Native Title Hot Spots

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Proposed native title determination

Daniel v Western Australia [2003] FCA 666

per RD Nicholson J, 3 July 2003

Issue

Does native title exist over areas of the west Pilbara in Western Australia and adjacent offshore areas and, if so, who holds it?

Background

This decision provides the basis for a proposed determination of native title under s. 225 of the *Native Title Act 1993* (Cwlth) (NTA) in relation to claimant applications brought on behalf of a composite claim group, namely the Ngarluma and Yindjibarndi peoples.

The decision also deals with the Yaburara Mardudhunera and the Wong-Goo-TT-OO claimant applications to the extent that they overlap the area covered by the Ngarluma and Yindjibarndi peoples' application. Both the Bunjima Niapaili Innawonga and the Kariyarra claimants were joined as respondents but did not take an active role in the proceedings. In relation to the overlapping applications, the Ngarluma and Yindjibarndi peoples asserted that their claim group included members of the Yaburara Mardudhunera and the Wong-Goo-TT-OO — at [40].

Claimed rights and interests not in application

The rights and interests sought to be recognised as native title rights and interests were asserted in submissions. They differed from, and were submitted to be in substitution of, the rights claimed in the application.

The Honourable Justice RD Nicholson was of the view that amendment of the application to include these rights was unnecessary. The court is required to make a determination of native title *in rem* in the terms set out in s. 225 of the NTA 'ultimately unconfined by the formulation of the claim' — at [69].

Summary of the outcome in relation to the majority of the application area

At [130] to [148], his Honour gives a succinct summary of his interpretation of the law as stated in the leading High Court cases relating to proof of native title and extinguishment. His Honour confirmed that the starting point for a determination of native title is s. 225 which (in turn) leads to the definition of native title in s. 223 of the NTA.

RD Nicholson J found that the claim area was inhabited at the time of the assertion of sovereignty by organised communities of Aboriginal peoples who, as members of organised society or societies, 'functioned under extensive traditions, procedures, laws and customs which connected them to the land'. Therefore, when sovereignty was asserted over the area covered by the application, those Aboriginal people possessed native title in respect of that land — at [405].

The court also concluded that:

- the area was occupied by the Ngarluma and Yindjibarndi groups; and
- the present applicants comprise members of those groups — at [370].

Further, his Honour was of the view that the Ngarluma and Yindjibarndi people have not lost their connection, through their traditional law and custom, to their respective claim areas — at [415] to [424].

This finding was made despite:

- the fact that European settlement had significantly impacted on those people, through the pearling, mining and pastoral industries and government policies;
- findings such as that there was no longer a Ngarluma speech community, that none of the Yindjibarndi people live on the claim area and that Ngarluma people now participate in the Yindjibarndi's law in relation to initiation — see [219], [421] and [423].

His Honour noted that:

> The reality and the sense of the [Ngarluma and Yindjibarndi peoples'] connection [to their country] appears from the evidence as enduring despite the influences which European settlement has brought to both peoples. In the case of each of them, it would appear to be that these impacts have brought them towards the cusp of the moment when their connection to each of their lands through their traditional law and custom could be washed away by the tide of history. From the evidence I do not consider that time has yet arrived — at [421].

Rights and interests

In relation to the claimed rights and interest presently observable in their exercise, his Honour found that they have been exercised continuously from sovereignty to the present day by the relevant groups and are exercised as *norms* of those groups — at [430] to [431].

In other words, the evidence showed that the rights and interests were normative both in the sense of being 'fundamental to their [the claimants] existence as a society' and that they were:

> more than social habits and [have] about them the quality of being a social rule in that some at least (and indeed a considerable number) of the [Ngarluma and Yindjibarndi] look upon the behaviour in question as a general standard to be followed by the group as a whole — at [304] and [436].

Some rights and interests were held to exist as a matter of fact (i.e. subject to extinguishment) over the entire area covered by the application. Others are severely limited to areas where they are exercised today — see [413] and [433] to [500].

This aspect of the decision is, with respect, somewhat surprising. His Honour acknowledged that the area over which rights are presently exercised does not necessarily limit the area over which the existence of rights and interests can be found. The court found that the rights and interests in the proposed determination meet the requirements of s. 223 of the NTA, including that the Ngarluma and Yindjibarndi groups by their laws and customs, have a connection to the whole of their respective claim areas. Yet his Honour finds that some of those rights and interests exist only within a geographically restricted area within the areas subject to the application. The evidence does not appear to suggest that such limitations were culturally driven. It may be that the present exercise of those rights and interests merely reflects the fact that that is where the Ngarluma and Yindjibarndi people prefer to undertake particular activities within their claim area.

In relation to the Yaburara and Mardudhunera, it was held that no relevant connection had been shown in relation to any society present in the area at the time of sovereignty — at [501].

In relation to the Wong-Goo-TT-OO, their argument that they had native title to the area referred as the Burrup by virtue of a process of succession was rejected, with his Honour noting that, even if that argument was accepted, the evidence did not establish a continuing connection to that area from the late 1930s to the present — at [505].

Role of anthropology in defining the community or group

In relation to defining the group that claims to hold native title, his Honour was of the view that, when making a determination under the NTA, the court is *not* required:

> to search for an anthropologically identified form of community or group. The NTA makes clear the Court is to examine the evidence to see who holds native title, if anyone, and so whether there are communal, group or individual rights and interests. Anthropological theory and research may inform that examination but cannot determine it — at [334].

What the court must do is make a determination of 'who the persons, or each group of persons' holding the 'common or group rights' comprising the native title: s. 225.

His Honour noted that a 'group' is defined relevantly to mean 'a number of people...regarded as forming a unity or whole on the grounds of some mutual or common relation or purpose' (referring to the *New Shorter Oxford English Dictionary* (1993) p. 1151) and went on to hold that:

> In *Yorta Yorta…*the word 'society' was utilised rather than the word 'community' in order to emphasise the close relationship between the identification of 'the group' and the identification of the laws and customs of that group.

In discussing genealogical issues, RD Nicholson J went on to refine this view of what constituted a group, namely, 'a number of people, regarded as forming a unity or whole on the grounds of some mutual or common relation or purpose' — at [358].

The State of Western Australia submitted that the claimant group had to establish patrilineal descent through an estate group. The Ngarluma and Yindjibarndi argued that the claim group formed a composite community. His Honour rejected both positions, stating that what was required was the identification of both the native title rights and interests that exist and the location of where they are held:

> [T]hat is the means by which the locus of the rights in a society, community or group is identified…It will be the evidence concerning the locus of the rights and interests claimed, if made out, that will establish the nature of the group holding the rights… Neither the Act nor the reasoning of the High Court in *Yorta Yorta i*s shaped in relation to anthropological considerations concerning estate groups or other similar entities… [W]hat is required of a primary judge is to look to the evidence and particularly the lay [e.g. claimant's] evidence relevant to connection without the intervention of other [anthropological] constructs. The findings of connection are to follow from the evidence rather than such constructs — at [339] and [420].

The Burrup

The Ngarluma and Yindjibarndi people effectively conceded that they had no claim to the Burrup Peninsula and the surrounding islands (referred to as the Burrup, an area that was subject to extensive development proposals) — at [372] and [1480].

