can be made over areas where there is no application (registered or otherwise) before the court—see ss. 24CD(3) and 24DE. That said, his Honour's point seems to be that taking advantage of the opportunities provided by the future act regime found in Pt 2, Div 3 of the NTA can direct the applicant's attention away from the due prosecution of the related application before the court—at [13].

Penangke v Northern Territory [2011] FCA 147

Reeves J, 24 February 2011

Issue

In this case, the Federal Court, on its own motion, dismissed a claimant application pursuant to s. 94C of the *Native Title Act 1993* (Cwlth) (the NTA), which deals with applications made in response to a future act notice.

Background

The relevant claimant application was made in 2003. The applicant's legal representative informed the court at various times that it was made in response to a future act notice (the proposed grant of a mining tenement) and that an agreement had been reached with the tenement holder. In August 2010, the applicant was directed to file and serve a program for further progress of the matter but did not comply. In December 2010, the applicant's legal representative made no submissions as to whether the court should make orders dismissing the application under s. 94C. The court therefore considered on its own motion whether to dismiss the application.

Dismissal under s. 94C

Subsection 94C(1) provides (among other things) that the court must dismiss a native title determination application if certain conditions are met, provided the applicant has been given a reasonable opportunity to present a case against dismissal and that there are no 'compelling reasons' why the court should not do so. Justice Reeves decided that, taking into account what the applicant's legal representative had said and the matters set out in s. 94C(1A) to (1G), each of the matters set out in s. 94C was met, in particular that:

- this was an application for a determination of native title in relation to an area;
- it was clear the application was made in response to a future act notice;
- the future act requirements were satisfied;
- the applicant had failed to take steps within a reasonable time to have these proceedings resolved;
- the applicant has been given a reasonable opportunity to present its case as to why the application should not be dismissed;
- there were no compelling reasons why the court should not dismiss the proceedings—at [8] to [9].

Decision

The application was dismissed pursuant to s. 94C.

Atkinson v Minister for Lands NSW [2010] FCA 1073

Jagot J, 1 October 2010

Issue

The main issue was whether to dismiss two claimant applications pursuant to s. 94C given that, in more than five years, the applicants had filed no evidence despite being ordered to do so by the Federal Court. The applicants had been 'permitted to exhaust every opportunity to obtain funding' but failed to secure it. It was found to be contrary to the interests of justice

'to permit the proceedings to consume yet more time and resources with no real end in sight'—at [25].

Background

These applications were brought on behalf of the Mooka and Kalara United Families, the first in February 2002 over the area subject to a future act notice given under s. 29 of the *Native Title Act 1993*(*Cwlth*) (NTA) concerning a proposed mining lease and the second in June 2002 over an area subject to a notice given under s. 29 in relation to a proposed exploration licence. Neither claim was accepted for registration. Both have a lengthy history before the court.

On 23 March 2005, the applicants were ordered to file certain materials by 23 September 2005 but did not comply. On 18 July 2006, the court ordered that all of the applicants' material be filed by 20 November 2006, extended to 20 November 2007 and then 1 July 2008 at the applicants' request. The applicants did not comply. On 25 July 2008, the court ordered them to file an amended application (as foreshadowed) and all relevant materials by 14 November 2008. Again, there was no compliance. On 26 February 2010, the Minister for Lands (NSW) sought orders that the applicants take steps to progress their claims by 1 October 2010 failing which the proceedings would stand dismissed. Justice Jagot agreed with the Minister's submissions that (among other things):

- recent amendments to the NTA were intended to ensure native title claimants had the same responsibility as all other applicants to 'advance and resolve' their claims;
- continuing non-compliance with orders, 'irrespective of the cause being an inability rather than an unwillingness to do so', involved 'unreasonable delay' that prejudiced both the respondents and 'the due administration of justice';
- dismissal for a failure to prosecute would not prevent subsequent properly constituted and diligently prosecuted applications being made—at [26].

Funding issue

From May 2009, the applicants pursued funding for their claims, including review of two decisions not to fund them. The court adjourned these proceedings several times to allow the applicants to do so. The applicants argued they were now being 'punished for diligently pursuing their funding application'. However, Jagot J said this argument was 'misconceived'. These proceedings were not about funding and, in any case, the applicants had been 'permitted to exhaust every opportunity to obtain funding' and had not secured it. It was contrary to the interests of justice 'to permit the proceedings to consume yet more time and resources with no real end in sight'—at [25].

Further, a lack of funding was not a 'compelling reason' not to dismiss the applications within the meaning of s. 94C(3), which provides that the court must dismiss claims made in response to future act notices in some circumstances. According to Jagot J:

> On the applicants' own submissions, the unresolved issues about their claim will remain unresolved without funding. As the prospect of obtaining funding is now purely speculative, the unresolved issues cannot be a reason, let alone a compelling reason, not to dismiss the applications—at [27].

Decision
In the circumstances, Jagot J was satisfied it was in the interests of justice to make self-executing orders whereby the applications would stand dismissed if the applicants did not file and serve their amended applications and other material by 29 October 2010.

Postscript
In *Atkinson v Minister for Lands for NSW (No 2)* [2010] FCA 1477, the applicants sought to vary Jagot J's orders but did not succeed. The applications now stand dismissed.

Variation of self-executing dismissal orders

Atkinson v Minister for Lands for NSW (No 2) [2010] FCA 1477

Jagot J, 16 December 2010

Issue
The issue before the Federal Court was whether to vary self executing orders made on 1 October 2010 requiring compliance by 29 October 2010. The applicant, by notice of motion, sought an exercise of the court's discretion to extend time which would have effectively reinstated the proceedings. The court refused to vary the orders.

Background
The applicant did not comply with an order to file and serve an amended claimant application and all material on which the applicant sought to rely by 29 October 2010, failing which the proceedings would stand dismissed. Therefore, the proceedings were dismissed. However, the applicant had filed and served six folders of primary material on 29 October 2010 and sought to file at least two more folders of material and an amended native title application. The court was told this was all the material upon which the applicant would rely. However, the two additional folders and the amended application had not been served on the other parties and so they had not had a chance to consider their position. Further, there was 'at least some doubt that the material is all of the material on which the applicants seek to rely' because there was an affidavit that indicated the applicant intended to file a further folder of evidence and at least 10 witness statements—at [5] to [6].

Fairness
Justice Jagot held that the applicant must:

- explain why the 1 October 2010 orders were not complied with;
- give the other parties 'an adequate opportunity to consider all of the material said to respond to the ... orders';
- advise the court as to whether or not the material was now complete and, if it was not, 'provide a clear explanation of what further material might be required'—at [9].

Her Honour found that: 'None of those requirements have been met today'—at [9]. Further, the evidence was that there was no funding to bring these proceedings to completion. Therefore, the applicant could instead:

> Focus ... resources on the collation of the material in substance on which they wish to rely and the commencement of fresh proceedings when that material is ready. That, however, is a matter for the applicants—[10].

Decision
Jagot J decided it was not appropriate to adjourn these proceedings 'because there is no indication as to when the notices of motion might be ready for determination'. Therefore, both notices of motion were dismissed—at [11].

Leave to discontinue - conditional

Gale v NSW Minister for Land and Water Conservation [2011] FCA 77

Jagot J, 2 February 2011

Issue
The issues before the Federal Court were whether to grant leave to discontinue a claimant application with conditions imposed on the making of another application by the same group and whether to make an order in relation to costs.

Background
A claimant application was lodged on behalf of the Darug Tribunal Aboriginal Corporation in May 1997. It was amended in May 2000 and accepted for registration in December 2000. On 31 March 2004, Justice Madgwick found in *Gale v Minister for Land and Water Conservation (NSW)* [2004] FCA 374 (the Gale proceeding) that native title did not exist because there was no evidence of a body of traditional laws and customs acknowledged or observed as required by s 223(1) of the *Native Title Act 1993* (Cwlth) (NTA). It was accepted that the claim dealt with in that matter and the claim dealt with in this matter were connected. The applicant sought leave to discontinue under O 22 r 2(2) of the *Federal Court Rules*. This was not opposed.

