Native Title Hot Spots

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Contents

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Mediation of a claimant application

Frazer & Ors v Western Australia [2003] FCA 351

per French J, 17 April 2003

Issue

This decision relates to the directions made by the Federal Court that reflect 'the proper role of the Tribunal in all phases of the establishment and management of the negotiation timetable' for the mediation of a claimant application. His Honour Justice French also took the opportunity to indicate that he wanted to see a more systematic and focussed approach to the progression of native title claims than has occurred to date.

Background

French J was concerned that, for the past three years, negotiations in relation to many of the claimant applications covering the Central Desert region of Western Australia had generally taken place between the applicants and the State of Western Australia without the active involvement of the National Native Title Tribunal. All of the applications concerned had been referred to the Tribunal for mediation under s. 86B of the *Native Title Act* 1993 (Cwlth) (NTA). Submissions were sought from the parties and the Tribunal as to 'the proper role of the Tribunal in all phases of the establishment and management of the negotiation timetable in the claim'.

Submissions

Submissions made on behalf of the applicants contended 'surprisingly, that the NTA does not confer any statutory role' on the Tribunal with respect to the timetabling of negotiations. The submission was that s. 86F of the NTA was the relevant provision, pursuant to which the parties may request assistance with negotiations from the Tribunal. His Honour rejected this submission as being unsustainable in the light of the provisions of the NTA such as s. 86A and s. 86B—at [10] to [13].

The state filed affidavits that, among other things, indicated its priorities in dealing with native title applications and made submissions, including, that:

- parties could communicate directly provided the Tribunal was kept informed of the communications to the extent necessary to fulfil any requirements to report to the court;
- mediation aims to facilitate agreement on some or all of the matters that a determination of the native title must include. The state needs to be satisfied that there is a 'sufficient evidentiary basis upon which to found a negotiated outcome';
- prior to the evidentiary basis being accepted by the state, the Tribunal can monitor progress and keep other parties informed of progress or chair meetings to deal with intra-indigenous issues arising out of overlapping claimant applications;
- it is only once the state 'is satisfied from its own assessment…that connection can be made out that mediation of other matters…in s. 86A(1) could proceed, facilitated by the Tribunal'—at [14] to [18].

WMC Resources submitted that negotiations about connection and evidentiary materials are not part of the mediation process and that the Tribunal's involvement was not necessary unless the parties requested mediation. The pastoral interests submitted that it was open to the parties to negotiate their own agreements without Tribunal assistance, provided the state and the applicant provide progress reports to the other parties—at [19] to [21].

The Tribunal did not make submissions but Deputy President Chaney provided the court with two mediation reports stating (among other things) that the Tribunal's role is the management of the mediation process, which can cover the production and assessment of connection material. It was also pointed out that there may be advantages to involving the Tribunal in this process. For example:

- the member has the power to limit the parties to a mediation conference: see s. 136B(1);
- section 136F empowers the member to make directions about the use and distribution of a connection report if it is tabled at a mediation conference;
- section 136A mandates that things said and done at a mediation conference are without prejudice. There is no such statutory protection available in relation to negotiations that take place outside of mediation conferences—at [22] to [23].

Purpose of mediation confined by s. 86A

French J noted that the 1998 amendments to the Act introduced a 'far more detailed regime' for mediation of applications made under s. 61(1) of the NTA. Section 86 mandates the referral of these applications (which includes claimant applications) to the Tribunal for mediation unless the court orders otherwise.

The new regime also confined the purpose of Tribunal mediation of applications referred under s. 86B(1) to assisting the parties to reach agreement on some or all of the following matters:

- whether native title exists or existed in relation to the area covered by the application;
- if native title exists or existed in relation to that area:
  - who holds the native title;
  - the nature, extent and manner of exercise of the native title rights and interests in relation to that area;
  - the nature and extent of any other interests in relation to the area;
  - the relationship between those rights and interests (taking into account the effects of the NTA);
  - to the extent that the area is not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others. (As his Honour notes, different matters must be covered in relation to an application for a determination of compensation)—at [25].

Role of the Tribunal

His Honour found that:

- any suggestion that the provision of connection evidence is outside of or antecedent to the mediation process should be rejected;
- a referral under s. 86B is a referral to the Tribunal and it has a central role in mediation. The fact that the NTA mandates the referral of all native title determination applications to the Tribunal for mediation (unless the court orders otherwise) supports this proposition;
- the provisions of Div 4A relating to mediation conferences are ancillary to the referral of applications to the NNTT for mediation and do not define the limits of the Tribunal's role;
- the Tribunal has responsibility for undertaking mediation of all aspects of the

application that are relevant to the purposes set out in s. 86A, including:

- the development of a detailed negotiation protocol;
- the exchange of information between the parties;
- the identification of issues to be resolved; and
- the times and venues for holding mediation conferences in furtherance of the mediation process;

- the court needed to be satisfied that any mediation proposal put to it demonstrated that there was a likelihood that the parties would reach agreement on facts relevant to some or all of the matters set out in s. 86A(1)—at [26] to [28] and [32].

Statutory mediation process should be timely

His Honour said that:

- Parliament's intention that mediation should take place in a timely fashion is reflected in s. 86C, pursuant to which, at any time after three months have elapsed since mediation commenced, any party can seek an order that mediation cease;
- while there are very substantial resource burdens placed on all parties, the court has a responsibility to ensure that the mediation process provided for s. 61 applications made under the NTA is applied in a timely fashion; and
- the court wanted to see a more systematic and focussed approach to the progression of native title claims than has occurred to date—at [27] to [28] and [31].

Setting priorities

French J found that:

- it is not open to any party, be it the state, a native title representative body or a respondent, to unilaterally announce priorities for dealing with claimant applications that have been referred to the Tribunal for mediation;
- any unilateral action by any party which is not acceptable to the others may result in a breakdown of the mediation process, leading to an order that mediation cease;
- it is legitimate for the Tribunal and the parties to:
  - have regard to resource and other practical constraints under which each of them operates;
  - develop protocols and timetables to provide for bilateral negotiations between parties with reports back to the Tribunal, provided it is understood that these bilateral discussions are an element of the mediation process undertaken by the Tribunal in exercise of its statutory function and that the Tribunal may be required to provide a report to the court in respect of such negotiations;
- it is appropriate to develop regional timetables that stagger mediation to reflect agreed priorities—at 28] to [29].

Connection evidence

The provision of connection evidence by way of a report and the assessment of that report by the state appeared to be 'major factors' leading to the delay of the mediation process. French J suggested that this might be dealt with more expeditiously by the court hearing 'important elements of connection evidence from the applicants themselves' for the purposes of preserving that evidence. This would give the applicants 'an opportunity to tell their story…at an early stage'. Two avenues for doing this were noted:

- referral by the Tribunal under s. 136D(1) of a suitably framed question of fact for a determination by the court under s. 86D;
- the court directing the hearing and determination of such issues—at [30].

In both cases, the court could determine the rights and interests of the native title claim group in all or part of the area covered by the application, without necessarily making

reference to questions of extinguishment and without the need for tenure searches or histories—at [31].

A third option was also canvassed, where mediation would be conducted by either the court or the Tribunal in which early neutral evaluation (ENE) was used as an aid to mediation. The evaluation could have regard to connection material or evidence taken or a determination made in the circumstances noted above—at [31].

Early neutral evaluation

When handing down this decision, French J described ENE as involving a person of high standing and with suitable expertise 'who can provide a confidential, non-binding assessment of the strengths and weaknesses of the respective cases of the parties to assist in assessing their situations when they go on to re-enter the mediation process': see transcript dated 17 April 2003.

Decision

French J made orders that the applicant, any overlapping applicants and the state, in conjunction with the Tribunal, prepare a program for mediation of the applications concerned over a period of 12 months commencing 1 October 2003. The mediation program, if agreed, must be lodged with the court and is to include:

- the specific issues to be negotiated;
- a detailed timetable, including proposed meeting dates and venues set in a regional context; and
- an outline of a negotiating protocol to be adopted by the state and the applicants.

The program must be made available to the other parties on request. If the program cannot be agreed within the timeframe set by the court, then the applicant and any other interested party would be required to show cause why the matter should not be referred to a substantive docket judge. Similar directions have been made in approximately forty applications in Western Australia.

French J also directed that:

- the applicants identify any persons who, in the applicant's opinion, should have their evidence taken in order to preserve it; and
- the applicants, the state and any other respondent wishing to do so are to discuss with the Tribunal the definition of any questions of fact that may be referred to the court for determination.

Amendment of a claimant application

Harrington-Smith v Western Australia (No 5) [2003] FCA 218

per Lindgren J, 14 February 2003 and 19 March 2003

Issue

This decision concerns an application by the Wongatha people seeking leave to amend their claimant application and to submit amended points of claim. It provides useful guidance for applicants in relation to drafting claimant applications. This summary sets out the main points only.

Background

This matter is part heard, with all of the applicant's witnesses (other than the experts) having given evidence in chief. The Commonwealth of Australia and the State of Western Australia objected to some of the proposed amendments.

General comment on drafting

His Honour Justice Lindgren noted that a claimant application should 'clearly and unambiguously [convey] the nature of the claim to native title that is made' and should not 'include matters which it can be said…will definitely not be supported on a final hearing'. However, his Honour commented that the unlikelihood of success on the final hearing is not a proper ground for refusing leave to amend—at [4].

Description of boundaries and map

Paragraph 62(1)(b) and s. 62(2) of the NTA require that a claimant application must contain information enabling the identification of the boundaries of the area covered by the application and any areas within those boundaries that are not covered by the application. In this case, the identification of the areas excluded from the application was in issue, as was the question of whether or not the proposed amended application included areas of land and waters that were not included in the original application, in contravention of the prohibition found in s. 64(1). His Honour was of the view that:

> Properly drawn, an application will identify the **area** of land and waters within the outer boundaries and the internal excluded **areas** of land and waters—at [8], emphasis in original.

However, the map that must be provided need only identify the outer or perimeter boundaries of the area covered by the application. It does not have to depict the areas within the boundaries that are not covered by the application—at [7].