The Yaburara and Mardudhunera claimants asserted that the area was inhabited by the Yaburara people. His Honour held that:

- the Yaburara and Mardudhunera had not discharged the onus of proof in this respect;
- if that is not correct or the Burrup had been inhabited by another group, the evidence establishes that the group disappeared as an identifiable group early in the 20th century;
- the applicants who claimed to be Yaburara had not established that this was the case. The evidence supported the view that they rather had a claim as Mardudhunera people — at [352] and [373]. See also Appendix G of the reasons for decision.

Succession

The Wong-Goo-TT-OO claimed (among other things) that the last two members of a tribe that had lived in the area had transferred their rights to the Burrup to the father of a member of the Wong-Goo-TT-OO and, therefore, that they had acquired the laws and customs relating to the Burrup.

RD Nicholson J found no evidence to support a finding that the traditional laws and customs in issue included such a right of transmission. However, even if such evidence existed, his Honour was of the view that the third applicants could not establish 'their continuity from sovereignty under those laws and customs because to do so would involve them relying impermissibly on another society', contrary to principles set out in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at [53] per Gleeson CJ, Gummow and Hayne JJ. Thus, his Honour was of the view that inter-society succession after sovereignty creates a situation when native title cannot be recognised as held by the successors — at [380] to [383].

Offshore and islands

In relation to offshore waters, RD Nicholson J found that the evidence:

- did not 'establish either present observable behaviour in terms of the rights claimed or any continuity from sovereignty of such claims'; and
- in so far as it related to fishing offshore by the Ngarluma and Yindjibarndi people, it showed that this behaviour was 'in the character of a social habit and not established as being normative' — at [526].

The same conclusion is drawn with respect to all islands within the determination area, save in relation to Depuch Island, where there was evidence of present visits by the Ngarluma and Yindjibarndi people. However, his Honour found that there was no evidence to establish the requisite continuity of connection with that island by any of the claimant groups — at [525].

Outcome before extinguishment is considered

The draft determination of native title RD Nicholson J proposed includes the following elements:

- no native title exists in respect of the Burrup or in respect of the sea below low water;
- no exclusive native title rights are held in relation to any of the determination area— see below;
- neither the Yaburara and Mardudhunera people nor the Karriyarra people hold native title rights in the proposed determination area;
- the Wong-Goo-TT-OO do not hold native title rights in the proposed determination area except where they may do so as Ngarluma or Yindjibarndi people;
- the rights held, as a matter of fact, by the Ngarluma and Yindjibarndi peoples are non-exclusive native title rights and interests to:
  - access the determination area;
  - conduct ritual and ceremony on that area;
  - take and use water; and
  - protect and care for sites and objects on and in that area.

Some rights, such as the right to camp and the right to cook and light fires were narrowly recognised as follows:

- in the case of the Yindjibarndi, limited to the Millstream-Fortescue area;
- in the case of the Ngarluma, limited to the proximity of river courses — at [1162].

Note, however, that these findings are subject to the resolution of extinguishment issues.

No exclusive native title

In order to establish, as a matter of fact (putting extinguishment to one side) the right to exclusive possession, it appears that the claimants must show that they currently have both the right to be asked permission to access the area and the right to speak for country

under their current system of traditional law and traditional custom: *Western Australia v Ward* (2002) 191 ALR 1 at [88] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

In relation to the finding that no exclusive native title rights are held in relation to any of the determination area, RD Nicholson J said that, while there was evidence of surviving practice to seek permission to enter what was considered to be Ngarluma and Yindjibarndi land, he got the impression that permission is sought as a matter of respect rather than in recognition of a *right* to be asked (i.e. a right to control access) — at [292].

Certain rights claimed found not to be native title rights and interests

In addition to rejecting rights to protect cultural knowledge that fell within the scope of the decision in *Western Australia v Ward* (2002) 191 ALR 1 at [57], the following rights were not recognised as native title rights:

- a right to maintain, conserve and/or protect sites and objects of significance by preventing by all reasonable means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such place or object;
- a right to maintain, conserve and/or protect by all reasonable lawful means places and objects located within the area of social, ceremonial, ritual significance to the native title holders from use or activities which are unauthorised or inappropriate use or activities, in accordance with the traditional laws and customs of the native title holders — [492].

This was because his Honour characterised them as duties incidental to the right to protect and care for sites and objects.

The following rights were also held not to be capable of recognition as native title rights and interests:

- the right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area. This was because a determination of native title must include a determination of who holds the common or group rights. Therefore, this right 'cannot of itself be a native title right and interest'; and
- the right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area. The reason for rejecting this right was that it is not a right that 'gives rise to a connection to land and waters' and, in any case, was a matter to be determined by reference to the Native Title (Prescribed Body Corporate) Regulations 1999 – at [302] to [303]. With respect, s. 223(1) requires that it is the traditional laws and traditional customs that give rise to the requisite connection, rather than the native title rights and interests.

Extinguishment issues

The parties have been given a limited opportunity to make submissions on whether or not and, if so, to what extent, non-native title rights and interests are inconsistent with the continued existence of the native title rights and interests found to exist as a matter of fact. It should, therefore, be noted that his Honour's comments in relation to extinguishment are, to a large extent, preliminary.

Discharging evidential onus for extinguishing acts

There were questions about the validity of some pastoral leases, chiefly on the basis that no suitable instruments to indicate the grant had been made were entered into evidence. However, where copies of the lease register (with relevant dates entered) and application forms were in evidence, these were found to

comprise sufficient evidence that the interest in question had been granted. In some cases, only a register extract was available. If it had been suitably completed, it was found that it constituted sufficient evidence that the lease had been granted, i.e. 'on the balance of probabilities, having regard to the presumption of regularity, valid leases were made' — at [557] to [564] and [567].

It was found that no valid lease had issued in circumstances where:

- there was no date of the application for a pastoral lease where the application was required to be within a specific time, or no date of issue was recorded in the register or there was no reference to the signing or issuing of a pastoral lease — at [565], [570], [571], [574] and [568];
- the land concerned was already leased — at [565];
- the application for a pastoral lease was marked 'no lease to issue' — at [565];
- in any case, the lease was issued contrary to the relevant statutory requirements, i.e. there was no valid exercise of statutory power — at [594] and [624].

In relation to leases for a lighthouse and a remote controlled electronic exchange site purportedly granted under s. 7(4) of the *Land Act 1933* (WA), there was no evidence as to the terms and conditions of the grant, which was not to be made in any prescribed form. In these circumstances, his Honour found that the party alleging extinguishment (in this case, the state) had not discharged the evidential onus of proof in relation to extinguishment — at [622]. Similar findings were made in relation to the lease of an area reserved for the purpose of a 'public utility' granted under s. 42 of the *Land Act 1898* (WA) — at [630].

Under s. 153 of the *Land Act 1898* (WA), the Governor of Western Australia could lease any town, suburban or village lands on such terms as the governor thought fit. Two such leases were found to be common law leases (i.e. to confer a right of exclusive possession) and, therefore, to completely extinguish native title. However, in several other instances where the lease document was not in evidence, RD Nicholson J declined to conclude that the leases alleged to have been granted had any extinguishing effect — at [626] to [628].