Decision – leave granted, conditions imposed
Justice Jagot was persuaded by the submission of Deerubbin Local Aboriginal Land Council (DLALC) that conditions should be imposed upon the commencement of any new proceeding by the same claim group because the maintenance of this proceeding had prevented DLALC from fully exercising rights which would otherwise be vested in it by the *Aboriginal Land Rights Act 1983* (NSW). Therefore, her Honour made orders preventing the filing of a further claimant application on behalf of the same claim group (however described) without the leave of the court unless that claim was filed in response to either a notice given under s. 29 of the NTA or a non-claimant application—at [27], [28] and [30].

Costs
DLALC sought an order for its costs from 31 March 2004 on the basis that:

- from the date of the Madgwick J's judgment (31 March 2004), it was or should have been apparent to the applicant that this claim could not proceed;
- this proceeding was kept on foot as leverage to induce the state government to enter into an Indigenous Land Use Agreement.

However, Jagot J was not persuaded that the circumstances warranted departure from the usual starting-point identified in s. 85A(1), i.e. that the parties bear their own costs—at [26].

Removal of respondents

Starkey v South Australia [2011] FCA 456

Mansfield J, 9 May 2011

Issue

The issue before the Federal Court was whether Ningil Richard Reid, a member of the Kokatha Uwankara native title claim group, should cease to be a respondent to the Kokatha Uwankara Native Title claimant application (KU application) pursuant to s. 84(8) of the *Native Title Act 1993* (Cwlth) (NTA). Orders were made that Mr Reid cease to be a respondent to the claim. It was found that the circumstances where a member of the claim group should be made or remain a respondent will be 'rare'—at [61].

Background

Mr Reid gave notice within the period fixed by the s. 66(10) of the NTA that he sought to become a party to the application. He apparently fell within ss. 84(3)(a)(ii) or (iii), i.e. as a person who claimed to hold native title in relation to the application area or as a person whose interests may be affected by a determination in the proceeding. Therefore, s. 84(3) apparently made him a party to the application as of right—at [36] and [65].

However, pursuant to s. 84(8), the court 'may at any time order that a person, other than the applicant, cease to be a party to the proceedings'. The material before the court showed that:

- Mr Reid did not say he had interests as a member of a different, competing claim group;
- rather, his concern was 'intra-mural', i.e. that the proper decision-making process for the purposes of authorising a person or persons to make the KU application pursuant to s. 251B of the NTA was not followed;
- Mr Reid said (at least for the Kokatha as part of the KU claim group) that only he could authorise the making of the claim under the traditional laws and customs and that he had not done so—at [46] to [47].

Respondent status for claim group member should be permitted rarely

Justice Mansfield conducted an extensive survey of the case law touching upon the issue before the court. Among others, Justice Ryan's comments in *Bidjara People #2 v Queensland* [2003] FCA 324 (*Bidjara #2*) 'concerned facts closely parallel to the present issue'. In that case, a claim group member sought to become a respondent relying upon the discretion available under s. 84(5). The person was dissatisfied with how the applicant was conducting the claim but had not made application for joinder within the notice period and so could not rely on s. 84(3). Ryan J joined her as a party, stating that:

> [I]t would ... lead to injustice if ... dissentient members were ... denied a voice in the determination of the claim. They clearly remain persons whose interests may be affected by a determination in the proceedings within the meaning of s 84(3)(ii) or (iii). It would unnecessarily multiply proceedings to require those persons to institute their own claims. Accordingly, I consider ... that such persons can be made parties pursuant to s 84(5).

Mansfield J was (respectfully) of the view that injustice would not necessarily follow if dissentient claim group members were 'denied a voice in the determination of the claim' and, in fact, could imagine circumstances when 'the opposite might be the case'. His Honour went on to note that:

> Section 62A ... contemplates the authorised applicant having control of the proceeding, and not the individual members, or any particular individual member, of the claim group. That is ... to ensure the coherent and effective prosecution of the claim. If the approach espoused in *Bidjara #2* were *routinely adopted*, any one or more dissentient members of the claim group would be able to become respondent parties to an application, even if the claim group as a whole according to its relevant decision-making process under s 251B had appointed the applicant and did not wish to remove and replace the applicant. ... . It would subvert the clear intention of s 62A ... to provide to respondent parties one person (or a group of persons) responsible for dealing with the claim on behalf of the claim group—at [55] (emphasis added).

After considering a number of other cases, Mansfield J found that, on balance, the authorities indicated that:

- there was 'no necessary legal impediment' to a claim group member being joined, or remaining, as a respondent;
- the discretion under s. 84(5) to join a claim group member as a respondent exists but 'its favourable exercise ... will be rare';
- the circumstances where a member of the claim group who became a respondent as a result of s. 84(3) would be permitted to remain a respondent 'will be rare'—at [61] and [68].

His Honour also thought it 'appropriate' to note (among other things) that neither the definition of native title in s. 223 nor the requirements of a determination of native title in s. 225 'require the consideration of, or the resolution of, any intramural or internal issues about the respective status of, or relative responsibilities of, individual members of the claim group'. As a result:

> There is ... no reason routinely to recognise and give a voice to those within the claim group who take a different view about any such matters from that taken by the claim group through the authorised applicant—at [63].

Mr Reid's case

The 'particular feature' of Mr Reid's case was 'his assertion that the claim itself has not been duly authorised because he is the only person who can do so'. It was found that the evidence was not 'presently sufficient' to allow Mr Reid to remain as a respondent party on this basis. His Honour noted that:

> It is hard to distil from the unsatisfactory material and cogent supporting evidence. He has not sought to explain fully why he should be allowed to go behind the agreements to accept the earlier decisions of the claim group or of the Kokatha People, to which he was a party. There may be more cogent evidence available to him, but it has not been identified. Significant time, money and resources have been invested in this claim. I am informed that these efforts are close to bearing fruit as a consent determination is within sight. Mr Reid, as a group member, will benefit from such a consent determination—at [69].

Decision
In the light of the findings on both the law and the evidence, Mansfield J decided it was 'not in the interests of justice' to allow Mr Reid to remain a respondent to the proceeding. Accordingly, pursuant to s 84(8), his Honour ordered Mr Reid cease to be a party—at [70] and [72].

Alternative procedural avenue – s. 84D
The court gave one further 'important' reason for the order:

> There is an alternative procedural avenue available to Mr Reid to explore the strength of his contention that only he could have authorised the claim: s 84D(2)(c) ... . It provides for a member of the native title claim group to apply for an order under s 84D(1) requiring the applicant to produce evidence to the Court of the authorisation. That provision provides a vehicle for Mr Reid to raise his concern, without him remaining a respondent party to the application—at [71].

Doyle v Queensland (No 2) [2010] FCA 1398

Collier J, 8 December 2010

Issue
The applicant for the Kalkadoon People #4 claimant application sought orders pursuant to s. 84(8) of the *Native Title Act 1993* (Cwlth) (NTA) or O 35(a) r 3(2)(d) of the *Federal Court Rules* (FCR) that four people cease to be respondents. Orders were made accordingly.

Background
The four respondents were required to, but did not, comply with an order made by Justice Collier on 28 October 2010 to write to the applicant and the court stating whether or not they adopted the admissions made by the State of Queensland and, if they did not, to give an explanation as to why not. Her Honour noted that, where proceedings are brought under s. 61 of the NTA as in this case, ss. 84 (8) and 84(9) provide for 'the removal of parties in appropriate circumstances'—at [6].
Further, at [8], her Honour noted s. 37M of the *Federal Court of Australia Act 1976* (Cwlth) was 'a relevant provision to take into account' in this case. It states that:

> The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and as efficiently as possible.