Description of the area covered by the application

His Honour was of the view that:

- the phrase 'external boundaries of the *claim*' did not conform with the NTA, noting that a claim is 'different in kind from the geographical area with which the [NTA] is concerned'. In order to better conform with the requirements of s. 62(2)(a)(i), the terminology used should be: *'The boundaries of the area of land and waters covered by the application';*
- the heading 'Internal boundaries' is not 'entirely appropriate', as what was required was the identification of *areas of land and waters* not covered by the *application* in order to conform with the language of s. 62(2)(a)(i). The use of a heading in these terms was, therefore, to be preferred. Further, areas should be excluded from the 'area covered by the application', not the 'claim'—at [12] to [15]

Exclusion of 'valid' past and intermediate period acts

The applicants sought to exclude from the area covered by the application any area in relation to which a 'valid' category A past or intermediate period act had been done. His Honour agreed with the Commonwealth's submission that the use of the word 'valid' in this context was superfluous and confusing and, therefore, should be omitted. (This is because, by definition, both past and intermediate period acts are valid: see ss. 14 and 22A of the NTA in relation to past and intermediate period acts attributable to the Commonwealth, as defined in ss. 239, 5 and 12A of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) in relation to past and intermediate period acts attributable to the state.) The use of 'valid' in the proposed amended application suggested that there could be both valid and invalid acts of the various kinds, which is not the case—at [16]. Although not mentioned in the judgment, the same can be said for 'previous exclusive possession acts' or 'relevant' acts, as some are called under the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA).

Exclusion of particular 'tenures'

The proposed amended application stated that, 'to avoid uncertainty', certain 'tenures' were expressly excluded from the *claim* area. Again, Lindgren J criticised the use of 'claim' rather than 'area covered by the application'. Further, saying that, 'to avoid uncertainty', these 'tenures' were excluded was 'unsatisfactory' and confused the issue because it was not clear whether these 'tenures' were within the class of excluded acts (e.g. category A past acts) or in addition to them. This required clarification. Finally, the point of time at which the exclusions occurred was not identified, e.g. at the point of filing the application—see [17] to [20].

Clarification of areas included

It was proposed to include in the amended application statements that:

- 'the applicants exclude from the claim any areas not covered by any of the original applications'; and
- the paragraphs expressly excluding specified 'tenures' were 'subject to such provisions of the non-extinguishment principle [as defined in s. 238 of the NTA] and such of the provisions of sections 47, 47A and 47B as apply to any part of the area contained within this application'.

The state was critical of these amendments, submitting that they were either unnecessary or, if necessary, they contravened s. 61(4), which prohibits the inclusion of any area not covered by the original application. His Honour was not aware of the terms of the original application but tentatively concluded (without deciding the matter) that the amendments were merely intended to make clear something that was previously implied in the application, i.e. that the exclusion of specified 'tenures' and defined acts was not to be taken as omitting an area to the extent that ss. 47, 47A and s. 47B or the non-extinguishment principle otherwise applied—at [30] to [32].

Identification of s. 47 to s. 47B areas required

The commonwealth argued that it was for the applicants to specify the areas where they claim s. 47, s. 47A or s. 47B applied. The proposed amended application did list specific pastoral leases (see s. 47) and Aboriginal reserves (see s. 47A). However, it referred 'in an unhelpful way' to 'vacant Crown land within the external boundaries of the claim' for the purposes of s. 47B. His Honour agreed with the commonwealth submission, noting that at this late stage in proceedings, when much of the applicant's evidence had been heard, the applicant should be able to identify with particularity the areas to which the applicant says s. 47, s. 47A or s. 47B apply—at [35].

Details and results of searches

Paragraph s. 62(2)(c) requires that an application must contain 'details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to land or waters in the area covered by the application'. The state had conducted extensive searches, filed the results in the court and served a copy on the applicants. Schedule D of the proposed amended application stated that:

> Searches…have been carried out by the State…and served on the Applicants in the form of 31 CD-ROMs…They are available for inspection at the offices of the Applicant's representative.

His Honour was of the view that Schedule D did not contain the 'details and results' required by the NTA. However, despite the contravention of s. 62, the respondents did not object, provided it was made clear that the applicant relied on the state's CD-ROMs. Lindgren J was prepared to accept Schedule D as drafted provided it included statements to the effect that:

- the applicant had not carried out the searches described in par 62(2)(c) of the Act; and
- details of results of all searches carried out to determine the existence of any non-native title rights and interests in relation to land or waters in the area covered by the application are those found in the CD-ROMs produced by the state for the purpose of the proceeding.

Presumably, this was acceptable in this because the hearing of the matter is well advanced, with most of the applicant's evidence having been given, and the fact that this material had been filed in the court and is, therefore, available to the parties.

Description of native title rights and interests

The state and the commonwealth submitted that certain rights claimed in relation to cultural knowledge 'pertaining to the area, and…of

places in the area' were not native title rights and interests as defined in s. 223 of the NTA, relying on *Western Australia v Ward* (2002) 191 ALR 1 at [17], [58] and [60] and M*embers of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at [33]. While his Honour saw force in the submission, it could be dealt with in the final reasons for judgment—at [39].

The native title rights and interests claimed in the proposed amended application were *subject to*, among other things:

- making no claim to native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act (as defined in s. 23F of the NTA) had been done;
- being limited to those rights and interests that are consistent with any act, grant, title or interest that partially extinguished native title;
- making no claim to a right of possession or rights to either control access or to make decisions about the use and enjoyment of any area where the native title rights to exclusive possession has been extinguished.

The commonwealth submitted that:

- the qualifications were vague and not properly referenced to the list of itemised rights and interests claimed; and
- a claim for non-exclusive rights and interests cannot be sustained.

Lindgren J did not see any reason to determine that question. The applicant's evidence relating to the matter is closed and the issue could be determined in the final judgement—at [42].

Shared rights

The state objected to a proposed amendment which would state that the rights and interests over a particular area are shared with other members of the Western Desert cultural bloc. The basis for the objection was that this suggested that the native title rights and interests are held by a group that is wider than the claimant group, in contravention of the requirement in s. 61(1), which requires that the applicant must be authorised by **all** the persons who, according to their traditional laws and customs, hold the common or group rights comprising the particular native title claimed.

His Honour disagreed:

> It is conceivable that the traditional laws and customs under which the rights and interests claimed are held might…be also traditional laws and customs of a wider population, without that wider population being a part of the claim group. I have rights and interests in land under the laws of New South Wales and those laws are "shared" with other persons, but it is not true that, as a result, my rights and interests in land are shared with them. The same laws apply so as to generate proprietorial rights in a person because of factual circumstances peculiar to that individual. Similarly, it is conceivable that traditional laws and customs shared by members of the Western Desert cultural bloc may apply so as to confer rights and interests on the Wongatha people in relation to the land and waters covered by the application which they do not confer on other members of the Western Desert cultural bloc—at [53].

Authorisation

The commonwealth objected to the description of the native title claim group on the basis that certain identified descendants had been excluded. This meant that the potential native title holding group was wider than the claimant group. Therefore, it was questionable whether there had been the authorisation required under the NTA. If this was the case, then the application was fatally flawed. The applicant submitted that the fact that certain named lineages or persons are excluded says nothing on the face of it as to whether or not authorisation occurred. Whilst the court agreed with this submission, Lindgren J did warn the applicants that the objection effectively puts

the applicants on notice of a potential difficulty that may arise at trial—at [64].

Decision

The application to amend was refused, with the judge noting that the applicants would, no doubt, want to submit a further draft application and draft points of claim. If so, it should be prepared as a matter of urgency and distributed to all parties with a view to agreeing that the draft conforms with the reason summarised here.

Review of registration test decision

Quall v Native Title Registrar [2003] FCA 145

per Mansfield J, 7 March 2003

Issues

This case concerns a review of a decision by the Native Title Registrar's delegate that the claimant application concerned should not be accepted for registration. The grounds upon which review was sought were:

- since the majority of the requirements of the registration test were met, the delegate erred in refusing to accept the application;
- the delegate took irrelevant information into account;
- the delegate erred in finding that the claim group was not a properly constituted native title claim group and in finding that the claim overlapped another registered claim and that there were members common to each claim group for those applications; and
- the delegate was biased or acted in bad faith by considering the application with a closed mind, based on the delegate having had reference to evidence and findings in the Report and Recommendations of the Aboriginal Land Commissioner under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) called the Kenbi (Cox Peninsula) Land Claim No. 37 (the Land Claim report).

Background

In 1999, the applicant made a claimant application on behalf of himself and eight named individuals who were described as members of the Danggalaba clan. That application was registered but the decision to do so was set aside in earlier review proceedings determined by his Honour Justice O'Loughlin.

The applicant then amended the application and sought a determination of native title on behalf of four named families described as descendants of Kulumbiringin, claiming he had been authorised to bring the claim under the traditional and customary law of the Kulumbiringin. The amended application was referred to the Native Title Registrar for consideration but was not accepted for registration by one of the Registrar's delegates. The applicant, who was unrepresented, sought a review of that decision. The Registrar made a submitting appearance, as was appropriate. The Northern Territory was granted leave to appear as *amicus curiae* in the absence of any contradictor.

Jurisdiction

It was unclear whether review was sought under the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (AD(JR) Act), in which case it was strictly a review of the legality of the decision-making process, or under s. 190D(2) of the NTA, which the Full Federal Court in *Western Australia v Strickland* (2000) 99 FCR 33 has found is a hearing *de novo*. His Honour Justice Mansfield decided to consider the application as if it was brought under both. In any event, nothing turned on this point as there was no information before the court that had not been before the delegate—at [10] to [13].

All conditions of the test must be met

The applicant's argument that the claim made in the application should have been registered because the majority of the requirements of the test were met 'must fail'. Subsection 190A(6) requires that an application *must not*

be registered unless *all* of the conditions in s. 190B and s. 190C are met. As the Registrar has no discretion, compliance with a majority of the conditions does not suffice—at [17].

Regard to information not provided by the applicant

Mansfield J noted that s. 190A(3) provides (among other things) that the Registrar may have regard to such other information as he or she considers appropriate. Therefore, it was found that the delegate did not err in having regard to the information contained in the Land Claim Report. Further, the Register of Native Title Claims is a public register of considerable 'public significance':

> The functions and the powers of the Native Title Registrar in determining whether to accept an application for registration should not be circumscribed by, or confined to, some form of administrative inquiry in which reliance may be placed only on the information provided by the applicant. The public significance of the…Register also indicates that the Registrar should be entitled to inform himself or herself of matters of significance, and…to receive information from the relevant Commonwealth, State and Territory governments or land councils—at [22].

Was the native title group properly constituted?

Having determined that the application was brought on behalf of the Kulumbiringin as a discrete native title group and not as a sub-group of the Larrakia people, the delegate considered whether or not there was evidence to support the Kulumbiringin being an appropriate native title claim group when:

- it had earlier been claimed that the Danggalaba clan was the proper claim group; and
- the area covered by the application is subject to a claimant application brought on behalf of the Larrakia group and there was information before the delegate to suggest that the Kulumbiringin may be a clan that is actually part of the Larrakia group.

His Honour noted that the identification of the native title claim group 'goes to the heart' of a native title claim. Pursuant to s. 190C(2), on the basis of the application and such other relevant information, the delegate must determine whether the application has been made on behalf of a 'native title claim group' as defined in s. 61(1)—at [26].