Freehold grants

Grants in fee simple made on or before 23 December 1996 are previous exclusive possession acts (PEPAs) and, unless the legislature provides otherwise (i.e. because the non-extinguishment principle found in s. 238 applies), such a grant completely extinguished native title, see: s. 23B of the NTA; ss. 12I(1)(a) and 12I(1A) of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (TVA) — at [539] to [540].

Grants of land in fee simple to the Commonwealth, state agencies or statutory authorities, the state itself (aka Crown to Crown grants) or to a local municipality made on or before 23 December 1996 are also PEPAs and, therefore, wholly extinguished native title — at [544].

Licences to occupy or purchase land

Pursuant to a licence to occupy issued under s. 52 of the *Land Act 1898* (WA), if the terms and conditions of the licence were met, then a Crown grant (essentially, the grant of an estate in fee simple) would issue. However, the licensee would forfeit the land and any moneys paid if certain of those conditions were not met. In these circumstances, his Honour found that, when a licence was issued under s. 52, no clear or plain intention to extinguish native title was evinced. The intention to make a Crown grant only crystallised when the licence conditions had been satisfactorily fulfilled. The terms and conditions might never be met, in which case no Crown grant would issue. Similarly, because of the nature of a licence application to purchase a town or suburban lot under s. 45A of the *Land Act 1933* (WA), it was not, in his Honour's view, an interest of a kind

that had the effect of extinguishing native title. Such a licence was liable to being (and, in this case, had been) absolutely forfeited, along with all fees and purchase money paid, as a result of a default in payment or a failure to fulfil certain conditions — at [551] and [553].

Pastoral leases

Following *Western Australia v Ward* (2002) 191 ALR 1 at [192] and [422], RD Nicholson J found that the grant of a non-exclusive pastoral lease was a previous non-exclusive possession act that had the effect of extinguishing any native title right to control access to, or to control the use to be made of, the area covered by the grant — at [568].

In rejecting a submission that the extinguishment of the right to control access was limited to controlling access by those who entered the area pursuant to the pastoral lease, his Honour stated that:

> [T]his is not what the High Court intended. When extinguishment occurs…it is inconsistent with so much of native title rights and interests as stipulated for control of access to the land the subject of the grants and denied to native title holders the continuation of a traditional right to say who could or who could not come onto the land in question…The extinguishment of such rights and interests is for all purposes — at [586].

On this view, a right to control access to the area by other Indigenous persons was also extinguished — at [586], contra the obiter comments made by O'Loughlin J in *De Rose Hill v South Australia* (2002) 116 FCR 390 at [558].

In any case, as noted above, his Honour found on the evidence that no exclusive native title right to control access existed as a matter of fact and so the question of extinguishment did not arise — see [292] and [587].

The right to protect and care for sites is not found to involve exclusivity or control by the holders of that right. However, to the extent an aspect of exclusive control was implied in the right to protect and care for sites and objects or the duties associated with that right, it would be extinguished because such a right is inconsistent with the rights of the pastoral lessee — at [587].

Application of s. 47 to Mt Welcome pastoral and other leases

Three pastoral leases were held by Mt Welcome Pastoral Company Pty Ltd (the pastoral company). That company and the Ieramugadu Group Inc were created on behalf of the Aboriginal workers' community in Roebourne. The Ieramugadu Group Inc was incorporated to act as a shareholder of the pastoral company.

It was argued that these pastoral leases were held on trust by the pastoral company for the benefit of the Ieramugadu Group members, who were, in turn, Ngarluma people. The first applicant's argument was, eventually, that there was a constructive charitable trust (i.e. the pastoral company holds the leases on trust for Ngarluma persons) and so s. 47(1)(b)(ii) was satisfied. That provision requires that, at the time the claimant application was made, a pastoral lease was held over the area by a trustee on trust for any of the native title claim group.

The pastoral company's articles of incorporation indicated that the company was dedicated to making a profit for its shareholders as a commercial venture. This led to a finding that:

- the pastoral company is not a trustee;
- even if the Ieramugadu Group holds its assets as trustee, those assets are shares in the pastoral company, not the pastoral lease;
- in any case, the evidence did not indicate a charitable purpose and a charitable trust could be constructed — at [614].

Thus s. 47(1)(b)(ii) did not apply. Further, none of the other provisions of s. 47 had any application. Therefore, any extinguishment brought about by the creation of any prior interest must be taken into account.

Special leases

Where a special lease was granted under s. 116 of the *Land Act 1933* (WA) before the *Racial Discrimination Act 1975* (Cwlth) (RDA) commenced on 31 October 1975 but the lease was not in force on 23 December 1996, the grant wholly extinguished native title at common law Special leases in force on 23 December 1996 are PEPAs: s. 12I of the TVA and s. 23B of the NTA — at [618] and [619]. Note that these provisions of the TVA differ significantly in some aspects from the provisions of s. 23B of the NTA.

Special leases granted after the commencement of the RDA but that were not on foot 23 December 1996 were category A past acts because they were agricultural and commercial leases and, as such, wholly extinguish native title: s. 12I of the TVA. The remaining special leases in this category were held to be category D past acts — at [620] to [621].

Leases of reserves

A lease of a reserve to a jockey club under the Land Regulations 1882 was found to be in the nature of a common law lease that conferred a right of exclusive possession. Therefore, it wholly extinguished native title — at [629].

When considering the effect of a grant of a lease over a reserve under s. 32 of the *Land Act 1933* (WA), his Honour pointed out that, while it was said in *Western Australia v Ward* (2002) 191 ALR 1 that a lease granted under this section wholly extinguished native title, this conclusion was reached only after careful consideration of the lease documents in each case to determine if the lease granted exclusive possession and, therefore, had the effect of completely extinguishing native title. In the matter before his Honour, while the evidence allowed the court to draw the inference that two leases that were not in evidence were issued, it was not possible, absent those documents, to infer that the leases in question conferred a right of exclusive possession. Having considered the lease documents in three other instances, his Honour was satisfied that the leases in question did confer a right of exclusive possession and, therefore, completely extinguished native title — at [631] to [633].

In relation to leases of reserves granted pursuant to s. 33 of the *Land Act 1933* (WA), his Honour chose not to equate the exercise of the power to lease in s. 33(3) with the effect of the vesting of a reserve under s. 33(2). The effect of the former will depend upon the nature of the agreement reached and the grant made. The fact that there is a right of public entry onto the lease does not negate an inference of exclusive possession. Some of the leases were in force on 23 December 1996 and were therefore PEPAs. Some were granted after the commencement of the RDA and were, therefore, category A or D past acts — at [637].

In relation to leases of reserves granted pursuant to s. 32 of the *Public Works Act 1902* (WA), his Honour found that there is nothing in that section to distinguish its effect from that of s. 32 of the Land Act. Consequently, the leases considered that were issued under that provision wholly extinguished native title at common law — at [639].

Roads

Where the Crown is permitted by legislative authority to constitute a public road, the question whether lands have been so constituted as a public road depends entirely on whether the statutory procedure has been followed. Legislative constitution of a road creates in third parties (e.g. members of the public) the enforceable right of free passage over the lands and denies to all persons the right to use the land for any other purpose than free passage or a purpose incidental thereto. This would, save in an exceptional case, be wholly inconsistent with any continuing right to enjoy native title in those lands and would, absent legislative intervention, extinguish native title — at [640].