Decision
Collier J ordered that all four parties cease to be respondents pursuant to either s. 84(8) of the NTA or O 35A r 3(2)(d) of the FCR because (among other things):

- they did not comply with the orders of 28 October 2010 and so each was required to show cause why they should not be removed as parties;
- the matter had been set down for trial commencing on 28 February 2011 and the purpose of those orders was to 'enable identify any issues ... remaining in controversy';
- their non-compliance meant all matters remain in issue 'as between them and the applicant' and so, if they remain respondents, 'the length and cost of the trial will be significantly increased';
- none of them had shown any interest in actively participating in the proceedings—at [9] to [12].

Budby v Queensland [2010] FCA 1017

Collier J, 15 September 2010

Issue
The main issue for the Federal Court was whether the Wiri Cultural Heritage and Community Development Corporation (the corporation) should cease to be a respondent party to a claimant application pursuant to ss. 84(8) of the *Native Title Act 1993* (Cwlth) (NTA). It was decided it should because it did not have sufficient interests to justify it maintaining that status.

Background
The applicant to the Barada Barna People's claimant application sought an order that the corporation be 'struck out' as a respondent party. The corporation was not represented in the proceedings. The only evidence of the corporation's interest before the court was identified in a Form 5 (notice of intention to become a party) as 'traditional connection to and Native Title Cultural Heritage "rights and interests" in lands over which this NT Application has been made'.

Corporation's interests insufficient
Subsection 84(8) provides that the court 'may at any time order that a person ... cease to be a party to the proceedings' and s. 84(9) relevantly provides that the court 'is to consider' making an order under s. 84(8) if the court is satisfied that 'the person never had, or no longer has, interests that may be affected by a determination in the proceedings'. Justice Collier held that 'interests' has the same meaning for the purposes of ss. 84(5) and 84(9). Therefore:

- the basis of the corporation's claimed interest was identical to that on which certain individual respondents claimed to have such interests;
- there was no evidence that the corporation had any interests above that of an ordinary member of the public or interests other than by association with the individual members of the corporation—at [12] to [13], applying *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1, *Adnyamathanha People No 1 v South Australia* (2003) 133 FCR 242 ; [2003] FCA 1377; and *Combined Dulabed and Malanbarra/Yidinji Peoples v Queensland* (2004) 139 FCR 96; [2004] FCA 1097.

Therefore, the court was not satisfied that the corporation had interests that may be affected by a determination in the proceedings—at [13].

Decision
The court ordered that the corporation cease to be a respondent.

Lovett v Victoria (No 2) [2010] FCA 1283

North J, 15 November 2010

Issue
In this case, the court dealt with a failure to comply with orders in relation to retaining respondent status.

Background
On 7 October 2010, the Framlingham Aboriginal Trust (the trust), was ordered to confirm its intention to remain a party to the Gunditjmara People's claimant application by 6 October 2010. In response, the trust indicated it wanted to remain as a party and advised the Federal Court's Registrar that it was seeking to rectify some difficulties it had in retaining legal representation. It also attached a list of what it said were its parcel specific interests. However, this simply listed all the parcels covered by the application without indicating any particular interest in respect of any of them. The next day, the court gave the trust an extra few weeks to comply and ordered that, if there was no compliance by that date, the trust would cease to be a party unless it appeared before the court on 15 November 2010 and satisfied the court it should remain a party. Before the hearing, the court's registrar received a fax with a letter that attached exactly the same list of parcel specific interests and stating that the trust would have a representative present at the hearing. However, despite being called, no-one appeared to represent the trust.

Decision
In accordance with the orders made 7 October 2010, the trust ceased to be a party to the application—at [7].

Party status

Freddy v Western Australia [2010] FCA 1158

McKerracher, 26 October 2010

Issue
The issue was whether a creditor of a mining company that had made an application for an exploration licence over an area subject to a claimant application should be joined under s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA). Justice McKerracher found this was too tenuous an interest to justify joinder—at [22].

Background
Among other things, Charles Ghaneson applied to the court be joined as 'an interested party' to a claimant application made on behalf of the Wiluna native title claimants. He also (among others) sought orders to:

- review and investigate the functions of Central Desert Native Title Services Ltd (CDNTS) and 'its effectiveness in representing' the Wiluna claimants;
- terminate funding to CDNTS on the grounds of 'unsatisfactory performance of functions of a representative body' under the NTA and replace CDNTS with another 'totally independent' representative body in relation to the claim;
- 'cease proceedings in relation to determination' of the Wiluna claim until the court had considered his notice of motion.

Mr Ghaneson was a creditor of Seven Star Investment Group (SSIG), which had an application on foot for the grant of an exploration licence. Mr Ghaneson's affidavit evidence contained allegations against CDNTS and what he called 'evidentiary documentation', much of was 'not in admissible form' and, in any case, 'difficult to follow'. It was found the court had no power to make the orders sought in relation to CDNTS because, under s 203DF, 'that

power lies with the Commonwealth'. Therefore, Mr Ghaneson's application was treated an application to become a party to the proceedings—see [4] to [13].

Joinder
Subsection 84(5) states that:

> The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.

McKerracher J noted the comments in *Chapman v Minister for Land and Water Conservation* (NSW) [2000] FCA 1114 at [10] that, because a respondent to the claim has 'the power ... to veto the process of mediation and conciliation' that the NTA favours, the requisite interests must be 'capable of clear definition' and 'of such a character that they may be affected in a demonstrable way by a determination in relation to the application'. Implicitly, Mr Ghaneson was asserting SSIG had an interest in the Wiluna claim for the purposes of s. 84(5) and, therefore, he too had 'a relevant interest as a creditor of that company'—at [15].

The court noted (among other things) that in *Members of the Yorta Yorta Aboriginal Community v Victoria* [1996] FCA 453 (*Yorta Yorta*), it was found that a single application for an exploration licence did not constitute a sufficient interest for joinder—at [19].

Decision
The court dismissed Mr Ghaneson's application because:

- there was no evidence of the status of the exploration licence application or any other interests SSIG may have in the area concerned and so it could not be accepted that SSIG had 'a relevant interest within the meaning' of s. 84(5);
- more importantly, the interest Mr Ghaneson claimed (i.e. as a creditor of SSIG) was 'more tenuous still' and 'insufficient to fall within the boundaries set by Emmett J in *Yorta Yorta*'—at [21] to [23].

Postscript
The National Native Title Tribunal determined that SSIG must not be granted an exploration licence – see *Seven Star Investments Group Pty Ltd/Western Australia/Freddie* [2011] NNTTA 53, summarised in *Native Title Hot Spots* Issue 34.

Bonner v Queensland [2011] FCA 321

Reeves J, 6 April 2011

Issue
The Federal Court was asked to join three people as respondents under s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA). The court joined one as a respondent but deferred ruling on the application of the others.

Background
Kenneth Markwell sought leave to be joined as a party to the Jagera #2 claimant application (Jagera #2) on the basis that part of the claim area was Mununjhali country. Ruth James and Myfanwy Locke sought leave to be joined on the ground that some of the claim area was part

of the traditional lands of the Ugarapul People. The applicant for Jagera #2 contended that joining these people was inconsistent with *Commonwealth v Clifton* (2007) 164 FCR 355; [2007] FCAFC 190 (*Clifton*) and that, in any case, none of them had a sufficient interest and it was not in the interests of justice to allow them to be joined.

Sufficient interest

On the strength of the affidavits provided, Justice Reeves was satisfied they all three claimed to hold native title rights and interests in various parts of the area covered by Jagera #2 that may be affected by a determination in those proceedings. This was a sufficient interest to allow them to be joined as respondents pursuant to s. 84(5) of the NTA.

Clifton

Justice Reeves noted that *Clifton* prevented those seeking joinder from becoming respondents if they wanted a determination of the existence of native title in their favour. However, *Clifton* was not authority for the proposition that they could not be joined as respondents for the purpose of seeking to protect the native title rights and interests they claim from 'erosion, dilution, or discount by the process' of the court making a determination in Jagera #2: '[P]ersons in positions similar to the present applicants may be joined as respondent parties … to seek to defensively assert their native title rights and interests'—at [16] and [17].

His Honour held that Mr Markwell was entitled to be joined as a respondent to the proceedings 'for the limited purposes of defensively asserting' his claim to hold native title rights and interests in parts of the application area and to seek 'to prevent any dilution of those rights and interests'—at [21] to [22].