Mansfield J cited with approval the observation of his Honour Justice O'Loughlin in *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60]:

> A native title claim group is not established or recognised merely because a group of people (whatever number) call themselves a native title claim group…[T]he tasks of the delegate include the task of examining and deciding who, in accordance with traditional law and custom, comprised the native title group.

In this case, the delegate decided that the native title claim group was not properly constituted as required under s. 61(1) because not all of the people who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed were included. This conclusion was based on the following:

- some of the offspring of the four named elders of the claim group were not included in the 27 people said to comprise the Kulumbiringin group and, according to the Land Claim report, one of the three apical ancestors named in the application had eight children, seven of whom had descendants. Only four of those descendants were referred to in the application. The only explanation given for the absence of these people was that some had 'opted out' of the claim;
- apart from this, the persons comprising the Kulumbiringin appeared to be those previously identified by the applicant during the Land Claim hearings as Danggalaba people—at [27] to [29].

It followed from this that the application did not comply with s. 61(4), which requires all persons in the native title claim group to be named or otherwise described sufficiently clearly so that it can be ascertained whether any particular person is one of those persons. Therefore, the delegate concluded that the application did not comply with the provisions of s. 190C(2) of the NTA—at [29].

Mansfield J found that:

- the process of reasoning of the delegate was not 'attended by any demonstrated factual misconception or any error of law' and that the determination of the facts was not 'shown to be erroneous';
- the delegate had identified the appropriate issues, asked the right question and addressed it. She was entitled to come to the conclusion that she reached and it was not appropriate for the court to go beyond that conclusion;
- if the application for review was made under the AD(JR) Act, then it was not a function of the court to re-address the issues of fact and, if brought under s. 190D(2), then this was not a case in which it was appropriate for the court to substitute its own findings for those of the delegate;
- the conclusion of the delegate should stand—at [30] to [32].

Overlapping claim

It was held that the delegate correctly concluded that the application did not comply with s. 190C(3), which 'precludes the registration of an overlapping claim where there are members of the claimant group common to a prior registered claim and the one being tested'—[34].

Authorisation

The court agreed with the delegate's conclusion that, as the claim group was not properly constituted, she could not be satisfied that the applicant was authorised to make the application and, therefore, failed to satisfy the provision of s. 190C(4)(b). His Honour noted that:

> Section 251B makes it clear that authorisation must be given by all the persons in the native title claim group…It followed, from the delegate's view that the claim group was not properly…constituted, that the applicant was not authorised on behalf of all the native title claim group—at [35].

Factual basis for claimed native title and other conclusions

As the delegate was not satisfied that the application was made by a properly constituted native title claim group, she concluded that:

- the requirement for a sufficient factual basis to support the assertion that the claimed native title rights and interests exist under s. 190B(5) could not be satisfied;
- *prima facie,* the rights and interests claimed could not be established as required under s. 190B(6); and
- the requirement to show that there is or was a traditional physical connection under s. 190B(7) could not be met.

His Honour was of the view that these conclusions should not be disturbed—at [36] to [37].

Allegation of bias and acting in bad faith

As a claim of bias or lack of good faith is a serious allegation, it should not be made without proper foundation. The applicant must show that:

> [A] suspicion may be reasonably engendered in the minds of those who came before the Registrar or in the minds of the public that the Registrar or his delegates may not bring to the resolution of the questions arising before them fair and unprejudiced minds—at [39].

After considering the evidence, the court found there was no basis to the claim, with his Honour commenting that:

- the delegate was entitled to and did have

regard to an extensive range of material;

- the applicant was given an opportunity to respond to the adverse information provided by the Northern Territory and the Northern Land Council;
- the fact that the delegate or the Registrar had previously considered and rejected applications brought by the same applicant did not mean that the delegate could not bring to the making of the decision an unbiased mind. The delegate acted appropriately in addressing the differences between the present application and the earlier applications and exploring the significance of those differences.
- the delegate was also entitled to have regard to both other applications in the area and the land claim report;
- the delegate's reasons reflected a 'careful and considered approach to the fulfilment of her task'. They did not give rise to conclusions of bias, either actual or apprehended. Nor did they indicate that the delegate approached her task in bad faith or with a view to achieving an end outside the purpose for which the decision-making power was conferred—at [39] to [41].

Decision

The application was dismissed with no order as to costs.

Party status

Kulkalgal People v Queensland [2003] FCA 163

per Drummond J, 28 February 2003

Issue

This case concerned an application brought pursuant to s. 84(5) of the NTA by a member of the native title claim group, seeking to become a party to that group's claimant application.

Background

Party status was sought because the person concerned was dissatisfied with the progress of the application. She felt that her views had been disregarded and claimed that rights would effectively be given to a group whom she did not believe should receive those rights.

The NTA provides that an application must be accompanied by an affidavit sworn by the applicant deposing to have the authority of **all** persons in the native title claim group to make the application—s. 62(1)(a)(iv). The person named as applicant is held to have authority to deal with all matters arising under the NTA in relation to the application—s. 62A.

Decision

His Honour Justice Drummond found that the only avenue for a dissatisfied member in a claim group is to apply pursuant to s. 66B for an order to replace the applicant, an action that requires the authorisation of the claim group. The statutory scheme:

- '[u]nfortunately…seems…to be clear and designed to prevent an application' of this kind from succeeding; and
- 'leaves no room for the principle…that a person represented in an action by a representative applicant under O 6 r 13 of the Federal Court Rules can, if dissatisfied with the conduct of the action, be joined as a respondent in the proceedings'—at [7] to [8].

The application was dismissed.

Birra Gubba (Cape Upstart claim) v Queensland [2003] FCA 276

per Drummond J, 28 March 2003

Issue

Did two commercial fishermen, who sought to be joined as respondents and who may have been acting unlawfully by fishing in a national park, have an interest that may be affected by a determination in the proceedings as required under s. 84(5)?

Background

Two commercial fishermen, who sought party

status, argued that a determination in the proceedings may affect the rights they currently enjoyed under their commercial fishing and fishing boat licences issued under s. 30 of the Fisheries Regulation 1995 (Qld). They argued that their licences authorised fishing in tidal waters that are part of a national park. The area concerned is both a 'protected area' and a 'prescribed place' under the *Nature Conservation Act 1992* (Qld) (the NCA). It is also within the area covered by a claimant application brought on behalf of the Birra Gubba people.

Under s. 62 of the NCA, it is an offence to (among other things) take fish from a protected area other than under (again, among other things):

- a licence or authority issued or given under an Act by the Governor in Council or someone else with the consent of the Minister for the Environment or the chief executive of the Environmental Protection Authority (s. 61(1)(c)(iii) NCA); or
- a licence or authority issued or given under a regulation made under the NCA (s. 61(1)(d) NCA)—see [17] to [22].

Those seeking to join the proceedings relied on these exceptions.

Test case

His Honour Justice Drummond noted that, 'in truth', the motion was brought to test a conflict that had arisen between the Queensland Seafood Industry Association Inc. (QSIA), a commercial fishermen's association to which both of the people seeking to be joined belonged, and the Environmental Protection Authority (EPA):

> It is a striking feature of the case that though there has been in force since 1994 what counsel for the State of Queensland contends is a clear prohibition on commercial fishing in national parks, the Queensland Department of Primary Industries (DPI), which administers the fisheries licensing regime, has continued to issue annual licences which…authorise commercial fishing in some national parks—at [8].

Evidence of fishing

There was undisputed evidence before the court that (among other things):

- the two fishermen had regularly fished in the tidal waters in question;
- commercial fishing in the tidal waters of national parks was a historic and well established practice;
- at least 79 of 2000 members of QSIA recently surveyed indicated that they fished in tidal waters within national parks;
- loss of access to these areas is an important issue for the commercial fishing industry and to individual commercial operators—at [5] to [8].

State's argument

The State of Queensland opposed the application for joinder, arguing that:

- while the DPI could lawfully issue licences to fish commercially in national parks, if the holders of such a licence exercised the right granted, they would commit an offence under s. 62 of the NCA;
- the term 'interests' in s. 84(3) and s. 84(5) comprehends only lawful interests;
- any rights to fish in the tidal waters of a national park can only be unlawful and, therefore, could not be 'interests' for the purposes of s. 84(3) and s. 84(5).

The native title claimants supported this contention—at [9].

Affected interests within s. 84(5)

Drummond J noted that:

- the native title rights and interests claimed included the right to control access to the area covered by the application; and
- if the application succeeded on those terms, then the commercial fishing interest holders

may be required to get permission from the native title holders before exercising their rights under the fishing licences. That was, in his Honour's opinion, sufficient to show each applicant has interests within s. 84(5) that may be affected by the determination sought by the Birra Gubba claimants—at [10].

Annual licence is not too transitory

Fishing licences of the kind considered here are typically issued under s. 30 of the Fisheries Regulation for only 12 month periods but are renewable under s. 56 and s. 58 of the Fisheries Act. His Honour found that, as the applicants held a lawful entitlement to fish and had at least an expectation of renewal, this was not (as the native title claimants had argued) too transitory an entitlement to constitute an interest within the meaning of s. 84(3) and s. 84(5)—at [11].

Were there lawful rights to take fish?

The central question was the existence of a lawful right to take fish in the area concerned. Drummond J reviewed the legislative history of the NCA and held that the applicants would not infringe s. 62(1) of the NCA by engaging in commercial fishing in the tidal waters concerned. They were exempt from the prohibition in s. 62(1) provided that they complied with:

- subsection 27(2) of the Nature Conservation Regulation 1994 (Qld) (NCR) made under s. 175 of the NCA, which allows a person to take fish from a national park provided conditions are met and, therefore, authorises 'that which would otherwise be prohibited by s. 62(1)'; and
- the conditions of their licences—at [22] to [43].

Therefore, s. 62(1)(d) applied to make the taking of fish in the tidal waters of a national park under the licences held by the applicants lawful—at [28].

His Honour rejected the state's argument that the application of s. 27 of the NCR is restricted to recreational fishing. That section:

> …confers a general authority on all persons to take fish from national parks subject to compliance with the conditions contained in s. 27. None of those conditions limits the taking of fish…for non-commercial purposes only—at [31].