Evidence of usage is relevant only in the case of a road that was not constituted as a result of the exercise of legislative authority or executive or administrative action under legislative authority — at [641].

In the case of roads dedicated after the commencement of the RDA, these were validated by the application of *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) as public works that are category A past or intermediate period acts and, therefore, wholly extinguished native title — at [642] to [646].

Resumptions

His Honour found that:

- without more, resumption of a pastoral lease under s. 109 of the *Land Act 1933* (WA) does not extinguish native title;
- it is necessary to determine whether the resumption gives rise to an estate in fee simple e.g. where the notice of resumption makes it clear that the resumption creates a fee simple vested in the Crown then, subject to the RDA, native title is extinguished;
- a resumption under s. 18 of the *Public Works Act 1902* made the Crown the absolute owner of the area concerned and completely extinguished native title. The RDA is not relevant because the Public Works Act did not treat native title any differently to other rights and interests in land;
- so far as the provisions of s. 18 of the Public Works Act are incorporated by reference into other legislation (e.g. *Country Areas Water Supply Act 1947, Iron Ore (Cleveland Cliffs) Agreement Act 1964* and Local Government Act), the above comments apply — at [647] to [649], referring to *Western Australia v Ward* (2002) 191 ALR 1 at [204] to [208].

Resumptions under the Public Works Act were held to be valid, despite the fact that public works were constructed on the area prior to the resumption, because s. 28 of that Act expressly authorised the resumption after the execution of any public work — at [652] to [654].

Resumptions under the Country Areas Water Supply Act and Public Works Act were all found to have been resumed in a way that extinguished native title — at [658] to [660].

Vested reserves

His Honour rejected an argument that the mere vesting of a reserve under s. 33 of the *Land Act 1933* (WA) did not wholly extinguish native title — at [665], referring to *Western Australia v Ward* (2002) 191 ALR 1 at [240] to [256].

His Honour also found that a vesting under the following legislation had the same effect on native title:

- regulation 33 of the Land Regulations 1882;
- regulation 36 of the Land Regulations 1887;
- section 42 of the *Land Act 1898* — at [666].

Thus, his Honour finds that all vested reserves considered in this matter completely extinguished native title upon vesting — at [667].

Unvested reserves

The creation of a reserve necessarily extinguishes the right to control the usage of the land subject of the reserve. To determine whether there is any further extinguishment, it is necessary to determine whether the rights in the reserves are inconsistent with the rights in native title — at [668] to [669].

Where there was no evidence of the assertion of the rights created by the reservation of the area concerned, then no further extinguishment was found. However, even where it appeared that a reserve for a stock route had been used for that purpose, it was held that there was no further extinguishment — at [670] to [682].

Where there was evidence that the creation of a reserve established that rights were both created *and asserted* that were wholly inconsistent with the continued existence of native title, native title was found to be wholly extinguished. Reserves in this category included reserves for a rifle or pistol range. A cemetery reserve that was used for its purpose was found to extinguish all but the native title right to access the area — at [689] and [693].

Where public works (e.g. the digging of gravel pits or construction of bores on water reserves where the work is done by or on behalf of the Crown in any capacity) have been established on the area reserved, then native title is wholly extinguished over the 'public work' as defined in s. 251D. Examples in this category were reserves for government purposes used for an electric substation, government housing, a lighthouse, slaughter yards, a Main Roads depot and reserves used for parking, drainage, hospitals, a quarantine station, a post office, a ration depot, a police station and a courthouse — at [684] to [699].

Query whether, by operation of the extended definition of public work found in s. 251D, native title is extinguished on the whole of the reserve on which the public work is situated. In one instance, the applicants did not bring evidence to rebut the state's case that was so in relation to water bore constructed on a 640-acre water reserve. Absent evidence to the contrary, his Honour accepted the state's submission — see [685].

Easements

Common law easements do not confer exclusive possession to land. However, in this case, the easements were granted either under s. 16 of the *Petroleum Pipelines Act 1969* (WA) or s. 134B to 134N of the *Land Act 1933* (WA). It was thus necessary to construe the terms of a statutory easement to determine what non-native title rights and interests had been granted. Having considered the statutory scheme, his Honour concluded that the easements in question did not confer exclusive title to the grantees — at [701] to [708].

Infrastructure on easements that fell within the definition of a public work done on or before 23 December 1996 completely extinguished native title. The onus rests on the applicants to rebut the presumption that native title is extinguished on the whole of the easement under the extended definition of public work found in s. 251D. Where the improvement is not a public work, consistent native title rights and interests will continue to coexist with non-native title rights — at [709] to [710].

Licences

While it was not necessary for his Honour to finally resolve the matter, he considered that the preferred position with respect to licences granted under s. 101 of the *Conservation and Land Management Act 1984* (WA) was that their grant 'extinguished the exclusivity of any native title rights to possess, occupy, use and enjoy the land the subject of the licence *during the existence of the licence'* (emphasis added) — at [725] to [726]. It is not clear why his Honour included the emphasised phrase, since extinguishment is permanent, unless the legislature has intervened to provide otherwise. That said, his Honour finds that the *use* of the licensed area by the licence holder (presumably for the licensed purpose) prevails over inconsistent rights of the native title holder.

Minerals and petroleum

His Honour relied upon the majority decision in *Ward v Western Australia* (2002) 191 ALR 1 at [377] to [385] to find that native title in minerals, petroleum and gas has been extinguished — at [728].

The state submitted that ochre is a mineral. His Honour referred to a proclamation under Pt VI of the *Mining Act 1904* (WA), pursuant to which the state asserted that red ochre was a mineral within the terms of the Mining Act. It was held that ochre is not included in the definition of a mineral under that Act if the ochre is to be used for the purpose of the exercise of a native title right and not for 'use in the manufacture of porcelain, fine pottery, or pigments', as was required by the proclamation — at [732].

Mining tenements — general

It was said that:

- mining tenements granted after the commencement of the RDA are not past acts; and

- inconsistent native title rights are extinguished by the grant of the mining tenement and the rights of the tenement holder prevail over the native title rights.

Use of the tenement area may prevent the exercise of any remaining native title rights and interests on parts of the tenement but does not extinguish any of those rights and interests — at [733].

Mining and related leases

His Honour was of the view that the following rights were extinguished over areas affected by the grant of gold mining leases under the *Goldfields Act 1886, 1895*:

- the right to control access;
- the right to access the area, in terms of remaining (although it is not clear what is meant by 'remaining');
- any right to perform ritual and ceremony;
- the right to camp, in terms of living on the land;
- rights to cook and light fires.

It was held that the grant of such a lease did not extinguish native title rights to:

- access, in terms of entering and travelling;
- hunt and forage;
- camp, but not where this involves living on the land (but, as noted above, without the right to cook or light a fire);
- collect bush medicine and tucker;
- take fauna;
- take flora;
- take ochre;
- take and use water; and
- protect and care for sites and objects — at [741], [746], [751], [763], [782], [786], [763] and [786] to [795], [803], [814] to [816], [822], [826], [830].

In relation to protecting and caring for sites, it may be that this is somewhat hampered by his Honour's finding that there is no native title right to perform ceremony and ritual on these areas.