Respondent not to be a representative party

The application made by Ms James and Ms Locke presented a difficulty because they sought to be joined 'on behalf of the Ugarapul people'. Following *Munn v Queensland* [2002] FCA 486, Reeves J noted that a person who wished to be joined to protect claimed native title rights and interests 'from erosion, dilution, or discount', as in this case, could not do so as a representative party. Further, it may be 'that their sole purpose in seeking to be joined is to obtain a determination of native title in their favour', contrary to *Clifton*. However, because Ms James and Ms Locke were unrepresented, his Honour deferred ruling on their application until they had an opportunity to clarify what they were seeking to achieve—at [19] and [23].

Decision

The court joined Mr Markwell as a respondent but deferred ruling on the application of Ms James and Ms Locke.

Far West Coast Native Title Claim v South Australia [2011] FCA 24

Mansfield J, 21 January 2011

Issue

The issue before the Federal Court was whether to join Mirning Community Incorporated (MCI) as a respondent party to the Far West Coast Native Title Claim (FWCNTC). The court found MCI did not have sufficient interests to be joined.

Background
The FWCNTC originated subsequent to agreements between the Mirning People and the Far West Coast People to resolve their overlapping claimant applications. MCI was incorporated on 20 November 2009 under the *Associations Incorporation Act 1985* (SA). Its objects are to:

- encourage, promote and cultivate an appreciation of Mirning language, culture, history and heritage;
- preserve and protect that language, history and culture and to carry out activities to do so; and
- to engage in such other activities as may be incidental to or in furtherance of those purposes.

Membership is confined to Mirning persons who were accepted by the board of MCI.

Sufficient interest?
MCI contended it had a sufficient interest to be joined as a party because it had a legal or equitable estate or interest in the area subject to the FWCNTC or some other right, charge, power or privilege over or in connection with that area so as to enliven either ss. 253(a) or (b) (the definition of interest) of the *Native Title Act 1993* (Cwlth) (NTA). Justice Mansfield applied the test expressed in *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1; [1997] FCA 797 and found that:

- MCI did not itself have a sufficient interest for the purposes of s. 84(5) to be joined as a respondent party; and
- its objects did not include any basis upon which it could assert a direct entitlement to interests in the area which constituted the claim area – at [21], [27], [28] and [29].

Decision
The application to be joined as a respondent was refused.

Jones v Western Australia [2010] FCA 1038

Siopis J, 16 September 2010

Issue
The issues before the Federal Court were whether to reinstate Monlor Pty Ltd (Monlor) as a respondent party to a claimant application and whether to join Geoffrey Miller, a director and shareholder of Monlor, as a respondent party to that application.

Background
Monlor Pty Ltd ceased to be a party to the proceeding on 1 April 2010 because it did not to respond to orders made on 2 March 2010 that any party that did not respond within 21 days of service would cease to be a party. Liberty to apply to be reinstated was granted. Mr Miller's evidence was that he misunderstood the orders and that:

- he held a lease over a property next door to Monlor's property;
- he delayed his application to become a respondent because he mistakenly believed his interest was sufficiently congruent with Monlor's in respect of the adjacent parcels to warrant him not becoming a party in his own right.

Interest in the proceeding
Justice Siopis considered that it was clear on the evidence that Mr Miller had a personal interest in the land subject to the application and that this interest qualified him to be a party to the proceeding. It was noted that none of the represented parties opposed the orders—at [5] to [7].

Decision
Monlor Pty Ltd was reinstated as a party and Mr Miller was joined as a party.

Notification of amended application

Roberts v Northern Territory [2011] FCA 242

Mansfield J, 18 March 2011

Issue
The issue before the Federal Court was whether to grant leave to amend a claimant application under s. 64 of the *Native Title Act 1993* (Cwlth) (NTA). The court went on to consider the consequences of the amendment having regard to ss. 64 and 66A of the NTA.

Background
The applicant sought leave to amend the application in a range of ways including by replacing the applicant and revising the claim group description and the native title rights and interests claimed.

Leave to amend
Justice Mansfield made the orders granting leave to amend because he was satisfied that each of the respondents had been notified of the application to amend and that there was no opposition to it—at [2] and [3].

Consequences - 66A
His Honour noted that s. 66A imposed certain obligations on the Native Title Registrar if the Registrar is given a copy of an amended application under s. 64(4). However, these obligations only arise if the amendments result in a change to the area of the land or waters the application covers. In this case, the Registrar would not be obliged to give notice of the amended application because there would be no change to the area covered by the application—at [8], [11] and [13].

Decision
Leave granted to amend the application.

Application for stay refused

Cheedy v Western Australia [2010] FCA 1305

Gilmour J, 25 November 2010

Issue

The issue was whether to stay two future act determinations of the National Native Title Tribunal (the Tribunal) under s. 38 of the *Native Title Act 1993* (Cwlth) (NTA) and a Federal Court order dismissing s. 169 appeal proceedings pending the outcome of an appeal to the Full Court.

Background

The s. 169 proceedings were dismissed in *Cheedy v Western Australia* [2010] FCA 690 (summarised in *Native Title Hot Spots* Issue 33). The appellant sought orders that both judgment in that matter and the determinations of the Tribunal in *FMG Pilbara Pty Ltd/Cheedy/Western Australia* [2009] NNTTA 91 and *FMG Pilbara Pty Ltd/Wintawari Guruma Aboriginal Corporation/Cheedy/Western Australia* [2009] NNTTA 99 be stayed pending the outcome of an appeal to the Full Court.

Orders of the primary judge incapable of being stayed

The orders of the primary judge were that each of the s. 169 appeals be dismissed. Justice Gilmour held that the orders were not executory and so could not be stayed because there was nothing upon which a stay of execution could operate—at [29] to [31].

Order of the Tribunal incapable of being stayed

Gilmour J held that the power to make stay orders was not apt in this case because future act determinations made by the Tribunal were permissive in nature and did not require anything to be done by either the appellant or the proponent, FMG Pilbara Pty Ltd (FMG)—at [32].

Seeking injunction more appropriate course of action

His Honour noted that the appellant could have sought orders under ss. 23 or 25(2B)(ab) of the *Federal Court of Australia Act 1976* (Cwlth) to restrain FMG from taking any steps to obtain the mining leases the subject of the Tribunal's determinations pending disposition of these appeals—at [34]. In this case:

> The appellant was invited both by senior counsel for FMG and by the Court to pursue such a course. Indeed, FMG indicated its preparedness upon the usual undertaking as to damages ... to treat the motions as embracing such an application. ... . However, the appellant's counsel steadfastly declined to take up this invitation—at [35].

Decision

The notices of motion were dismissed.

Costs

Cheedy v Western Australia (No 2) [2011] FCA 305

Gilmour J, 1 April 2011

Issue
The issue before the Federal Court was whether to order costs against an applicant following the dismissal of motions to stay a judgment of the court and two determinations made by the National Native Title Tribunal.

Background
The background to this matter is provided in the summary of *Cheedy v Western Australia* [2010] FCA 1305, summarised in *Native Title Hot Spots* Issue 34. Following those proceedings, FMG Pilbara Pty Ltd applied for an order that the applicant pay its costs on the stay applications.

Costs – s. 85A not applicable
Justice Gilmour held that:

- while the appeal before the primary judge was instituted pursuant to the provisions of s. 169(1) of the *Native Title Act 1993* (Cwlth) (NTA), the appeal from that decision came before the court pursuant to s. 24(1)(a) of the *Federal Court of Australia Act 1976*(Cwlth) (FCA);
- the court was acting as the Full Court under s. 25(2B)(ab) of the FCA exercising appellate jurisdiction; and
- the applicants reliance on the provisions of s. 169 of the NTA as a 'platform for the submission as to the extended reach' of s. 85A was 'misconceived' ;
- although the motions for stay orders were not appeals they were made in appellate proceedings;
- there were no reasons why costs ought not to follow the event—at [7] applying *Murray v Registrar of the National Native title Tribunal* (2003) 132 FCR 402 at [10] to [12].