Habitual unlawful activity may be an 'interest'

Drummond J surveyed the authorities on point, noting that the term 'interests' as used in s. 84(3) and s. 84(5) is not confined to legal and equitable interests in land and waters. Whether or not a person's interests may be affected by a determination in the proceedings is a question of fact governed by the circumstances in the particular case—at [44] to [48]. Particular reference was made to:

- Olney J's comment in *Members of the Yorta Yorta Aboriginal Community v Victoria* (1996) 1 AILR 402 that the habitual use of an area without any legal right to do so but with the 'acquiescence' of the title holder may be sufficient to give rise to an interest within s. 84(3) and s. 84(5), which Drummond J took to be a reference to acquiescence in a 'non-technical, practical sense'; and
- Dowsett J's acceptance in *Combined Mandingalbay Yidinji-Gunggandji Claim v Queensland* [2002] FCA 730 that habitual use without any legal right in circumstances where the native title holder has tolerated that use may also be sufficient—at [50];
- the fact that the series of licences issued to the fishermen under the Fisheries Act purported on their face to authorise fishing in the tidal waters of a national park;
- the absence of any evidence of enforcement of s. 62 of the NCA against licence holders commercially fishing in national parks, which suggested that a deliberate policy of non-enforcement has been adopted to date—at [51].

His Honour concluded that, even if commercial fishing in tidal waters of a national park was a contravention of s. 62 of the NCA (and, therefore, unlawful), the licencees would still be entitled to become a party to the claimant application—at [14] and [52].

Decision

Drummond J found the fisherman had an interest that was sufficient for the purposes of s. 84(3) and s. 84(5) NTA and made orders joining them as parties to the Birra Gubba claimant application.

Bidjara People 2 v Queensland [2003] FCA 324

per Ryan J, 7 April 2003

Issue

This decision concerned an application under s. 84(5) of the NTA by a member of a native title claim group to be joined as a party to that group's claimant application.

Background

In this case, the person seeking to be joined indicated that she did not accept that those named as the applicant (one of whom is her brother) in the application have, or ever have had, authority to make the application and conduct the proceedings on her behalf.

His Honour Justice Ryan:

- noted that there was no facility under s. 61(1) of the NTA for proceedings to be constituted by applicants acting in different interests or claiming different authorisation to bring proceedings; and
- referred to *Kulkalgal People (Aureed Island) v Queensland* [2003] FCA 163 (which is noted above), in which Drummond J rejected a similar application on the basis that the NTA is clearly designed to prevent such an application from succeeding.

However, Ryan J was of the view that the application under s. 84(5) could succeed because:

- a dissatisfied claimant is 'clearly' a person whose interest may be affected by a determination in the proceedings 'within the meaning of s 84(3)(ii) or (iii)'; and
- it would be unjust to not allow dissentient members a voice in proceedings but that it would unnecessarily multiply proceedings to require such persons to institute their own claims.

His Honour acknowledged that:

- subsection 61(1) requires the person or persons who are named as the applicant to be authorised by all the members of the native title claim group; and
- section 66B enables the replacement of the applicant in certain circumstances.

However, Ryan J was of the view that s. 66B 'does not accommodate the situation which has arisen here, where the applicants retain the authorisation…of the majority of the claim group, but there are…dissentient members of the group'—at [7].

Decision

Pursuant to s. 84(5) of the NTA, the applicant was joined as a party to the proceedings.

Wilson on behalf of the Bandjalang People v Dept of Land & Water Conservation [2003] FCA 307

per Hely J, 9 April 2003

Issues

The two questions before the court were:

- should two claimant applications by the same applicant over adjoining areas be consolidated; and
- should those with interests on the adjoining application be joined as respondents to the first?

Background

Two claimant applications have been made in north-eastern New South Wales on behalf of the Bandjalang People (referred to as Bandjalang No. 1 and Bandjalang No. 2). Bandjalang No. 2

adjoins the area covered by Bandjalang No. 1 but covers a much larger area.

As a result of legal advice and due to funding considerations, the separate applications were filed at different times and are, therefore, at different stages in the process. However, the evidence given to date in Bandjalang No. 1 suggests that there is only one traditional Bandjalang area, made up of the area covered by the two applications. Much of the evidence filed in Bandjalang No. 1 regarding traditional law and custom may, therefore, also be relevant to Bandjalang No. 2. However, it was anticipated that further expert evidence will be filed if Bandjalang No. 2 proceeds to trial.

Application for joinder and consolidation

Members of the NSW Farmers Association (the farmers), who were respondents in Bandjalang No. 2 but who had no interest in the area covered by Bandjalang No. 1, filed a notice of motion pursuant to s. 84(5) of the NTA in Bandjalang No. 1 seeking joinder. They also sought an order consolidating the proceedings pursuant to Federal Court Rules (FCR) O29 r 5. In support of the motion, they submitted that:

- evidence given and decisions made in Bandjalang No. 1 (to which they were not parties) could be received into evidence in Bandjalang No. 2; and
- the findings of the court in the first matter be adopted by the court in the second: see s. 86 and s. 82(1) of the NTA—at [12] to [14].

The farmers' application was opposed by the native title applicant on the basis that:

- the farmers did not have an interest in the area subject to Bandjalang No. 1;
- the NTA does not permit the consolidation of the kind sought; and
- it was a matter of speculation that the court would exercise the discretion available under s. 86 when hearing and determining Bandjalang No. 2—at [17] to [18] .

Did the farmers have the requisite interest?

His Honour Justice Hely noted that, according to s. 225 of the NTA, the court's task in Bandjalang No. 1 is to determine the nature and extent of both the native title and non-native title rights that exist in relation to the application area—at [19] to [20].

In accordance with s. 84(5) of the NTA, the court has the power to give leave to a person to join the proceedings if it is satisfied that the person's 'interests' may be affected by a determination in the proceedings. In this context, the term 'interests' is not confined to those referred to in s. 253 of the NTA.

Hely J referred to the findings on the meaning of 'interest' in this context made in *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1 and noted that, although that decision was made under the old NTA, it continues to apply to the amended NTA. The test enunciated in that case was, essentially, that the interest:

- need not be legal or equitable but must be genuinely, demonstrably and not indirectly affected by a determination in the proceedings;
- must be capable of being defined with reasonable certainty; and
- must not be so remote or insubstantial that it would be mere speculation as to whether and how it might be affected.

His Honour applied this test and found that while there was no reason for giving a narrow or confined operation to s. 84(5):

- it was difficult to see how a person who does not assert any interest in or connection with the area covered by the application has an interest that may be affected by a determination in the proceedings;
- whether or not the farmers had an interest because of the potential 'precedent' value of the outcome of Bandjalang No. 1 was a matter of speculation. There was no way to

know whether or not the court would exercise the discretion available under s. 86, even if asked to do so and, even if this was proposed, the farmers would have an opportunity to make submissions on the point. Therefore, even if the farmers had such an interest, it could not be clearly defined at this stage and was indirect or remote. Therefore, it did not meet the test enunciated in *Byron*;

- any party to the proceedings is entitled to participate in mediation and to veto any consent determination that might be proposed. According the farmers this status in Bandjalang No. 1 when their interests are in relation to lands within Bandjalang No. 2 would be 'inconsistent with the scope and purpose of the NTA'—see [22] to [35] and [51].

Intervention

The farmers, as an alternative, sought to intervene in Bandjalang No. 1 under O 6 r 17 of the FCR for the limited purpose of cross examination of any witness whose evidence touched on Bandjalang No. 2. Hely J found that what was sought was outside of the realms of O 6 r 17.

His Honour also considered s. 23 of the *Federal Court Act 1976* (Cwlth) (a point not raised by the farmers), but was of the view that even if there was power under that section to permit intervention, it would not be appropriate to exercise it for a purpose unrelated to the disposition of the proceedings. An intervener is a party to the proceedings and has all the privileges of a party. Therefore, a person who does not have a sufficient interest to meet the requirements of s. 84(5) should not be permitted to intervene—at [36] to [38].

Consolidation

Hid Honour was of the view that an order consolidating the proceedings under O 29 r 5 of the FCR, the two applications 'would be merged into one', with the:

> …necessary consequence…that the land the subject of the consolidated proceedings would be the two areas the subject of the existing applications. In order to achieve that result, amendment of the applications …would be required—at [40].

Hely J then referred to s. 64(1) and s. 64(2) of the NTA, which provide that a claimant application can only be amended to include land or waters that were not covered by the original application if the amendment combines the application with another claimant application. The question as posed by Hely J was whether the court could force an applicant to combine the two applications and whether any such power should be exercised. It was noted that:

- section 67, which requires that the court make such orders as it considers appropriate to ensure that, to the extent of any overlap between the areas covered by one or more applications for a determination of native title, the applications are dealt with in the same proceeding, did not apply because the applications abut rather than overlap;
- it was not contended that the prosecution of two separate claims was an abuse of process; and
- the bringing of two applications was not 'obviously' oppressive given the differences in the persons (other than the claimants) with interests in the area covered by each application—at [42] and [45].

After noting that the power to consolidate is a discretionary power, Hely J expressed the view that the structure of the NTA is such that he had 'real doubts' as to whether the court has the power to 'force a combination' of claimant applications 'except in the circumstances referred to in s. 67'. (Presumably his Honour meant to confine this to circumstances where applications that overlap are brought by the same applicant on behalf of the same claim group. For example, it would seem unlikely that compliance with s. 67 in other cases would allow

for combination would be 'forced' upon overlapping claimant applications brought by different groups). If this is the case, then the court 'cannot effectively order consolidation of proceedings which relate to separate claims'. Even if there is such a power, this was not a case in which the court should exercise it—at [46].

Query whether his Honour had regard to *Strickland v Western Australia* (1998) 89 FCR 117 at [3] to [4] (to which no reference was made). In that case, the orders made indicate that his Honour Justice RD Nicholson accepted that there is a legal distinction to be drawn between the combination and consolidation. An order to combine applications results in two or more claimant applications becoming a single application. It is a 'species of amendment' in which one claimant application is amended to combine it with others: *Western Australia v Strickland* (2000) 99 FCR 33 at [6] Beaumont, Wilcox and Lee, citing with approval French J in B*ropho v Western Australia* (2000) 96 FCR 453; (2000) 169 ALR 365 at [25]. On the other hand, an order to consolidate results only in two or more matters being treated as one proceeding, rather than being an amendment of any of the substantive applications. The orders made by RD Nicholson J indicate that, when claimant applications are combined, it is not appropriate for the court to also exercise the power to consolidate.

Concurrent trials

His Honour considered making an order under O 29 r 5 of the FCR, pursuant to which different proceedings are tried at the same time, but concluded that this was not an appropriate course to take in the circumstances because:

- Bandjalang No. 1 was relatively close to trial whereas Bandjalang No. 2 was still in mediation;
- it could not be assumed that the same judge would determine both cases because the farmers had already indicated that they would apply to disqualify Hely J from hearing No. 2 if he made findings in No.1 that were adverse to their interests;
- it was difficult to determining which witnesses were common to both applications; and
- the other respondents to No. 2 were not parties to the motion and may not be in a position to cross examine No. 1 witnesses before they have prepared their own cross examination in the proceedings to which they were parties—at [48] to [49].