The same preliminary findings were made in relation to the extinguishing effect of:

- gold mining leases under *Mining on Private Property Act 1898* and the *Mining Act 1904*;
- mining leases granted pursuant to the *Land Regulations 1887*;
- dredging claims under the *Mining Act 1904*;
- machinery, quarry, tailings and market garden areas as authorised holdings under the *Mining Act 1904*;
- mineral claims, mineral leases and miner's homestead leases under the *Mining Act 1904*;
- mining and general purpose leases and miscellaneous licences under the *Mining Act 1978* (WA).

His Honour found that the grant of the mining or general purpose lease under the *Mining Act 1978* (WA) extinguished *all* rights to be asked permission to use or access the lease area had they existed i.e. these native title rights are extinguished in respect of all persons, not just the grant holder — at [586] and [822].

In relation to machinery, tailing and market garden areas as authorised holdings under the *Mining Act 1904* (WA), his Honour concluded that these types of interest confer a right of exclusive possession but did not go on to find complete extinguishment. It is not clear why this is so — see [775], [782], [814] and [816].

In relation to mining leases granted pursuant to the *Land Regulations 1887* (WA), having concluded that these were 'indistinguishable' from pastoral leases, his Honour goes on to find that they had the same effect on native title rights as did the grant of gold mining leases etc. noted above, i.e. they brought about more extinguishment than did a pastoral lease — at [746]. It is not clear why his Honour took that view.

Prospecting areas for holders of miner's rights under the Mining Act 1904

In his Honour's view, the rights given under a prospecting area were inconsistent with any native title right to control access to the area — at [797]. It is not clear why his Honour did not also discuss the impact of the licence on the right to control use of the area.

Tramway leases under the Mining Act 1904

His Honour was of the view that the grant was wholly inconsistent with the continued existence of native title and so completely extinguished it — at [817].

Business and residential area tenements under the Mining Act 1904

His Honour holds that the registration of each business area conferred on the holder a right 'akin to a right of exclusive possession'. Thus, on this view, native title is wholly extinguished on those areas — at [758] and [805].

Water rights under the Mining Act 1904

The relevant grant conferred on the holder a right to take and sell water and extinguished any exclusive native title rights to water on the area subject of the grant — at [820].

Prospecting and exploration licences under the Mining Act 1978

His Honour was of the view that there is no inconsistency between native title rights established and the rights given to the holder of a prospecting or exploration licence under this Act. Presumably his Honour is referring to the rights as he determines to exist in this case i.e. non-exclusive native title rights — at [838] and [844].

State Agreement mineral lease

The lease in question was granted to Dampier Salt Limited under s. 48 of the *Mining Act 1904* as modified by the *Dampier Solar Salt Agreement Act* (WA). This was a case, his Honour said, where the understanding of the rights is properly informed by the evidence of usage. The lease covers the whole of the salt production area. RD Nicholson J was of the view that exclusive possession must have been intended, given the nature of solar salt production. Thus, the grant of the lease wholly extinguished native title — at [847].

Licences to prospect for mineral oil under the Mining Act 1904

The licence gave the licensee the right to occupy the land for a period not exceeding 10 years and an exclusive right to bore and search for mineral oil in the area. His Honour found that such an interest would have extinguished any exclusivity of native title rights had they been found to exist — at [851].

By-laws

Several water reserves had been constituted under *Country Areas Water Supply Act 1947* (WA) over fairly substantial parts of the application area. By-laws made under that Act absolutely prohibit camping or picnicking within 300 metres of the high water mark or of any bore, reservoir or feeder thereto and absolutely prohibit removing, plucking or damaging flora growing on any land or reserve vested in the Minister, within half a mile of any bore or reservoir. Where they came into effect before the RDA commenced, these by-laws were found to extinguish native title 'within their terms'. If these by-laws came into effect in relation to a particular area after the commencement of the RDA, then the act of making the by-laws would be a category D past act to which the non-extinguishment principle applies — at [857] to [858]. The same reasoning was applied to two similar by-laws made under *Parks and Reserves Act 1895* (WA) — at [860] and [861].

National Parks Authority Act 1976

Regulations made under this Act were found to be category D past acts. In any case, only two of the regulations, which dealt with the erection of permanent or semi-permanent structures, could have arguably had any extinguishing effect — at [866].

Rights in Water and Irrigation Act 1914

His Honour followed the majority in *Western Australia v Ward* (2002) 191 ALR 1, i.e. the vesting of water in the Crown is inconsistent with exclusive native title rights to water. Where by-laws made prior to the commencement of the RDA absolutely prohibited the rights to hunt fauna or gather plants, native title was extinguished to that extent — at [868].

Wildlife Conservation Act 1950 (Fauna Protection Act)

RD Nicholson J was of the view that, within a declared 'nature reserve' or 'wildlife sanctuary', the native title right to take fauna has been extinguished pursuant to s. 23 of the Fauna Protection Act. However, the creation of such places after the commencement of the RDA is discriminatory, and consequently, the act of creating those places is a category D past act — at [879].

Transfer of Land Act 1893 (WA) (TLA)

Registration of a grant under the TLA does not further extinguish native title over and above that caused by the grant of the interest itself — at [884].

The Cossack–Roebourne Tramway Act 1886

It was not argued that this was a public work. However, given the nature of the lease issued, his Honour was of the view that native title was wholly extinguished over the area — at [885].

Marine and Harbours Act 1981

Vesting of land under s. 9 of this Act vested in the Minister beneficial ownership of the land. The vesting of the seabed of the ports in the Minister extinguished any native title rights to the seabed and the space above it in so far as those rights relate to the intertidal zone (no rights at all were found to exist below the intertidal zone) — at [892].

Subsection 12(2) of the above Act provided for the grant by the Minister of leases in respect of the land vested under the Act. The lease in question here used the language of a common law lease and hence granted a right of exclusive possession of the leased area which, consequently, completely extinguished native title — at [896].

Pastoral leases that were Category A past acts or PEPAs (if in force on 23 December 1996)

One pastoral lease was found to be a Category A past act that completely extinguished native title. At [919], his Honour found that three other pastoral leases that were in force on 23 December 1996 were PEPAs. However, with respect, it is not possible for non-exclusive pastoral leases to be PEPAs. They are PNEPAs, although s. 6 of the TVA will still apply to them pursuant to s. 12M(2) of that Act. See also s. 23G(2) of the NTA.

Intermediate Period Acts (IPAs)

A range of freehold grants were found to be IPAs and also PEPAs — at [922]. Resumptions of land under the *Local Government Act 1960* (WA) and the *Public Works Act 1902* (WA) within the relevant period were found to be IPAs and PEPAs. Some leases were IPAs and scheduled interests and, thus, PEPAs.

His Honour seems to draw some significance from the issue of whether IPAs cease to be IPAs when they are also PEPAs — at [926]. With respect, this seems a fruitless analysis. IPAs, like past acts, do not cease to be those types of acts merely because they are also PEPAs. The NTA merely resolves which provision applies in relation to the *effect of validation* of those acts, i.e. s. 23C applies rather than ss. 15 and 22B.

Section 47A

With respect to the meaning of 'occupy' for the purposes of s. 47A, his Honour accepted and followed the view of the majority in *Western Australia v Ward* (2000) 99 FCR 316, finding that occupation was established for the purposes of s. 47A(1)(c) wherever he found connection — at [938].