Decision
The applicant was ordered to pay FMG Pilbara Pty Ltd's costs to be taxed if not agreed.

Cheedy v Western Australia (No 2) [2010] FCA 1154

McKerracher J, 26 October 2010

Issue
The issue before the Federal Court was whether to award costs following the dismissal of an appeal brought under s. 169 of the *Native Title Act 1993* (Cwlth) (NTA). It was decided no order as to costs should be made.

Background
In *Cheedy v Western Australia* [2009] NNTTA 91, summarised *Native Title Hot Spots* Issue 33, two appeals under s. 169 against future act determinations made by the National Native Title

Tribunal under s. 38 were dismissed. Parties were then invited to make submissions as to costs.

Costs

According to s. 85A of the NTA, the parties bear their own costs unless the court orders otherwise. However, as Justice McKerracher noted:

> [W]hile the rule in s 85A NTA does not ... have direct application ... it may be relevant to the exercise of the discretion under s 43 of the ... FCA [the *Federal Court of Australia Act 1976* (Cwlth)] ... . It is appropriate in the exercise of s 43 FCA discretion ... to take into account all relevant matters including the nature of the proceeding, the question of whether important and novel questions are being responsibly pursued and the desirability of resolution of those questions without costs being imposed adversely as a penalty—at [8].

The court was satisfied the appeal proceedings met all the criteria identified in *Murray v Registrar, National Native Title Tribunal* [2003] FCA 45, upheld in *Murray v Registrar, National Native Title Tribunal* (2003) 132 FCR 402; [2003] FCAFC 220, namely:

- the proceedings were centrally concerned with provisions of the NTA;
- there was public interest in determining the correct construction of those provisions;
- it was in the interests of justice that no costs orders be made.

Decision

For the reasons note above, the court decided that 'the appropriate disposition in exercise of the discretion' under s. 43 of the FCA, taking into account 'the spirit' of s. 85A of the NTA, was that there be no order as to costs.

Bullen v Western Australia (No 2) [2010] FCA 1206

Siopis J, 29 September 2010

Issue

The issue before the Federal Court was whether to make an order for costs in circumstances where an applicant had successfully sought a declaration in relation to the construction of certain provisions of the *Native Title Act 1993* (Cwlth) (NTA). The relevant proceeding was not one to which s. 85A of the NTA applied.

Background

The relevant declaration was successfully sought in *Bullen v Western Australia* [2010] FCA 900, summarised in *Native Title Hot Spots* Issue 33. The applicant subsequently contended that, as s. 85A did not apply, the respondents should pay the costs of the application. The respondents contended that the court should exercise its discretion in respect of costs by applying the 'spirit' of s. 85A.

Bona fide dispute

Justice Siopis held that, in this case, there was 'a bona fide dispute which gave rise to arguable issues on both sides' and 'proved difficult to resolve'. Therefore, his Honour held that it was appropriate to apply the 'spirit' of s. 85A of the NTA to the question of costs—at [8] to [10], referring to *Murray v Registrar of the National Native Title Tribunal* (2003) 132 FCR 402; [2003] FCAFC 220.

Declining applicant's offers
The applicant contended that, even if it was appropriate to apply the spirit of s. 85A, the court should take account that an offer to negotiate an indigenous land use agreement (ILUA) which would have rendered the proceeding 'otiose' was declined, as was an offer of consent orders for mediation. The applicant further contended this conduct was 'analogous to them having unreasonably declined to enter into a compromise agreement'. However, the court held that the respondents did not act unreasonably in declining to accept the applicant's offers because this was a 'difficult [case] ... to resolve, with good arguments on both sides'—at [12] to [13]

Decision
The 'spirit' of s. 85A should apply, i.e. each party should bear its own costs.

Administration of future act funds

Allen, in the matter of North East Wiradjuri Co Limited (Administrators Appointed) [2010] FCA 1248

Jacobson J, 5 November 2010

Issue
The issue was whether the Federal Court should appoint receivers to two corporations given there was a question as to who was entitled to control those corporations, both of which receive native title agreement monies for distribution to the Wiradjuri People. The dispute concerns entitlement to be a member or a director of the corporation, which rests upon proof of being Wadjuri via genealogical descent. The Federal Court was satisfied receivers should be appointed.

Background
Bill Allen, Ester Cutmore and Robert Bugg (the applicants) applied to have receivers and managers appointed to the North East Wiradjuri Co Limited (NEWCO) and the North East Wiradjuri Community Fund Limited (NEWCF) because of a dispute between two groups of shareholders about who controls NEWCO and NEWCF. Justice Jacobson was satisfied this deadlock justified the appointment of receivers 'so as to preserve the assets of both companies'—at [6].

His Honour summarised the dispute as follows:
- NEWCF and NEWCO deal with payments received from 'native title properties', i.e. each receives payments 'from mining interests' for distribution to 'members of their community';
- the applicants (the first shareholder group) claimed they were members of the Wiradjuri People and that Mr Allen was validly appointed to the board of NEWCO in May 2010 because 'he is a Wiradjuri man and therefore has the requisite genealogical requirements for membership of the company and appointment to the Board';

- the applicants alleged among other things that those who comprise the second shareholder group are not members of the Wiradjuri People and are not, therefore, 'entitled to be members or directors of the company';
- NEWCO and NEWCF are related because NEWCO is entitled to appoint directors to the Board of NEWCF and so the dispute affected both corporations;
- the dispute extended to 'the power and entitlement of the respective parties to deal with the proceeds of royalty payments', with funds in the bank accounts of both companies now frozen—at [10] to [15].

According to His Honour:

> [I]t is plain that the power to appoint receivers and managers contained in s. 57 of the *Federal Court of Australia Act 1976* (Cwlth) is enlivened. The applicants are persons who are aggrieved because they say the second shareholder group are not of the requisite genealogical descent and are therefore not entitled to be members or directors of the companies. It is therefore proper to exercise the power to appoint receivers where there is a dispute as to who exercises the power to control the companies—at [16].

The court then dealt with several other issues not summarised here.

Decision
Among many others, an order was made appointing receivers and managers of NEWCO and NEWCF 'without security, until further order'.

Postscript – referee appointed, costs
The Hon Murray Wilcox QC, formerly of the Federal Court, has been appointed as referee under s. 54A of the Federal Court Act 1975 (Cwlth) to conduct an inquiry into this matter. He must report to the court no later than 31 July 2011. NEWCO and NEWCF are jointly and severally to pay the referee's fees and the 'reasonable costs' of the parties' legal representatives, an agreed anthropologist and the witnesses 'in connection with the inquiry', which are estimated to be upward of $200,000 according to orders made on 11 March 2011.

Injunction to restrain claim group meeting

Wuthathi People No. 2 v Queensland [2010] FCA 1103

Greenwood J, 5 October 2010

Issue
The issue relates to an application for an injunction under the *Federal Court of Australia Act* 1976 (Cwlth) to restrain the conduct of a native title claim group meeting that was to take place the following day at Injinoo at the northern tip of Cape York Peninsula. The Federal Court refused to make the orders sought.

Background
The meeting was for a claimant application brought on behalf of the Wuthathi People. It was called so that the traditional owners of the claim area could discuss the native title claim group description and consider making amendments to the application, including

amendments to the boundary description. The notice was directed to, and called for, the descendants of the apical ancestors of Eliza and Ela to attend the meeting. However, two elders of the Gudang Yadhaykenu People, who applied for the injunction, said they did not wish to attend the meeting because other apical ancestors who, in their view, ought to have been included in the notice were not included. The applicants for the injunction contended that, by reason of these omissions, the notice was defective and failed to comply with the *Native Title Act 1993* (Cwlth). It was said that:

- boundary changes were of great importance to the Gudang Yadhaykenu People;
- substantially, the position was that there was one broader Gudang Yadhaykenu group properly called the Gudang Yadhaykenu mob.