Decision

The notice of motion filed by the farmers was dismissed with no order as to costs.

Application to vacate trial

Wilkes v Western Australia [2003] FCA 142

per Beaumont J, 5 March 2003

Issue

This was an application filed by the South West Aboriginal Land & Sea Council Aboriginal Corporation (SWAL&SCAC) on behalf of the applicant to vacate the hearing of claimant applications made over the Perth metropolitan area, Rottnest Island and some of the coastal sea. The trial was scheduled to commence four days after the application to vacate was made.

Background

Since 1999, trial dates have been vacated on four occasions. There was some history of disharmony and disagreement within the native title claim group: see *Wilkes v State of Western Australia* [2002] FCA 1416. The evidence to support this application to vacate was that:

- certain disaffected members of the Noongar Land Council (the former representative body for the area) continued to assert that SWAL&SCAC was not the properly appointed representative body for this claim;
- difficulties had arisen in mediation from May 2002;
- moves were afoot to consolidate many of

the applications in the region into a single claim brought on behalf of all Noongar people;

- the state, through Deputy Premier the Hon. Eric Ripper, had issued a media statement that evidenced an intention to mediate claims in the South West region.

It was noted that the state had not reached any agreement with SWAL&SCAC regarding the matters raised in the media statement and that it opposed the motion to vacate.

Decision

His Honour Justice Beaumont refused the application, concluding that the interests of justice required the case to proceed rather than being deferred once more. The matter had been lodged many years ago, had been subject to long periods of unsuccessful mediation and SWAL&SCAC had failed to explain, to the court's satisfaction, the reasons for the long delays in progressing the claim and deciding on the appropriate course of action. One elderly applicant in an overlapping claimant application, who was unrepresented and in ill health, had submitted all of his evidence (including anthropological reports). He was, therefore, entitled to ask the court to adjudicate on the matter—at [16] to [17].

Restricted evidence

Wilkes v Western Australia [2003] FCA 156

per Beaumont J, 5 March 2003

Issue

This case concerned an application to the court for orders that would:

- exclude certain people from the hearing of evidence about certain sites; and
- protect confidential information.

Background

One of the people sought to be excluded had his own claimant application that overlapped the Wilkes application (the latter is referred to as the Combined Perth Metropolitan Claim). The other two people were Aboriginal men who asserted interests in the area covered by the Combined Perth Metropolitan Claim and were 'objecting' to that application. *Prima facie* evidence had been given to the effect that:

- the sites were sacred:
- the explanation of the significance of these sites to the Noongar people is something kept in the confidence of those people;
- it is part of the traditional law and custom of the Noongar people that only certain elders have authority to permit others to enter such sacred sites;
- the three men sought to be excluded were from other areas and would be at risk of suffering an illness if they were present on the sites when evidence was given.

The court's powers

His Honour Justice Beaumont noted that:

- subsection 82(2) of the NTA allows the court to take into account 'the cultural and customary concerns of Aboriginal peoples…but not so as to prejudice unduly any other party to the proceedings'; and
- subsection 17(4) of the Federal Court of Australia Act 1976 (Cwlth) (FCA) empowers the court to exclude persons from open court where their presence would be contrary to the interests of justice;
- section 50 of the FCA empowers the court to restrict publication of particular evidence in order to prevent prejudice to the administration of justice—at [5] to [7].

It was noted that 'several competing interests need to be taken into account when making…advance interim orders to protect information claimed…prima facie, to be of a confidential character—at [8].

Decision

His Honour made orders that:

- the unrepresented applicant should be

permitted to hear the evidence in relation to those sites that were also covered by his application. This was 'a necessary incident of providing him with an adequate opportunity to be heard in his own cause';

- the two unrepresented opponents to the Combined Metropolitan Claim were in a different position. In advance of the giving of the evidence, the confidential character of the explanatory information should, prima facie, be given more weight than their as yet undefined interests in opposing the claim;
- the transcript of the evidence given at the specified sites be separated from the general transcript and be marked 'restricted evidence'; and
- copies of the transcript are only to be made available to the Court and to each person entitled to attend the hearing at the specified sites—at [10] to [12].

Access to money held in trust to defend a s. 66B application

Adnyamathanha People v South Australia [2003] FCA 211

per Mansfield J, 18 March 2003

Issues

The main questions dealt with in this case are:

- whether the court should permit the trustees of a charitable trust administering future act agreement monies to make decisions about the use of that money to defend a s. 66B application when two of the trustees were the people sought to be removed from the group of people named as the applicants; and
- whether two of the three trustees should be removed.

Background

The principle claimant application dealt with in this case is an amalgamation of previous applications brought on behalf of the Adnyamathanha People over an area surrounding the Flinders Ranges in South Australia. These applications were bought prior to the 1998 amendments to the NTA and, therefore, prior to the introduction of both the requirement in s. 251B that persons bringing a claimant application must be authorised by the claim group and the registration test.

In April 1998, one of people named as the registered native title claimant made an agreement with a mining company. The agreement made provision for royalty payments that were to be applied to a specified charitable trust (the trust). The trustees were Flinders Trustees Ltd (an independent corporate trustee), the claimant who entered the agreement and her son (the mother and son).

Despite the nine people currently named as the applicant in the principle proceedings having been authorised to maintain the principal application, there was some obvious discord among them. It was alleged that, at a meeting of the Adnyamathanha People held in March 2001, a decision was taken to bring an application under s. 66B to remove the names of the mother and son from the group named as the applicant. In August 2001, an application in these terms was made to the court, together with (among other things) an application for an injunction to prevent the mother and son from dealing with the trust funds and orders removing the son and Flinders Trustee Ltd as trustees.

However, the trustees had passed a resolution to allow the mother and son to access trust funds to pay for their defence of the s. 66B application.

Application of trust funds

His Honour Justice Mansfield commented that the question was whether or not, in the circumstances of this case, the court should permit the trustees to make decisions about the use of the money held in trust. Without taking any view with respect to the rights and wrongs of the evidence to date, his Honour declined to exercise his discretion to interfere with the trustees fulfilling their obligations

pursuant to the trust, apparently in accordance with their bona fide intentions of doing so. In this context, it was notable that one of the trustees was an independent corporate trustee—at [24] to [25].

His Honour noted that there was significant evidence provided:

- on the one hand, by those bringing the s. 66B application such that, although it was not necessary to do so at this stage, it could be concluded that there was a serious question to be tried as to whether the mother and son should maintain their status as claimants and, in the case of the mother, as one of the people named as the applicant;
- on the other, to show that the resolutions relied upon to support the s. 66B application were both flawed and did not amount to authorisation by the Adnymathanha People in accordance with s. 251B, as required by s. 66B(1)(b)—at [26].

Further, there was evidence to suggest that it was not irresponsible of the mother and son to oppose the s. 66B application and that there was a reasonable basis for resisting it. Therefore, Mansfield J was of the view that this was not a case where it would be clearly inappropriate to allow the trust funds to be applied to defending the s. 66B application—at [26].

Notwithstanding the existence of serious questions to be tried, his Honour was not persuaded that the court should exercise its discretion so as to prevent the trustees from continuing to act for the time being:

> Their duties as trustees are clear. If they abuse them, they may be called to account…[Those seeking to restrain the trust] should not…gain the benefit of effectively freezing out the trustees from their role…[in circumstances] where it is not clear that the trustees have acted, or are likely to act, in breach of the Trust and where it is not clear that the assets of the Trust might be placed beyond reach or improperly dissipated without the beneficiaries having any meaningful recourse to the trustees. I am also not sufficiently persuaded that the proposed expenditure of the funds to resist a disputed application to alter the native title claimants is so outside the scope of the Trust as to be unauthorised—at [28] to [29].

Decision

Amongst other things, orders were made to permit the funds of the trust to be released in order to meet the proper costs of the mother and son in defending any application to remove them as applicants and any incidental expenses in that defence—at [30].

Claim group description

Edward Landers v South Australia [2003] FCA 264

per Mansfield J, 31 March 2003

Issues

This decision deals with whether or not a native title claim group is properly constituted if certain people are excluded from the claim group description merely to meet the requirements of registration test, in particular s. 190C(3).

Background

A motion was brought to either strike out a claimant application made by six people (referred to as the Edward Landers group) on behalf of The Edward Landers Dieri People under s. 84C(1) of the NTA or to summarily dismiss it under O20 r 2(1) of the FCR on the basis that:

- the application did not comply with s. 61 of the NTA; and
- the applicant had not been authorised in accordance with s. 251B of the NTA to bring the application on behalf of the Dieri Mitha People.

The motion was brought by a group (referred to as the Dieri Mitha group) that:

- had brought a claimant application that encompassed the area covered by the Edward Landers application; and
- were parties to the Edward Landers application.

Both groups acknowledged that their respective claimant applications were 'authorised by and made on behalf of' the same native title claim group, namely the Dieri People. The evidence suggested that the same apical ancestors are 'the foundation for identifying the Dieri People'—at [11].

The question was, therefore, who was authorised as required under s. 251B by the Dieri People to bring an application on their behalf?—at [12].

Principles for summary dismissal applied

Regardless of the source of the court's powers in the proceedings, his Honour was of the view that the principles for summary dismissal applications applied. Therefore, the court should only dismiss the application if:

- the case for doing so was very clear; and
- the claim as expressed was untenable even upon the version of the evidence most favourable to the applicant. However, this should not generally involve undertaking any weighing of conflicting evidence or of the inferences that might be drawn from the evidence—at [7].

Old or new Act?

Section 84C, which came into effect when the majority of the amendments to the NTA commenced late in 1998, provides (among other things) that:

- an claimant application that does not comply with s. 61, s. 61A or s. 62 of the amended NTA may be struck out by the court on application of any party to the proceedings; and
- the court must consider any application for strike-out brought under s. 84C(1) before proceeding further with the claimant application.

The Edward Landers application was originally made under the old Act (i.e. the NTA as it stood prior to the 1998 amendments: see the transitional provisions, NTA Sch 5, Pt 9, cl 31) on behalf of both the Dieri and the Yandruwandha Peoples over a much larger area. However, it was amended after the new Act commenced to both reduce the area and remove the Yandruwandha Peoples from the application. In these circumstances, his Honour Justice Mansfield found that the claimant application must comply with s. 61 as amended, referring to *Quall v Risk* [2001] FCA 378 at [65] and the support provided to that decision in several other authorities.

A process aimed at addressing authorisation under s. 251B was undertaken and the application was certified by the Aboriginal Legal Rights Movement (the ALRM), which is the representative body for the area concerned. It was accepted for registration by the Native Title Registrar in 1999—at [5] and [13] to [14].