His Honour applied s. 47A to a variety of circumstances, each of which turns on its own facts. For example, in relation to reserves of a

particular kind, he held that s. 47A(1)(b)(i) applied to a reserve, the purpose of which was expressed to be for a 'Native Mission School'. On the other hand, in relation to reserves in respect of 'Preservation of Native Art' and 'Archaeological site', s. 47A does not apply because 'they are not expressly for the benefit of [Aboriginal] people alone' — at [955].

Section 47B

His Honour determined that temporary reserves are reservations within the meaning of sub-paragraph 47B(1)(b)(ii) of the NTA — at [968]. In his Honour's view, it was evident that the legislative intent was to apply this excluding provision as widely as possible. In relation to the meaning of occupy in s. 47B, his Honour took the same approach as he did in respect of s. 47A — at [967] and [973].

Mediation of a claimant application

Jones v State of South Australia [2003] FCA 538

per Mansfield J, 30 May 2003

Issue

Should orders allowing for limited mediation in respect of a native title determination application be made as a matter of principle because a state-wide indigenous land use agreement (ILUA) strategy for dealing with native title was on foot?

Background

The Aboriginal Legal Rights Movement (ALRM), the representative body for South Australia, sought an order that would severely limit the extent of the Federal Court's referral of a claimant application to the National Native Title Tribunal for mediation under s. 86B while a state-wide ILUA strategy for dealing with native title was being pursued. The limited issues in respect of which the motion sought an order for referral under s. 86B related to:

- the resolution of overlapping claims;
- issues relating to various licences;
- the identification of areas where extinguishment was confirmed under the state's native title legislation; and
- the identification of the nature and extent of non-native title rights and interests.

The Honourable Justice Mansfield noted that:

- subsection 86B(1) obliges the court to refer every application to the Tribunal for mediation unless an order is made under s. 86B(2) that there be no mediation in relation to the whole of the proceeding or a part of the proceeding; and
- the intent underlying the motion was that all claimant applications within South Australia not be referred for mediation under s. 86B while the state-wide ILUA strategy was being pursued.

The motion was opposed by various pastoral parties.

Power of court to defer mediation in relation to part or all of a proceeding

In finding that the court had the power to defer mediation under the NTA in respect of some parts or all of a proceeding, Mansfield J noted that:

- the broad scope of the matters set out in s. 86A confirms that the court may, if appropriate, refer a particular part of a proceeding for mediation from time to time;
- the expression 'a part of the proceeding' in s. 86B means simply 'an issue or any issue which arises in the proceeding';
- the requirement in s. 86B(1) that referral to mediation be made 'as soon as practicable' does not impose an obligation to refer to mediation in any narrow sense. The issue of practicability is a matter for the court and may encompass a deferral of mediation — at [14].

Statewide ILUA Strategy

Mansfield J noted that the applicants, the state, the ALRM and peak bodies representing mining and pastoral interests have developed, and are implementing, a strategy for the resolution of the major native title issues in South Australia through the negotiation of indigenous land use agreements separate from, and outside of the framework for, mediation by the Tribunal — at [16].

In considering whether it was appropriate to make the orders sought, Mansfield J considered the strategy and its progress in some detail, including the fact that:

- it had already produced a number of significant initiatives which may provide a very useful vehicle for further progressing resolution by agreement of the subject application and other claimant applications — at [24]; and
- three sets of pilot project negotiations were on foot that were intended broadly to cover the areas of pastoral land, minerals exploration, national parks and other protected areas, local government and future acts and fishing and sea rights — at [23] to [31].

His Honour noted that:

- while the achievements to date under the ILUA strategy were significant, they were made at the 'macro' level;
- only one of the pilot project negotiations was relevant to the application, with those negotiations being relevant only to the pastoral party supporting the motion;
- the opposing pastoral parties had not participated in the pilot negotiations, nor been asked to do so and were not privy to details as to the content or progress of those negotiations;
- there was no basis for concluding that the pilot projects will progress in a speedy fashion and that although the strategy had been in place for some time, there was 'no clear light at the end of the tunnel'; and
- there were difficulties with resources, time and expertise and that the resolution of native title determination claims involves complex and extensive issues — at [32] to [33].

Mansfield J observed that the motion, if granted, carried the assumption that it is appropriate for those who are parties to the application but not directly involved in the pilot program to simply abide the course of development of the strategy, even if they are anxious for the claim to be heard so that their position in respect of the application is resolved — at [33].

With regard to the benefits of the strategy as a quicker and cheaper alternative to litigation, it was said that those benefits are also available via the mediation process contemplated under the NTA:

> It does not follow that such benefits should be sought to be achieved by a form of mediation outside that contemplated by the NT Act and at the exclusion of certain parties from the process even if there is a real prospect that ultimately forms of template agreements may be able to be achieved which would be available to the other parties in the litigation and in other applications — at [44]

The proposal put to the court would, if accepted, give responsibility, in the first instance, to 'peak bodies' rather than to the individual litigants. It was based on an assumption that the individual litigants would then 'accede to agreements proposed on their behalf to which they have had no direct input'. Accepting the proposition would remove:

- the entitlement of the parties to the litigation to progress the claims to finality;
- the function of controlling the timing of the progress of the proceedings from the court.
- each individual party's capacity to participate in the process of mediation — at [44].

Role of the Tribunal in mediation

Mansfield J found that the orders sought did not pay sufficient regard to the central role of the Tribunal in the mediation process under the NTA. His Honour agreed with and adopted the findings by French J in *Frazer v Western Australia* [2003] FCA 351 as to the Tribunal's role in this context — at [36] to [37].

His Honour noted the proponent parties' acknowledgment that:

- the Tribunal has the resources and expertise to deal with matters such as the limited issues;
- until overlapping claim issues are resolved, there will be little chance of reaching agreed outcomes (by mediation or private negotiation under the strategy); and
- issues such as extinguishment and the identification of the extent of claimed rights and interests, are matters 'which need to be clarified ... before agreements can be formalised' — at [34].

Mansfield J expressed the firm view that mediation by the Tribunal pursuant to s. 86B and the progress and successful implementation of the strategy were not mutually exclusive or conflicting processes. It was noted that:

- the purpose of mediation was the same as the objective of the state-wide ILUA strategy and the Tribunal was unlikely to impede or impair the progress of that strategy; and
- it was unclear why the mediation power of the Tribunal should be inhibited because the strategy was being pursued — at [38] to [41].

His Honour took the view that referral to the Tribunal for mediation would address the interests of those parties to claimant applications who were not directly involved in the strategy and who wished the claim to proceed in the normal manner — at [39] and [40].

Decision

The motion was adjourned for further hearing. However, Mansfield J made it clear that the court did not accept that it should order that there be only limited mediation as a matter of principle because of the state-wide ILUA strategy. Whether the court should refer the whole or part only of a proceeding to the Tribunal is to be considered on a case-by-case basis, having regard to the particular circumstances. It must ultimately be borne in mind that the purpose of mediation is to assist the parties to reach agreement on some or all of the issues which arise in the proceeding — at [48].