It was not contended that the Wuthathi People had no interest in the claim area. The Gudang Yadhaykenu People's point was that they had a 'fundamental interest' that was being ignored, both in the calling of the meeting and in relation to some earlier arrangements.

Interlocutory injunctions

According to Justice Greenwood:

- the question of the interests the Wuthathi People have (or might have) is a matter requiring 'detailed and forensic examination' by anthropologists;
- issues going to the rights and interests of the Gudang Yadhaykenu People 'would require examination as to the facts and history of connection and other matters which are well known elements of claims of this kind';
- the injunction proceedings were not 'the place or the forum to decide' those issues—at [7] to [8].

It was noted that there was insufficient information before the court upon which to decide whether there was an arguable case as required under the 'well understood principles governing interlocutory injunctions' as noted in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57—at [8].

However, the 'real issue' involved considering the cost of convening the proposed meeting, which was to be held in a remote location. As his Honour noted, if the court granted an injunction, $60,000 of expenditure spent by Cape York Land Council would be 'entirely wasted', as would all of the 'effort, time and energy involved in gathering people together at the place nominated for the meeting', especially since many of them were probably already there. His Honour could not identify any utility 'whatsoever in wasting that money by enjoining this meeting from taking place'. Further: 'The question of the legal efficacy or validity of decisions made [at the meeting] can, ... in the calm light of day be tested', at which time the relevant parties can put on whatever material they may wish to challenge or defend decisions taken at the meeting—at [10] to [11].

Decision

Greenwood J dismissed the injunction application.

Claim group composition - court appointed expert

Roberts v Western Australia [2010] FCA 1483

North J, 9 December 2010

Issue

The main issue was whether the Federal Court should appoint an expert to assist in the resolution of issues in relation to the native title claim group description in two claimant applications made on behalf of the Kariyarra people and, if so, what questions that expert should address.

Background

The Kariyarra applications (filed in 1998 and 2009 respectively) were thought to be capable of resolution by agreement but, during the negotiations, it became clear that there was no agreement in regard to whether the four families should be included in the claim group. As a result, the applicants and the State of Western Australia both proposed that the court appoint an expert anthropologist under O 34 r 2 of the *Federal Court Rules*, with the court to meet the expense of the appointment. The proposal was that the expert would report on 'specific questions concerning the connection of the group entitled to apply for a determination of native title'.

Appropriate case for expending court resources

Justice North considered as a preliminary question whether the case was of 'sufficient importance' to warrant expenditure of limited court resources to meet the costs associated with the appointment of such an expert. All of the parties who appeared before the court were of the view that it was appropriate in this case—at [3] to [6].

The next issue was 'the purpose ... to be served by commissioning the expert report'. Counsel for the Kariyarra (whose view was 'based on knowledge and experience from working with the community and should be accorded special weight') pointed out that the expert report might resolve the position in relation to at least some of the families and, if the matter went to trial and a number of the families were self-represented, the report was likely to be 'a valuable piece of evidence' that assisted in delineating the issues to be addressed and the questions for the court. Therefore, North J was satisfied that:

- this case was of 'such importance' that court resources should be devoted to meet 'the reasonable costs of an independent anthropological expert'; and
- there was likely to be 'value in the submission of such a report, if not to the parties, then for the purpose of a trial of the matter'—at [7] to [8].

Questions for the expert

It was agreed that both applications needed to be amended prior to any trial 'to reflect the proper constitution of the native title holding group'. The questions were:

- should this be done before or after the expert report was produced; and
- what was the scope of the question to be determined by the independent expert anthropologist?

North J found that the report should be provided 'before the applicant is called upon to amend their application'—at [11].

The scope of the questions to be put to the court expert as proposed on behalf of the applicants was narrower than that proposed by the state. The mining respondents contended for even broader questions going to all of the requirements of s. 225 of the *Native Title Act 1993* (Cwlth). His Honour preferred the applicants' position, having been persuaded by the argument that:

> Adopting the wider proposal would involve duplication by requiring the expert to traverse ground already covered in previous research. The State has already accepted that this earlier research has demonstrated connection to some extent. Consequently, the issue to be determined is properly confined by the question posed in the draft minutes submitted by the applicant—at [15].

Decision
Orders were made that the applicants and the state confer with a view to agreeing upon a suitable anthropologist to be appointed as a court expert pursuant to O 34 r 2 of the FCR to report upon identified questions and then report to the court regarding any agreement reached.

Funding for trial
His Honour noted that the court intended that, at the very least, the issue of claim group composition would be set down for trial in the second half of 2011 if it was not resolved by agreement. Yamatji Marlpa Aboriginal Corporation (the relevant the representative body) filed an affidavit of its Chief Financial Officer setting out its financial circumstances and the process for obtaining funding for trial. His Honour commented that: 'No doubt, the funding bodies will take into account the importance attached to the case as expressed to the Court by the applicant, the State and BHP Billiton companies'—at [17].

Legal professional privilege

Roe v Western Australia [2010] FCA 1436

Gilmour J, 17 December 2010

Issue
The issue before the Federal Court was whether legal professional privilege (LPP) had been waived in relation to a draft connection report as a result of the reading of two affidavits prepared by an expert witness engaged by the Kimberley Land Council (KLC).

Background
In the Goolarabooloo and Jabirr Jabirr Peoples' claimant application, an application under s. 66B(1) to replace the applicant was heard by Justice Gilmour. During the s. 66B hearing, his Honour upheld a claim of LPP asserted by the KLC in relation to a draft connection report prepared by a consultant anthropologist (Ophelia Rubinich) for the KLC for use in litigation. This case deals with Gilmour J's reasons for judgment. It was contended privilege had been waived or, in any event, that the report was producible because it was used by Ms Rubinich in the formulation of the opinions expressed in her affidavit evidence. The affidavits

concerned issues as to the ancestral descent of certain Goolarabooloo and Jabirr Jabirr People. The affidavits did not refer to the report.

Legal professional privilege
Counsel for Mr Roe referred to the common law principles of LPP in relation to expert reports and related documents as distilled by Justice Lindgren in *Australian Securities & Investments Commission v Southcorp Ltd* [2003] FCA 804 (*ASIC v Southcorp*) at [21], which include that privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents.

Ms Rubinich's evidence was that the report was 'used' to find secondary sources. She also said some things in the report were 'a one-line opinion based on the secondary source' and these opinions had been repeated in her affidavits in the s. 66B proceedings. Gilmour J found that Ms Rubinich's use of the report did not 'constitute relevant use in the sense employed by Lindgren J in *ASIC v Southcorp'*. According to the court:

> [T]he Report was used ... as a convenient reference to enable her to locate the relevant and important secondary sources. Her opinions in the Report were based in part on those secondary sources. The same secondary sources were relied upon by her for the purpose of making her affidavits for the purposes of this hearing—at [18].

The evidence persuaded his Honour that Ms Rubinich did not use the report 'to formulate opinions expressed in her affidavits'. Rather: 'Those opinions were based on materials in both affidavits which she quite properly has identified'—at [19].

Decision
For the reasons summarised above, 'the claim for client privilege asserted by the KLC' was upheld—at [21].

Adjournment of mediation

Naghir People #1 v Queensland [2010] FCA 1265

Greenwood J, 15 November 2010

Issue
The issue here was whether to adjourn mediation meetings because of the death of two members of the Nagilgaul People's claim group, one of the claim groups involved in the mediation. The court published reasons for allowing the adjournment because there was significant public and private expenditure associated with convening the meetings.

Decision
Justice Greenwood held that, having regard to the evidence that traditional laws and customs prevented any members of the Nagilgaul People travelling or engaging in meetings until after the funerals, the proper course was to adjourn the mediation. Costs and expenses associated with the adjournment were reserved. The applicant was ordered to file an affidavit within 21 days of the date of the funerals setting out whether, in the period between the time he first became aware of each death and the funeral for each person, he had travelled by air to Canberra (or elsewhere) or had engaged in any meetings in Canberra with

a member or officers of the Commonwealth Government or ministerial staff in Canberra (or elsewhere). His Honour considered this would need to be taken into account in determining whether an order for costs should be made—at [10] to [12].