Authorisation

Subsection 61(1) requires that the applicant must be authorised by all the persons who, according to their traditional laws and customs, hold the common or group rights comprising the particular native title claimed. In this case, the 'particular native title claimed' was that of the Dieri People. Section 251B sets out the manner in which the applicant must be authorised.

The Edward Landers group relied on a meeting held over two days in March 1999 (the authorisation meeting). This was the same meeting at which it was decided to reduce the area covered by the application substantially and to remove the Yandruwandha People from the application so that they could bring a claimant application in their own right. The minutes of that meeting record that the six people in the Edward Landers group were 'authorised to make the application and deal with matters arising in relation to it' on behalf of all the other Dieri People. ALRM certified the

application, being of the opinion that, as a result of the meeting, the six people to be named as the applicant were authorised under s. 251B(a) i.e. a traditional decision-making process that must be followed under traditional law and custom for authorising things like the making of a claimant application—at [20] to [21].

Those seeking dismissal submitted that many of the persons who attended the authorisation meeting were not entitled to have participated in the traditional decision-making process. Conversely, some of the people who, under traditional law and custom, should have been involved in the decision did not participate either because they were not given the opportunity to do so or chose not to attend. Further, it was said that the Edward Landers group:

- had not followed the traditional decision-making process of the Dieri People at the authorisation meeting;
- included people who did not have the native title rights and interests they claimed;
- had not consulted with important Dieri persons and the claim did not include sites significant to the Dieri People; and
- had lost their connection with the area covered by the application, their knowledge of traditional Dieri law, custom and sites and no person in that group was born within the area covered by the application—at [22] to [25].

Mansfield J refused to dismiss the application on the grounds of lack of authorisation, noting that:

- the authorisation meeting had been advertised extensively;
- significant numbers of people attended each day;
- this was not a case where it was clear that those attending were not Dieri People;
- the question of whether or not the process used reflected traditional laws and customs was not a question to be decided in these proceedings—at [27].

Description of claim group

The Edward Landers group relied on s. 61(4)(b) of the NTA, which requires that the native title claim group be described sufficiently clearly so that it can be ascertained whether any particular person is one of the persons in that group. In this case, the native title claim group was described 'by means of the principle of descent' from named apical ancestors. However, it was expressly stated that 'all of the people listed as the applicant group' in the Dieri Mitha group's particulars of claim were excluded from the native title claim group 'whilst those people's names appear as members of that applicant group'—see [18]. The main reason given for excluding them related to the requirements of s. 190C(3)(a), pursuant to which a claimant application (the current claim) cannot be accepted for registration if any person in the native title claim group is also a member of a native title claim group for another claimant application that had been accepted for registration and was on the register when the current claim was made.

His Honour found that the approach taken in this matter did not comply with s. 61(4)(b) because the application did not describe the native title claim group (i.e. the Dieri People). Rather, it described a smaller group of people (i.e. the Dieri People minus those excluded from it, namely the Dieri Mitha group). Mansfield J was of the view that s. 61(4)(b):

> [R]equires the application to be on behalf of the people who have authorised it. It does not permit the making of a claim by a native title determination application by a subgroup of the native title claim group, or the grant of native title to a subgroup of the real native title claim group: see *Ward v State of Western Australia* (1998) 159 ALR 483 at [541], *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60], *Tilmouth v Northern Territory of Australia* (2001) 109 FCR 240. By excluding from the authorising group, namely the Dieri People, the 87 persons named as the applicant group (or even merely the Dieri Mitha group) in the

> Dieri Mitha application, that is what the Edward Landers' group has done. The smaller group, as expressed, is not the group of people who should exclusively enjoy the communal native title—at [33].

The submission that s. 61(1) and s. 61(4) should be read down to require only that the claim group should be capable of registration was rejected:

> The significance of the requirement introduced by s. 251B is clear…see *Moran v Minister of Land & Water Conservation for New South Wales* [1999] FCA 1637 per Wilcox J at [48]. The proper identification of the native title claim group is the central or focal issue of a native title determination application. It is the native title claim group which provides the authorisation under s. 251B, and it is the group on whose behalf the claim is then pursued and, if successful, in whose favour a determination of native title is then made. I do not consider the registration procedures…were intended to detract from that focus. Nor do I consider there is any tension between those procedures and s. 61 of the NT Act.
>
> The term "native title claim group" in s. 253 is…the group mentioned in…s 61(1). It refers to "all the persons" who authorised the particular applicants to make the claim. In this instance, it is the claim of the Edward Landers' group that they were authorised by the Dieri People. But the application does not then identify the Dieri People as the persons on whose behalf the claim is made, but 'some only' of the Dieri People. I think the requirements of s 61(1) and (4) are clear—at [35] to [36].

It was also argued that the application only provisionally excluded some of the Dieri People and did so only in order to pass the registration test. His Honour was of the view that s. 61(1) and s. 61(4) 'do not permit such an exclusion whether for that reason or otherwise'—at [40].

Purpose of the registration test

Mansfield J went on to note the importance of registration. Registration gives the applicant status as a native title party, attached to which are significant rights. In response to a submission that the requirements of the registration test were so onerous as to deny registration to all but unassailable claims, the court referred to the second reading speech of the Attorney-General, which indicated that the introduction of the registration procedures was to ensure only those with a 'credible claim' should become a 'native title party' in future act matters. It also sought to avoid giving that status to those who make 'ambit and unprepared' claimant applications—at [37] to [38].

Subsection 190C(3)

Counsel for the ALRM contended that the description of the 'native title claim group' for the purposes of s. 61(1) is the group of people that satisfied the requirements of s. 190C(3). Any other reading would raise the bar to registration 'so high as to deny registration of all but unassailable claims'—at [35].

His Honour noted that s. 190C(3) does not prevent the registration of competing claimant applications brought by different claimant groups over the same area of land and waters. Rather:

> It seeks to ensure that an application for native title by a particular native title applicant is authorised by the native title claim group. If there are different persons making a claim over the same or partly the same area on behalf of the one native title claim group, it is consistent with giving s. 61(1) and (4) their full operation and with s. 251B that the legislation intended… registration to be refused. The circumstances of different applicants on behalf of the same native title claim group separately seeking determination of native title over the same, or partly the same, claim area would tend to indicate some flaw in the authorisation process. The proper course…may be for the native title claim

group under its proper processes to substitute new applicants in one or other of the claims under s. 66B…or to have one or other of the authorised claims amended to avoid any overlap. Hence…the procedural requirement of s. 190C(3) does not impose any 'unassailable bar' upon registration but is consistent with the proper operation of ss 61(1), 61 (4) and 251B of the NT Act—at [38].

Decision

His Honour was of the view that, because of the failure to comply with the requirements of s. 61(1) and s. 61(4), the application should be dismissed. In this case, it was not appropriate to adjourn the proceedings to enable amendment to be made because:

- the Edward Landers group did not seek an adjournment;
- there was a real possibility that considerable dissension would arise between significant sections of the Dieri People as to who is authorised to make and maintain a claimant application on their behalf:

  Such issues are better addressed in a fresh authorisation process under s. 251B which should enable a fresh native title determination application to be made on behalf of all the Dieri People—at [41].

Appeal

Representatives of the Dieri People filed a Notice of Appeal in the Federal Court on 22 April 2003 in relation to the decision to dismiss the application. The grounds for appeal relate to compliance with s. 61 and the requirements of s. 251(b) of the NTA.

Dieri People v South Australia [2002] FCA 187

per Mansfield J, 31 March 2003

Issues

This decision deals firstly with whether the filing of particulars of claim might amount to an amendment of an old Act application, and secondly with whether a statement that the application is made 'on behalf of the Dieri People' alone satisfies the requirement of subregulation 5(1)(a) of the *Native Title (Tribunal) Regulations 1993* (Cwlth) (pre-amendment) in being a sufficient description of the persons other than the applicants who claim to hold native title.

Background

A motion was brought pursuant to s. 84C of the NTA to strike out the native title determination application made by eight people (referred to as the Dieri Mitha group) because it did not comply with s. 61 of the NTA or, alternatively, pursuant to O 20 r 2(1) of the Federal Court Rules.

The motion was brought by a group (referred to as the as the Edward Landers Dieri group) who were native applicants in a claimant application entirely within the area covered by the claimant application of the Dieri Mitha People. A similar notice of motion was brought by the Dieri Mitha People in relation to the Edward Landers Dieri People determination application: see summary of *Edward Landers v South Australia* [2003] FCA 264 above.

Had the Old Act application been amended?

On 2 June 1999, the Dieri Mitha People filed a document entitled particulars of claim. This document was filed in response to directions of 14 December 1998, that the applicants provide information so as to comply with s. 61 and other sections of the NTA. In addition, pursuant to an order of the court made on 25 October 2000 the applicants filed a further document entitled amended particulars of claim.

The particulars of claim and the subsequent amended particulars of claim (referred to together as the particulars of claim) were meant to contain all the particulars of the applicant group, include a list of all identified persons in the applicant group and those ancestors who are claimed to have held traditional interest in the land or waters at the time of sovereignty, as well as details of the rights and interests claimed and connection with the claim area. It was clear from the

particulars of claim that the Edward Landers Dieri group and the Dieri Mitha People application shared ancestors.

It was contended by the Edward Landers Dieri People that the filing of these particulars of claim amounted to an amendment of the application.

Justice Mansfield held that the particulars of claim did not amount to an amendment of the native title determination application. His Honour's reasons were extensive but included that:

- that the particulars of claim did not accord with or follow the form prescribed in the 1998 Regulations nor state that they amount to an application for a determination of native title; and
- no party suggested that the particulars of claim generated the obligation to send to the Native title Registrar a copy of the particulars of claim as, or as part of, an amended application by virtue of s. 64(4) of the NTA, or that the Native Title Registrar should give notice under s. 66A of the NTA in relation to the particulars of claim, or that the Native Title Registrar re-address the issue of registration under s. 190(3) of the NT Act, and no procedures for amendment of the native title determination were adopted—at [25] to [31] and [45].

In obiter, Mansfield J considered whether the application might be struck out if the particulars of claim had amounted to an amendment of the application. His Honour concluded that the evidence indicated that the native title claim group was a sub-group of the Dieri people. In addition, it was apparent that the authorisation granted to the applicant was granted by a group of persons who are a smaller group than the native title claim group and that consequently the necessary authorisation prescribed by s. 251B of the NTA was not given—at [55] and [56].

Having concluded that the determination application had not been amended, Mansfield J held that the native title determination application did not satisfy the requirements of regulation 5(1)(a) of the Regulations pre amendment. The statement that the application is made "on behalf of the Dieri people" was not a sufficient description of the persons other than the applicant who hold the claimed native title. His Honour held that there must be some actual description or means of identification of who the other people are; as per *Madgwick J in Korewal People—Longbottom v NSW Minister for Land and Water Conservation (No.2)* [2000] FCA 1237 at [11]—at [60].