Maori customary title

Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust [2003] NZCA 117

per Elias CJ, Gault P, Keith, Tipping, Anderson JJ, 19 June 2003

Issue

This decision arises from a stated case in which the High Court of New Zealand's opinion was sought on eight questions including the following questions on whether:

- the Maori Land Court has the jurisdiction under the *Te Ture Whenua Maori Act 1993* to determine the status of foreshore or seabed and the waters related thereto;
- the law of New Zealand:
  - recognised Maori customary title to all or part of the foreshore (the intertidal area); and
  - prior to the enactment of the *Territorial Sea and Fishing Zone Act 1965* (NZ), would have recognised any Maori customary title to part or all of the seabed and 'the waters related thereto' (that is, both the 'inland waters' of harbours and bays and territorial waters); and
- certain legislation extinguished any Maori customary title to the foreshore and/or seabed.

Background

The Maori applicants sought a declaration from the Maori Land Court that certain land below the mean high water mark in the Marlborough Sounds is 'Maori customary land': see s. 18(1)(h) of the *Te Ture Whenua Maori Act 1993* (NZ). In the event the land was not Maori customary land, a declaration that the Crown held the land in a fiduciary capacity for their benefit was sought.

Case stated

Following an objection to the application on the ground that it could not succeed either at common law or under statute, Maori Land Court Judge Hingston made an interim finding that the legislation relied upon did not have the effect of extinguishing any customary property that the applicants might establish. This decision was appealed to the Maori Appellate Court which, after some hesitation, agreed to state a case for the opinion of the High Court on points of law which could substantially determine the applications.

The Honourable Justice Ellis heard the stated case and held that land below the low water mark in New Zealand was beneficially owned by the Crown at common law and declared so by statute. Accordingly, it was held not to be Maori customary land. In relation to foreshore land between the high and low water marks (the intertidal area), his Honour found that any Maori customary property in the foreshore had been extinguished once the contiguous land above high water mark had lost the status of Maori customary land, either by Crown purchase or a vesting order made by the Maori Land Court where the sea was described as the boundary — at [7]. An appeal against that decision was brought by the Maori applicants.

The decision of the High Court on the appeal in relation to the case stated deals only with the initial question of whether the Maori Land Court has jurisdiction to consider the substantive issues. It did not resolve whether such title existed in relation to the area under consideration — the foreshore and seabed of the Marlborough Sounds. On the former point, the court unanimously allowed the appeal and held that the Maori applicants must be permitted to go to hearing in the Maori Land Court. The question of whether certain legislation would have had the effect of extinguishing Maori customary title to those areas was also considered.

Chief Justice Elias was critical of the case stated, noting that:

> [T]he questions as eventually framed are…not helpful and…it is impossible to resolve many of the legal points raised in them in advance of determination of the facts. It is as well to keep in mind…that, when considering questions of customary property…Abstract principles fashioned a *priori* are of but little assistance, and are as often as not misleading — at [5], quoting *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 404 per Lord Haldane.

Maori customary land

Maori customary land is defined in s. 129(2)(a) of the *Te Ture Whenua Maori Act 1993* as land that is 'held by Maori in accordance with tikanga Maori'. In earlier Maori land statutes, it was defined as lands 'owned by Natives under their customs or usages'. The Privy Council affirmed that the common law recognised pre-existing property after a change in sovereignty in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 407 to 408. Such property is not the creation of the Treaty of Waitangi or of statute, although it was confirmed by both. It was property in existence at the time Crown colony government was established in 1840 — at [14] and [15].

A succession of court decisions, beginning with *R v Symonds* (1847) NZPCC 387, reflect a continuing tension in the common law between the notion of the Crown's 'radical title', 'sovereignty' and the survival of Maori customary title — see Elias CJ at [21], Gault J at [102], Keith and Anderson JJ at [136] to [138] and Tipping J at [183].

The present position is that the radical title of the Crown is subject to the existing native rights, which cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statute — Elias CJ at [29], referring to *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20 at 23 to 24 per Cooke P.

Extinguishment

Elias CJ stated that the fact that New Zealand has assumed the continued existence at common law of customary property until it has been extinguished was of significance in this appeal. The Chief Justice identified three ways in which it can be extinguished:

- by sale to the Crown;
- through investigation of title by the Land Court and subsequent deemed Crown grant; or
- by legislation or other lawful authority — at [47].

The Solicitor-General accepted the above principle in relation to land above the high water mark. However, it was argued that a different approach should be taken to the intertidal zone and the seabed. This difference was said to arise both at common law and because of legislation vesting such lands in the Crown — at [48].

In relation to the common law, any prerogative of the Crown as to property in the intertidal area and seabed does not apply in New Zealand if displaced by local circumstances. In the case of New Zealand, the prerogative is displaced by any Maori custom and usage recognising property in those areas unless it has been lawfully extinguished. The determination of the content of any Maori property right is in application of the Maori tikanga (customary values and practices). That is a matter for the Maori Land Court — at [49].

Three of the judges saw no reason to conclude that the outcome was any different in relation to the seabed. Interests in such areas were known under the laws of England and included interest that had arisen by custom and usage. Such interests have also been created by Crown grant in New Zealand and have been recognised in reports of the Waitangi Tribunal and certain legislation as possibly existing in relation to seabed areas — Elias CJ at [51] and Keith and Anderson JJ at [133]. The other judges did not directly discuss the issue.

Overruling earlier case

There existed the 'authority' of *In Re the Ninety-Mile Beach* [1963] NZLR 461, where it was held that any Maori customary property in the foreshores (that land which lies between the high and low water marks) was extinguished once the contiguous land above high water mark had lost the status of Maori customary land. (The jurisdiction of the Maori Land Court was also challenged on the basis that the reference to 'land' in s. 129 of the Te Ture Whenua Maori Act did not include the intertidal or seabed areas.)

It was found that *In Re the Ninety-Mile Beach* was wrong in law and should not be followed, based as it was on a premise that the Crown had acquired the property of land in New Zealand along with its sovereignty. The reasoning in a strong line of New Zealand authority from R v Symonds onwards, Canadian cases and *Mabo v Queensland* (No. 2) (1992) 175 CLR 1 was preferred. These are cases that clearly separate the notions of sovereignty and Crown ownership of property — at [84], [87], [158] and [215] per Elias CJ, Keith and Anderson JJ with Tipping J agreeing.

Decision

It was found that:

- the Maori Land Court had jurisdiction to determine the status of foreshore and seabed — at [90], [124], [182] and [216] per his Honour Chief Justice Elias with the concurrence of Gault, Keith, Anderson and Tipping JJ;
- as to the nature of any surviving Maori customary rights in those areas, their

Honours held this was a matter for factual determination by the Maori Land Court. The evidentiary matters to be considered included the nature of the traditional customs and usages in the foreshore and sea, the terms of any sale or vesting of land contiguous with the foreshore, the effects of certain area-specific legislation conferring freehold interests extinguishing customary property rights.

Specific legislation

The question for the High Court then was whether Parliament had extinguished any property rights that Maori may be shown to have had. The following legislation was considered:

- *Harbours Act 1878 and 1950 (NZ);*
- *Territorial Sea and Fishing Zone Act 1965 (NZ);*
- *Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 (NZ);*
- *Foreshore and Seabed Endowment Revesting Act 1991 (NZ); and*
- *Resource Management Act 1991 (NZ).*

None of this legislation was found to appropriate Maori property or cause any extinguishment of customary property rights: see [60], [72], [76], [154] and [170].