Programming orders - former Wongatha area

Murray v Western Australia (No 3) [2010] FCA 1455

McKerracher J, 21 December 2010

Issue

This case deals with programming orders for the Yilka claimant application, which covers the area previously subject to the Cosmo-Newbury claim which was heard and dismissed by Lindgren J in *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 (Wongatha). An appeal from the decision to dismiss the Cosmo-Newbury claim is still on foot (Cosmo appeal).

Background

The Yilka claim was in mediation but an order was made pursuant to s. 86C(1) that mediation cease. At the same time, orders programming the matter to trial were made. Justice McKerracher noted that: 'It seems there is no prospect at this stage of the matter being resolved by agreement'. The applicant put forward draft programming orders, most of which were agreed. It was also accepted that the pleadings, in accordance with requirements of s 37N of the *Federal Court Act 1976* (Cwlth), 'serve the purpose of identifying the real and substantive issues, *bona fide* in dispute'—at [3], [9] to [10]. The reasons for decision summarised here deal with the main areas of disagreement between the parties.

Section 67

According to the court, s. 67(1) had to be considered because the Yilka proceeding and the Cosmo appeal cover the same area. Subsection 67(1) provides that:

> If 2 or more proceedings before the Federal Court relate to native title determination applications that cover (in whole or in part) the same area, the Court must make such order as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding.

His Honour agreed with Finn J's finding in *Kokatha Native Title Claim v South Australia* [2006] FCA 838 at [5] that s. 67(1) requires 'facilitating the orderly and efficient administration of justice where claims overlap'. According to McKerracher J, the best way to achieve those objectives in this matter was to adjourn the Cosmo appeal until the outcome of the Yilka proceedings—at [8].

Comment on application of s. 67

On one view, there is no native title determination application that overlaps the Yilka application area because the Cosmo-Newbury application was dismissed. If this is correct, then s. 67(1) has no application. On the other hand, if the Cosmo appeal is a proceeding before the court that relates to a native title determination application (e.g. the Cosmo-Newbury application) and so s. 67(1) is attracted, then (again with respect) the orders made

in this case do not appear to 'ensure' those applications 'are dealt with in the same proceeding'. However, assuming s. 67(1) is attracted, it is difficult to envision how this statutory direction could be fulfilled in this case other than to take the pragmatic stance adopted by his Honour.

Yilka claim should be resolved before the appeal is finalised

It was likely there would be 'a considerable overlap in the evidence sought to be led' if both the Cosmo appeal and the Yilka claimant application proceeded at that time. Therefore, his Honour found the Yilka proceeding should be determined first, accepting the Yilka applicant's submissions that:

- determining the Yilka claim before the Cosmo appeal was finalised would remove (or limit) the duplication of evidence;
- the Yilka claim was different from the claim made in the Cosmo-Newbury application because the former was a claim for individual native title rights and interests and the latter a claim for group rights and interests—at [4] and [6].

Timing of amendments to Form 1

The applicant submitted that amendments to the Form 1 (which it was acknowledged would be required) should be made after pleadings were completed. The state argued the amendments should be made when points of claim were filed. It was found that, when the applicant submitted its points of claim, it 'should at least indicate in writing' the parts of the Form 1 to which the respondents should, or should not, have regard in responding to those points of claim—at [12] to [17].

Points of claim and verification of pleadings

It was agreed that the pleadings should identify and narrow the issues but there was disagreement on particular points. The state argued (and the court accepted) the applicant should furnish:

> [A] statement of facts and inferences which are said to arise from facts and contentions ... on which the applicant relies in seeking the making of that determination be added to the pleading requirement—at [21].

Restriction on raising preliminary matters

The applicant sought orders modelled on O 52 r 18 of the FCR which deals with challenges to the competency of an appeal, placing certain constraints on a respondent wishing to raise any issue going to 'the viability of the proceeding' or any issue that relied on findings or orders made in relation to the Cosmo-Newbury application or the Wongatha proceedings. As McKerracher J noted:

> The applicant argues that the State should be required at the close of pleadings to inform the Court as to whether it will make such an application. Similarly, if pleadings are further amended, a similar requirement should be imposed—at [27].

While this much could be accepted, the court refused to make the orders because:

> [I]t is not clear that an applicant that may have such concerns as to its vulnerability is entitled to bind the other parties and the Court to make a final determination on such a matter at a time or stage in the proceedings of its choosing. In particular, that is so in the present situation when the possibility of a subsequent further amendment of the applicant's claim has not been excluded. ... [T]here is no basis upon which the respondents should be prevented from relying on particular

principles or the applicant should be protected from the operation of those principles by the imposition of a pre-emptory deadline—at [28].

Conference of experts

It was agreed that the court's Native Title Registrar should convene a conference of the expert witnesses from time to time as considered appropriate by the Registrar and limited to experts of a particular discipline. The state proposed that:

- the conference should not be convened under O 34A r 3(2) of the *Federal Court Rules* but should be 'intended to promote the informal development of experts opinions through interchange between them';
- the Registrar would produce a report 'for the use and guidance of the experts in finalising their reports' which identified the matters and issues on which the Registrar perceived the experts to be agreed and those on which the Registrar perceived they differed;
- 'in the interests of promoting frank discussion', any such report would not be received as evidence in the proceedings or referred to in the experts' final reports, be put to an expert on cross examination or 'directly or indirectly be made the subject of a notice to admit facts'.

McKerracher J made orders essentially as proposed by the state because this would:

- 'guard against a misunderstanding as to the approach to be taken in this conference';
- encourage 'the free exchange of ideas between experts ... before final reports are filed and served';
- ensure the conferences do not become 'an opportunity to lay groundwork work for cross-examination, the securing of admissions or otherwise gaining procedural advantage'
- make it clear that 'the report of the Registrar is not to be used by the Court but is to guide the experts in finalising their reports'—at [42].

Applicant's evidence in chief – written statements required

The state argued that:

> [T]he process favoured by the applicant appears to be one in which the case will gather specificity as it advances towards the completion of the oral evidence which it is proposed to be given in remote places over several weeks. Summaries that do not adequately capture the detail of the evidence, even if provided together and with ample opportunity for them to be understood as a whole before the commencement of the exercise, would place the respondents in a position of not really knowing what evidence should be treated as significant or even momentous when taken with other evidence to be given later—at [50].

The applicant argued that:

- reducing the evidence in chief of all indigenous witnesses to writing 'would run to hundreds of thousands of dollars at least' and that it would 'take much longer to prepare evidence to be led orally';
- the state's proposal for 'the election of evidence to be led orally would add significantly to the applicant's costs';
- there was 'an appearance of unfairness and discrimination in that lay witnesses of the respondents will not be subject to the discretionary requirement of evidence to be led orally' but, rather, be subject to the ordinary 'objection' regime;

- further, the state's proposal was arguably unfair in that respondents 'would have the advantage of all the evidence in writing well in advance of the hearing at the considerable expense of the applicant'—at [47].

His Honour adopted the regime proposed by the state, noting that:

> As witnesses will have to be prepared, in any event, completion of a written statement will not greatly increase the cost or delay of case preparation. It will add significantly to the efficiency of the hearing where the cost to a greater number of people will be a real consideration—at [53].

Decision
Having resolved all of 'the debates about those matters so that a final form of a minute for directions until trial could be agreed and made', the court left it to the parties 'to file a consent order reflecting these reasons'—at [64].

Leave to amend opposed

Anderson v New South Wales Minister for Lands [2011] FCA 114

Jagot J, 17 February 2011

Issue
The State of New South Wales opposed an application to amend the Numbahjing Clan's claimant application, arguing the proposed amendments were not likely to lead to registration of the claim made in that application. The Federal Court found leave to amend should be granted, noting the registration test is neither 'a screening mechanism' for access to the court nor a 'condition precedent to the making of a determination of native title' by the court—at [7].