Decision

The Dieri Mitha group's claimant application was dismissed.

Future act decision appeal

Hicks v Western Australia [2002] FCA 1490

per French J, 22 November 2002

Issue

This case concerns an appeal brought by Mr Hicks on behalf of the Wong-Goo-TT-OO group (the native title party) under s. 169 of the NTA against the Tribunal's determination that good faith negotiations had taken place in relation to a future act application: see *Western Australia/David Daniel & Ors*, NNTT WF02/17 and WF02/18, Hon C.J. Sumner, 12 November 2002.

The issues were whether:

- the state:
  - was entitled to take as its negotiating position that native title did not exist over the area concerned;
  - had failed to negotiate with one of the native title parties and thereby failed to negotiate in good faith;
- the Tribunal:
  - breached procedural fairness in failing to permit cross-examination of those who gave affidavit evidence relied upon by the State of Western Australia;

- had asked itself the wrong question by asking whether the conduct of the state showed bad faith, when the proper question was whether the state had negotiated in good faith;
- wrongly had regard to confidential and without prejudice communications made in the course of mediation and private meetings between the native title party and the state;
- had made directions in relation to the filing of contentions and documents that were contrary to procedural fairness and contrary to the character of the good faith hearing as a threshold jurisdictional question.

■ by reason of various aspects of the state's conduct, the Tribunal ought to have found that it had not negotiated in good faith;

■ a statement in Parliament by the Hon. the Deputy Premier was admissible as evidence of lack of good faith by the state in its negotiations with the native title party—at [8].

The native title party also sought a stay of the s. 35 arbitral hearing of the future act application by the Tribunal under O 52 r 17 of the FCR until the appeal was heard and an order for abridgement of the time limited for bringing the motion on for hearing. His Honour Justice French made the abridgment order.

Stay application

French J reviewed the relevant statutory framework, noting that the jurisdiction conferred on the Federal Court by s. 169(5) of the NTA is an original jurisdiction. The rule the applicants sought to reply upon, O 52 r 17, 'relates to appeals proper in the exercise of the appellate jurisdiction of the Court'—at [12].

'Appeals' from decisions or determinations of the Tribunal are dealt with under O 78 r 22 to r 33 of the FCR. The only source of power for a stay order is in s. 170(2) NTA, conditioned upon the requirement the court considers the stay order 'appropriate for securing the effectiveness of the hearing and determination of the appeal'—at [13].

The native title party's application 'puts into contention the authority of the Tribunal to conduct a substantive inquiry into whether or not the future act in question should be done'. The main contention was that, absent a stay, the substantive hearings would proceed, and the benefit sought, a return to negotiations, would be lost:

> It might be said…that the Court should not risk rewarding a breach of the obligation to negotiate in good faith by allowing a hearing to proceed in spite of a challenge to the finding that such negotiation has not occurred. That is a risk which may be assessed in part by reference to the strength of the applicants' case on appeal. While the reasons for decision of the Tribunal on the good faith question prima facie raise some serious and important questions of law, they are comprehensively and on the face of it, attractively reasoned—at [16].

His Honour noted that judgments about the strength of appeals for the purpose of a stay application 'must be essayed cautiously' but was not satisfied that refusing a stay:

> would run a high risk of rewarding a failure by the state to negotiate in good faith having regard to the facts found by the Tribunal and bearing in mind that the appeal is limited to questions of law only—at [16].

Subsection 170(2)

In relation to the s. 170(2) of the NTA, French J was not satisfied that:

> to refuse a stay would ultimately affect the effectiveness of the hearing and determination of the appeal…It is, of course, open to the applicants to seek a stay of the ultimate determination of the Tribunal, as an incident of this appeal or as an incident of an appeal against the ultimate determination of the Tribunal. The refusal of the stay at this time would not result in any extinguishment of native title rights and interest.

French J noted the burden upon the applicants to participate in the continuing inquiry which may be wasted in the event the appeal is upheld. On the other hand, it was necessary to balance the statutory framework and legislative purpose of 'reasonable expedition' of future act matters. To grant the stay would have introduced 'a degree of fragmentation into the arbitral process that is unwarranted having regard to the legitimate interests of the parties'—at [20] to [21].

Validity of s. 29 notice

Williams v Minister for Land & Water Conservation, NSW [2003] FCA 360

per Wilcox J, 2 May 2003

Issue

Whether a notice given by a government party under s. 29 of the NTA in respect of the grant of a mining lease needs to include reference to off-site infrastructure works.

Background

Identical notices of motion challenging the validity of a s. 29 notice published by the New South Wales Government in respect of the proposed grant of a mining lease were filed in two separate proceedings seeking a determination of native title in relation to the same area of land. The boundaries of the claimed area of land were identical to the boundaries of the area of land that was the subject of the relevant mining lease application (MLA).

The validity of the notice was challenged on the basis that it did not contain 'a clear description of the area that may be affected by the act' as required by the Native Title (Notices) Determination 1998 (Notices Determination). It was argued that the notice should have referred to the extent or location of off-site electricity and water supply infrastructure works that were essential to the mining project but located outside the boundaries of the MLA (the off-site infrastructure details). It was argued that the absence of these details defeated the purpose of giving a s. 29 notice i.e. the facilitation of negotiations in respect of a project.

His Honour Justice Wilcox had regard to the definition of a 'future act' found in s. 226, s. 227 and s. 233 of the NTA and found that the relevant 'act' for the purposes of s. 29(1) and the Notices Determination was the grant of the proposed mining lease over the MLA. Wilcox J distinguished the grant of a lease by the government party from the development and operation of the mine by the lessee pursuant to the lease.

It was noted that, while s. 29 is concerned to facilitate negotiations between a government party and a native title party, the NTA does not contemplate that the negotiations are at large. They may include activities that will occur beyond the boundaries of the proposed lease area but that possibility cannot enlarge the legal requirements in relation to the content of the s. 29 notice or the extent of the obligation imposed by s. 30(1)(b), which requires that the negotiation parties negotiate in good faith with a view to obtaining the agreement of each of the native title parties to 'the doing of the act'.

Decision

The notice was found to be valid. Both motions were dismissed with costs.

Authorisation

Booth (Bunthamarra People #2) v Queensland [2003] FCA 418

per Tamberlin, J, 9 May 2003

Issue

Was the applicant authorised by the native title claim group to make an application for a determination of native title on their behalf?

Background

The Queensland South Representative Body Aboriginal Corporation (Queensland South) applied to be joined as a party to the

proceeding and subsequently moved that the proceedings be struck out pursuant to s. 84(5) of the NTA or dismissed pursuant to O 20 r 2(1) of the FCR. Tamberlin J was satisfied on the evidence filed that Queensland South could be joined as a party.

The second question before the court was whether the applicant had been authorised pursuant to the NTA to bring the application. The applicant relied upon:

- his status as the son of a Bunthamarra elder;
- his status as Managing Director of Yundra Pty Limited, pursuant to which he holds 'authority' from that company as a trustee of the Bunthamarra Native Title Group;
- his previous negotiations on behalf of the native title claim group;
- his evidence that, between 1997 to 2000, members of each Bunthamarra family had attended several meetings or had been consulted by telephone and, as a result, he was authorised by 'majority vote' There were no formal records of the meetings, telephone calls or notices of the meetings—at [8].

Queensland South contended there was no evidence of a decision-makingprocess by which the applicant had been authorised, nor any evidence that the decisions from the 1997 to 2000 meetings were current when the application was lodged in April 2002—at [9].

Section 251B

His Honour Justice Tamberlin noted that the members of the native title claim group were not identified by either name or description. In relation to the requirements of s. 251B, it was found that:

There is…a lack of evidence that the [claim group]…alleged to have authorised [the applicant] had any applicable traditional decision-making process or that any particular process was followed. There is no evidence that the [group] agreed to and adopted some other decision-making process in relation to authorising the applicant to make the application. Nor is there any evidence that the process has been recognised or that any process has been followed…[T]here is no evidence, oral or written, as to the constitution of the group or the basis on which it is claimed that a majority vote would be sufficient. Moreover, this begs the questions in relation to the majority vote as to who and how many persons are entitled to vote and precisely what is meant by the expression "majority vote"—at [11].

His Honour referred to the recent decisions of the court dealing with the requirements for the authorisation of a claimant application. In the light of the matters noted above and the authorities cited, Tamberlin J was not persuaded that the applicant had complied with the requirements of NTA in relation to establishing authorisation to make or pursue the application—at [12] to [13].

Decision

The claimant application was dismissed.

Right to negotiate applications

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

Future act determinations

Western Australia/David Daniel & Ors (Ngarluma and Yindjibarndi)/ Valerie Holborow & Ors (Yaburara and Mardudhunera)/Wilfred Hicks & Ors (Wong-goo-tt-oo)

[2003] NNTTA 4, WF02/17, WF02/18 and WF02/27, Hon. C.J. Sumner, 21 January 2003

Issues

Whether the Tribunal had the jurisdiction to continue a s. 35 inquiry following the filing of a s. 31 (s. 41A) agreement and whether s. 37 applied. The decision also covered procedural matters that arose in the proceedings, including whether the Tribunal should publish a public notice calling for submissions in relation to matters covered by an inquiry.

Background

This decision concerned three future act determination applications for compulsory acquisition of native title rights and interests pursuant to the Land Administration Act 1997 (WA) and s. 26(1)(c)(iii) of the NTA. The land in question, which was in the vicinity of Dampier and Karratha, on the Burrup Peninsula and on adjacent islands, was the subject of three claimant applications. The Tribunal had previously decided that the government party had fulfilled its obligation under s. 31(1)(b) NTA to negotiate in good faith with the native title parties: see *Western Australia/David Daniel & Ors,* NNTT WF02/17 and 18, Hon C.J. Sumner, 12 November 2002) and the appeal in *Hicks v Western Australia* [2002] FCA 1490 noted above.

The agreement under s. 31

A comprehensive set of agreements, referred to collectively as the implementation deed, had been signed by all of the native title parties. The Tribunal was satisfied that the implementation deed was a s. 31(1)(b) agreement. As a consequence, s. 37 applied so that the Tribunal must not make a decision. Therefore, no further action was required and s. 35(3) of the NTA provides that the applications are taken to be withdrawn—at [16].

Stay application

An application to stay the proceeding was refused. The Tribunal's determination on this point was unsuccessfully appealed to the Federal Court: see *Hicks v Western Australia* [2002] FCA 1490 noted above.

Application that the member disqualify himself

The submission that the member hearing the matter should be disqualified, as he had had regard to confidential information in hearing the good faith negotiations matter, was refused. The Tribunal determined that:

- the NTA does not specify that different members should decide the two issues;
- the native title party did not provide any basis for a reasonable apprehension that a member conducting the substantive hearing would be biased;
- the native title party did not point to any findings of fact or decisions on the credibility of witnesses in the good faith decision

which could be seen to be prejudicial to the substantive proceedings—at [21] to [22].

Evidence in good faith hearings

The Tribunal ruled that evidence tendered in the good faith hearing would not be evidence in the substantive hearing unless a party sought to adduce it—at [23].

Publication of a public notice calling for submissions

The Tribunal decided to publish a public notice calling for submissions in relation to the substantive inquiry and held it was within its power to do so. Following submissions from the parties, the notice was limited to two of the criteria in s. 39 of the NTA, namely economic or other significance (s. 39 (1)(c)) and public interest (s. 39(1)(e)) in the doing of the act. The Tribunal noted the call for public submissions was not a precedent for all future matters of this kind—at [26].

The Tribunal rejected a submission by the government party that the public submissions should only be taken into account as evidence of the opinions held by the authors and not as proof of their contents unless the contents were verified on oath and by government party given leave to cross-examine the authors. The Tribunal is not bound by rules of evidence and has a preference for making decisions based upon written statements and documentary evidence. The Tribunal referred to comments made in the good faith decision and pointed out that the contents of a substantial number of the government party's documents had not been verified on oath—at [26] to [28].

The weight and relevance of documentary evidence received will depend on the circumstances in each inquiry. The Tribunal should exercise care in accepting evidence vital to a decision solely on the basis of a document where the issue is in dispute. Procedural fairness would usually require such evidence to be verified on oath and subject to cross-examination—at [28].

Decision

The Tribunal determined that s. 37 applied and the application is taken to have been withdrawn: see s. 35(3).

Western Australia/Jidi Jidi Aboriginal Corporation/Paladin Resources Ltd

NNTT WF02/14, Hon. C.J. Sumner, 26 June 2002 (Reported—*Western Australia v Jidi Jidi Aboriginal Corporation* (2002) 169 FLR 470

Issues

Consideration of what is required for a Registered Native Title Body Corporate to enter into a s. 31 agreement and whether:

- it amounts to a native title decision under the Native Title (Prescribed Body Corporate) Regulations 1999;
- a decision by a RNTBC not to tender evidence in a hearing relating to a s. 35 application was a native title decision.

Background

The native title party was the first registered native title body corporate (the corporation) to be involved in a s. 35 application. The corporation reached agreement with the grantee party for exploration licences to be granted, subject to conditions to protect the native title holders' cultural heritage. The parties sought a consent determination. However, the parties had been unable to execute a s. 31(1)(b) agreement. A letter to the Tribunal from the representative body set out the circumstances of corporation meetings in regard to:

- an agreement in principle;
- a contract for services in relation to the exploration; and
- instructions from the corporation to make the s. 35 consent determination application.

The Tribunal referred to the Native Title (Prescribed Bodies Corporate) Regulations 1999 reg 8(2) which specifies the steps a prescribed body corporate must take to consult

with and obtain the consent of the common law holders before making a native title decision. A 'native title decision' is defined in reg 8 as a decision to surrender native title or to mean a decision to do, or agree to do, any other act that would affect the native title rights or interests of the common law holders. Regulation 9 specifies how the process of consultation and consent can be evidenced—at [10].

The parties agreed that a decision to consent to the determination that the exploration licences could be granted was a native title decision. The Tribunal found the Regulations had not been followed, and, for this reason, the corporation, as native title party, could not consent to a determination that the exploration licences be granted. The government party then made a s. 35 application and the corporation as native title party did not tender any evidence—at [11].

Decision

The Tribunal held that a decision not to tender evidence was not a native title decision as defined in the regulations and determined that the future act could be done.

Objection to the application of the expedited procedure

Bruce Monadee & Ors (Ngarluma Indjibarndi) and Wilfred Hicks (Wong-goo-tt-oo)/Western Australia/Cossack Resources

[2003] NNTTA 38, WO02/290 and WO02/457, Mr J. Sosso, 26 February 2003

Issues

The Tribunal made comments about the level of evidence provided by the parties to the proceedings and also determined whether it could take into account the fact that members of the first native title party are members of an indigenous church which meets on the subject area for religious and related activities as evidence of community and social activities for the purposes of s. 237(a).

Background

This inquiry related to the proposed grant of a prospecting licence to Cossack Resources Pty Ltd in relation to an area of Western Australia in the vicinity of Karratha. The government party considered that the act attracted the expedited procedure. Two native title parties objected to the inclusion of that statement in the s. 29 notice.

Evidence from non-native title parties

The Tribunal commented that a certain level of evidence should be provided to enable the Tribunal to consider the factors that need to be evaluated in the predicative risk assessment conducted under s. 237 to determine whether or not a proposed future act is an act attracting the expedited procedure.

In this inquiry, which concerned the grant of a prospecting licence, there was no evidence from the grantee party and slight evidence from the government party. There was no evidence of whether there had been any previous exploration or mining activities, only evidence of previous grants, and many other evidentiary matters that were absent. The Tribunal dealt with the matter on the basis that the grantee party will fully exercise its legal entitlements if the prospecting licence is granted—at [7] to [9] and [17].

Section 237 conditions

The native title party's affidavit evidence was uncontested. The Tribunal noted that the s. 237(a) predictive risk assessment is directed only at those activities which are a manifestation of claimed native title rights and interests. Following *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at [44], where it was recognised that some evolution and development of traditional law and custom may be acceptable, the Tribunal held it was open to it to take into account the fact that members of the first native title party are members of an indigenous church which meets on the subject area for religious and related activities—at [27].

The proposed tenement is primarily on an indigenous owned pastoral lease. The Tribunal found the usual risk assessment factors of the ongoing lawful activities of the pastoralists prevailing over native title rights did not automatically occur. Further, evidence was led that the native title claimants had easy access to the pastoral lease to carry out traditional activities. The Tribunal inferred that the type of restrictions otherwise placed on native title holders traditional activities do not occur on this pastoral lease and there was free access—at [28].

The Tribunal did not make a predictive assessment pursuant to s. 237(b) but did hold that whether or not a grantee party has funded or supported an Aboriginal heritage survey is irrelevant when making a s. 237(b) assessment, unless evidence was led that the grantee party expressed hostility to issue of sacred site protection and the like and would be likely to interfere with sites despite the legal regime—at [13].

Decision

The Tribunal held on the basis of the uncontested affidavit evidence of community activities carried out regularly and by a significant number of native title holders and no evidence of previous mining activities or the grantees intentions, that the grant would be likely to have substantial impact on community and social activities. The proposed grant was determined not to be an act attracting the expedited procedure – at [28] to [30].

Michael Page on behalf of the Jaywon People/Northern Territory/Michael Teelow

[2003] NNTTA 9, DO02/99, Mr J Sosso, 7 February 2003

Issues

This determination sets out the approach taken by the Tribunal when faced with an objection application relating to a future act which is virtually identical (same land and parties) to one where the Tribunal had previously determined that the expedited procedure applied. The Tribunal reviewed factors which are relevant to the exercise of its discretion to adopt the evidence and findings in other proceedings: see s. 146 of the NTA.

Background

This application relates to the grant of an exploration licence over the same area as reported in *Page v Teelow* (2002) 169 FLR 62 (DO01/22), in which it was determined that the act was an act which attracted the expedited procedure. That grant was not made. The grantee party made submissions, prior to any contentions being lodged, that the objection should be dismissed under s. 147 or, if not dismissed, shortened directions should be made in place of the standard directions. The government party submitted the Tribunal should use its power under s. 146(b) and adopt the determination in DO01/22 for the purposes of the inquiry in DO02/99. The native title party objected to dismissal under s. 147 in respect of a subsequent future act, even where the area and parties are the same. The native title party contended it should be allowed to adduce evidence of relevant actions of a grantee party that have occurred since the grant or evidence of previous actions that have subsequently come to light – at [10] to [13].

Section 147

The Tribunal refused to dismiss the application pursuant to s. 147 and referred to *Dixon v Northern Territory* (2002) 169 FLR 103 (see [106] for the manner in which the Tribunal approaches s. 147). The Tribunal found the objection application over the same land and waters by the same native title party, involving the same grantee party, provided no prima facie basis for a dismissal pursuant to s. 147. Once the native title party has lodged its contentions, a proper basis for a dismissal could be made out if no new material is produced by the native title party. At this stage in the inquiry, the application to dismiss was premature—at [15].

Section 146(b)

The Tribunal reviewed past use of the exercise of its discretion under s. 146 (see Re Smith (1995) 128 FLR 300 at 303) and the use of s. 86, a similar provision, by the Federal Court (see *Phillips v Western Australia* [2000] FCA 1274, Carr J).

The Tribunal determined that, in exercising its discretion, it needs to take into account the attitude of the parties, the relevance and impact of receiving into evidence the material in question and the potential savings of time and resources, bearing in mind the potential consequences for the ultimate determination—at [20].

The Tribunal was not minded to adopt the findings in DO01/22 in toto at this early stage of the inquiry, as it would limit the course of the inquiry. Instead, the earlier directions were vacated and the native title party was directed to file material supplementary to the material lodged in the previous inquiry. The native title party gave notice that no further evidence would be lodged and did not comply with the new directions.

Decision

The objection was dismissed pursuant to s. 148(b), on application of the grantee party for failure of the native title party to comply with the amended directions.

Re A.K.A Grotjahn & W. Baumer [2003] QLRT 34; Re Mirko Cindric [2003] QLRT 35

per Smith DP, 31 March 2003

Issue

The Queensland Land and Resources Tribunal made recommendations (on the papers) in each of the above proceedings that, subject to all relevant processes under the Winton ILUA being completed, opal mining leases be granted for a term of 10 years (leases).

Background

The area of each mining lease application the subject of each proceeding fell within the boundaries of the Winton ILUA, which is registered on the Register of Indigenous Land Use Agreements.

Deputy President Smith noted in each matter that the native title issues and the lease terms were subject to the Winton ILUA and that the respective applicants would need to take great care to ensure compliance with the ILUA, in particular requirements relating to inspections and any resulting exclusion zones and site protection measures.

Decision

The recommendation to the Minister for Natural Resources and Minister for Mines for grant of the leases in each proceeding was made subject to a recommendation that any exclusion zones or recommendations for site protections measures arising from any inspection report pursuant to the Winton ILUA be included as special conditions of the grant. It was also stated to be implicit that no grant should proceed until all relevant processes under the Winton ILUA are completed.

For more information about native title and Tribunal services, contact the National Native Title Tribunal, GPO Box 9973 in your capital city or on freecall 1800 640 501.
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