Background
The Numbahjing Clan application was filed pursuant to s. 61 of the *Native Title Act 1993* (Cwlth) (NTA) in November 2008. It was not accepted for registration because it did not meet all of the conditions of the registration test. In particular, it did not meet all of the conditions in s. 190B (the merit conditions). The applicant sought leave to amend the application under O 13 R 2(1) of the *Federal Court Rules*. The state opposed the grant of leave.

Principles applied when considering leave to amend
At [3], Justice Jagot noted the statement in *Medich v Bentley-Smythe Pty Ltd* [2010] FCA 494 at [8] that:

> The general principle is that leave to amend should be granted unless the proposed amendment is obviously futile or would cause substantial prejudice or injustice which could not be compensated for. These considerations require the Court to take account of the nature of the proposed amendment, whether it is made in good faith, the stage in the proceedings at which leave is sought, the nature of the prejudice that may be caused and the means by which such prejudice might be redressed. The question of delay is relevant to these considerations however it is not the purpose of the Court to punish a party for delay in seeking an amendment.

It was noted these general principles must be applied within the context of the NTA, particularly the registration test provisions—at [4].

Contentions

The state contended leave should be refused because the proposed amendments did not 'cure the deficiencies in the application which caused the Registrar to refuse to register the claim in its original form'. It followed there was 'no real possibility' of the proposed amended application satisfying the conditions of the registration test.

The argument about the likelihood of the application again failing the registration test related to s. 190F(6), which empowers the court (on the application of a party or on its own motion) to dismiss a claimant application that has been refused registration if the conditions in s. 190F(6) are met and if all avenues of reconsideration or review have been exhausted. The conditions of s. 190F(6) are that:

- the court is satisfied that the application has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar;
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Her Honour noted at [5] that the state accepted 'likely' in this context means a real possibility of registration and not that registration is 'more probable than not', as found in *George v Queensland* [2008] FCA 1518 (*George*). It followed, according to the state, that:

- 'the proposed amendments are thereby futile';
- 'it would be unjust . . . and contrary to the public interest for futile amendments to be permitted';
- the general principle set out in *Medich v Bentley-Smythe* 'dictates that leave to amend should be refused'—at [5].

Subsection 190F(6) is the 'screening mechanism', not the registration test

It was found that the statutory scheme supported the applicant's approach, i.e. 'registration is not a condition precedent to the making of a determination of native title'—at [7].

Justice Logan's comments in *George* at [50] was cited with approval:

> Strictly, even after the amendments made by the [*Native Title Amendment (Technical Amendments) Act 2007* (Cth)], it remains true that the registration test found in Pt 7 is "not a screening mechanism for *access* to the Federal Court" … [Justice Jagot's emphasis]. That is so if for no other reason than that satisfaction of the registration test is not a condition precedent to the ability to file in the Court an application for determination of a native title claim . . . It is s 190F(6) which provides the "screening mechanism".

Likelihood of registration is not the exclusive focus

The 'likelihood or otherwise of registration is a part of the factual context informing the merits of the application for leave to amend' and 'cannot be an irrelevant consideration' but this 'does not undermine the essence of the applicants' submission that the Minister's exclusive focus on the likelihood of registration is misconceived'—at [9].

The court held there was a range of material factors that must be considered, including that the proposed amendments:

- were supported by additional affidavits that were not before the Registrar when the application first underwent the registration test that, pursuant to s. 190A(3)(a), must be considered when the amended application is tested;
- 'can be inferred to represent the best attempt the applicants are likely to be able to make to advance the application';
- were 'put forward in good faith by the applicants to advance their case and to obtain registration'—at [13], [14] and [20].

Other relevant considerations included that:

- Registrar's delegate, as an administrative decision–maker, must make a decision on the amended application that appears on the material to be 'sound' and 'right' and not merely 'justifiable' or 'defensible';
- 'there would be a wide spectrum of findings potentially open to the Registrar' and so 'the earlier decision ... cannot predetermine any decision' on the amended application;
- notification and the associated 'administrative burden' imposed on the Registrar, along with the 'consequential impact on rights of others following notification … are not enlivened until the claim is registered' (see comment below on this point);
- if the amended application is not registered, the process provided by s. 190F(6) remains available—at [15], [18] to [20].

According to her Honour:

> If the proposed amendments are not obviously futile, then the unfair prejudice to the applicants which will be occasioned if the amendments are not allowed far outweighs the potential prejudice to the Minister and the public interest in the effective use of resources which might result from allowing them—at [23].

Decision

Justice Jagot granted leave to the applicant to amend the application as proposed, noting that, if the application again failed the registration test, the state or the court may require the applicant to show cause why the application should not be dismissed under s. 190F(6)—at [23] to [24].

Note on Registrar's duty to notify claimant applications, whether amended or not

Her Honour expressed the view at [18] that notification is not enlivened unless and until the claim is registered, relying on *George* at [13] to [14]. With respect, the duty to notify a claimant application under s. 66 is enlivened regardless of whether the claim is accepted for registration—see ss. 66(6)(a) and (b). Further, where notice of an amended application must be given under s. 66A (and this is only in limited circumstances), there is no duty to await the outcome of the application of the test but, as a matter of policy, the Registrar usually does.

Constitution of the ERD Court – native title question

Straits Exploration v The Kokatha Uwankara Native Title Claimants [2010] SAERDC 55

Tilmouth J, 28 September 2010

Issue

The issue before the Environment, Resources and Development Court of South Australia (ERD Court) was whether, in proceedings involving a native title question, the court must be constituted by at least one native title commissioner. It was found this is not required.

Background

This matter concerned an application for a declaration that exploratory mining operations may be conducted on land in the Lake Torrens area made pursuant to s. 63S of the *Mining Act 1971* (SA). The section provides that, if an agreement between the proponent and the native title parties is not reached within the relevant period, any party to the negotiations or the relevant Minister may apply to the ERD Court for a determination. A preliminary issue arose concerning the constitution of the court.

Constitution of the Court

Section 15 of the *Environment, Resources and Development Court Act* 1993 (SA) (the ERDC Act) provides for the constitution of the court and, read 'in isolation' seemed 'clear enough', i.e. it provides for an administrative discretion to be exercised by the senior judge to determine the constitution of the court in any given matter, which may consist of a judge, magistrate or commissioner sitting alone—at [7].

However, s. 15(13) of the ERDC Act states that:

> Where other provisions of this Act or the provisions of a relevant Act deal with the manner in which the Court is to be constituted for the purposes of proceedings or any other business under a relevant Act, this section applies subject to those provisions.

Judge Tilmouth took this to mean that:

> [W]hen any particular statute … vests particular jurisdiction in the ERD Court, but is silent on the constitution, it takes the ERD Court as it finds it under the ERD Act. On the other hand, when the statute … deals with questions of the constitution, that statute prevails over s 15 … to the extent provided for—at [9].

Section 7 of the *Native Title (South Australia) Act 1994* (NTSAA) provides that the court must 'make use of the expert assistance of native title commissioners' appointed under the ERDC Act in proceedings involving a 'native title question'. There was no doubt in this case that s. 7 applied. After examining other provisions dealing with the role of commissioners in South Australian courts, Tilmouth J held that:

> Had Parliament intended that native title commissioners must sit in the ERD Court in applications like the present, it could quite easily have done so in the legislation conferring the jurisdiction ... as

> it has so often in other instances. ... . The legislature has on the contrary consciously chosen a less prescriptive model, one requiring only that the court must make use of the expert assistance from a native title commissioner—at [17].

Section 7 of the NTSAA was 'no more than facultative', i.e. 'it is an aid to the court informing "itself as it thinks fit"... rather than constitutional or jurisdictional in nature'—at [18].

Decision

It was found that the ERD Court may sit without a native title commissioner when hearing and determining an application brought before it under s. 63S of the *Mining Act 1971* (SA)—at [19].

Postscript – substantive decision

The substantive decision in this matter was handed down on 14 January 2011 and is now subject to appeal: see *Straits Exploration v The Kokatha Uwankara Native Title Claimants* [2011] SASCFC 9 summarised in *Native Title Hot Spots* Issue 34.