However, Tipping J was of the view that the *Resource Management Act 1991* (NZ) may 'represent a formidable barrier' to the existence of any 'as of right' activity within the coastal marine area which may be said to derive from the establishment of the status of Maori customary land — at [192].

Objection to jurisdiction

In response to the jurisdictional objection raised by one of the respondents, Elias CJ referred to the various dictionary definitions of 'land' and found that, while these were not conclusive, many were wholly consistent with the intertidal area and seabed being 'land' for the purposes of the *Te Ture Whenua Maori Act* — at [55].

In any case, if the Maori Land Court did not have jurisdiction to hear matters relating to such areas, then the High Court did and could refer questions of Maori tikanga for the opinion of that court. Thus, it did not seem a 'sensible or intended result' that the Maori Land Court did not have jurisdiction to decide Maori property matters in relation to such areas — at [55] and [56] per Elias CJ. See also Gault at [110], Keith and Anderson JJ at [173] to [179] and Tipping J at [188].

The appeal was allowed with costs.

Comment

Their Honours noted the limited significance of their rulings, being no more than the preliminary finding on a limited number of questions of law. They stressed the final outcome was a matter for the evidence. In any case, there are notable differences between New Zealand and Australian native title law, mainly reflecting the much longer statutory overlay and existence of the Treaty of Waitangi in the New Zealand context.

Further, it appears accepted in Australian jurisprudence that the Crown does not have radical title to offshore areas. In *Commonwealth v Yarmirr* (2001–2002) 208 CLR 1; (2001) 184 ALR 113, it was said that:

> [I]t is of the very first importance to bear steadily in mind that native title rights and interests are not created by and do not derive from the common law. The reference to radical title is, therefore, not a necessary pre-requisite to the conclusion that native title rights and interests *exist*. The concept of radical title provides an explanation in legal theory of how the two concepts of sovereignty over land and existing native title rights and interests *co-exist*…
>
> It is, however, not right to say…that native title rights and interests cannot exist without the Crown having radical title to the [relevant] area. This contention gives the legal concept of radical title a controlling role. The concept does not have such a role.

> It…is no more than a tool of analysis which reveals the nature of the rights and interests which the Crown obtained on its assertion of sovereignty over land.
>
> It by no means follows that it is essential, or even appropriate, to use the same tool in analysing the altogether different rights and interests which arose from the assertion of sovereignty over the territorial sea. In particular, it is wrong to argue from *an absence of radical title in the sea or sea-bed* to the conclusion that the sovereign rights and interests asserted over the territorial sea are necessarily inconsistent with the continued existence of native title rights and interests. The inquiry must begin by examining what are the sovereign rights and interests which were and are asserted over the territorial sea. Only then can it be seen whether those rights and interests are inconsistent with the native title rights and interests which now are claimed — at [48] to [50] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, footnotes and references removed.

Removal of one of those named as the applicant

Central West Goldfields People v Western Australia [2003] FCA 467

per Carr J, 14 May 2003

Issues

This case concerned an application by Dorothy Dimer, one of the group of people named as the applicant in the Central West Goldfields claimant application, to have her name removed from that group. Orders were also sought to have Ms Dimer and descendants 'excluded' as 'registered claimants' and to 'exclude' one of her ancestors from the application.

Background

Ms Dimer's reasons for bringing the application to remove her from the group of people named as the applicant were primarily that:

- the representative body had not provided adequate information or advice to her family prior to the combination of their application with three other overlapping claimant applications; and
- genealogical information about her family had been made available in an inappropriate way.

Submissions

The Goldfields Land and Sea Council (GLSC) submitted that the court could exercise the discretion available under O6 r9(b) of the Federal Court Rules, which provides relevantly that the court may, either of its own motion or by application of a party, order that a person cease to be a party where the person has ceased to be a proper or necessary party. The State of Western Australia submitted that Ms Dimer was one of the people who, jointly, constitute 'the applicant' rather than a party in her own right — see s. 61(2).

Removal from group named as the applicant

The Honourable Justice Carr was of the view that:

> Although there are provisions in the Act for amending an application "so as to replace the applicant with a new applicant" [s. 64(5)] and to replace an applicant in particular circumstances relating to authorisation [s. 66B], there does not appear to be any provision for the present circumstances where one of a group of applicants seeks to have herself removed from the proceedings — at [8].

While agreeing with the state's submission, Carr J was of the view that Ms Dimer was also a party to the proceedings because she was 'named as one of the eight joint applicants who seek the relief (albeit in a representative capacity) described in the principal application'. The reasons why Ms Dimer wished to be excluded did not need to be considered. The fact that she no longer wanted to be one of the 'named applicants' was enough. Carr J found

that it was 'no longer necessary for her to be a party and…it would not be proper to force her to be one' — at [10] to [11].

Removal as 'registered claimants'

The second order sought was the exclusion of Ms Dimer and her descendants as 'registered claimants'. It was possible that this was a reference to 'registered native title claimant', which is defined in s. 253 as a person or persons 'whose names appear…on the Register of Native Title Claims as the applicant'. Given that orders were made to remove Ms Dimer from the group named as the applicant, there was (in his Honour's opinion) 'no point' in seeking this order. Therefore, Carr J interpreted the second order sought as being one that excluded Ms Dimer and her descendants from the native title claim group.

The third order sought related to removing one of Ms Dimer's ancestors. While he would 'ordinarily' make such orders simply because it was sought, Carr J refused to do so in this case because:

- it was not sufficiently clear that this was what Ms Dimer wanted;
- to do so might affect the interests of other people in the claim group; and
- there was no evidence that all of the persons who might be affected had consented to these orders being sought or that those jointly named as the applicant were 'duly' authorised by those who might be removed as members of the claim group if the orders were made — at [12].

Comment

The removal of Ms Dimer's name from the group named as the applicant pursuant to the Federal Court Rules, rather than under the NTA, is (with respect) somewhat problematic and has some implications that do not appear to have been noted by the court.

Subsection 61(2) provides that where more than one person is authorised to make a claimant application, they are jointly 'the applicant', i.e. a single legal entity. Altering the constitution of the group named as the applicant is a replacement of the applicant in that, for example, the 'old' applicant in this case included Ms Dimer and the 'new' applicant does not.

Under the NTA, this would be an amendment to the application and s. 64(5) would apply. This requires that the new applicant (constituted by those who remained after Ms Dimer was removed) must file an affidavit stating that they are authorised by the claim group to be the applicant and stating the basis for that authorisation.

Given the repeated statements by the court that proper authorisation of the applicant is of central importance to the conduct of claimant applications and to the importance of maintaining the 'ultimate' and 'continuing' authority of the native title claim group by ensuring 'the applicant' is properly authorised (e.g. *Daniel v State of Western Australia* (2002) 194 ALR 278 at [11], [16] and [17] per French J), it is not surprising that there is a requirement under the NTA that the newly constituted applicant must be shown to retain authority of the claimant group. Were this not so, the change in the applicant brought about by removing one of its members could be done without the claim group's authority.

It is not difficult to envision circumstances where the claim group authorised a group as 'the applicant' only so long as it was constituted in a particular way (e.g. to include a particular person or to include one representative from each the subgroups or families that make up the claim group). The removal of a particular person (even because they are deceased) could mean that those remaining are no longer authorised. The Explanatory Memorandum to the Native Title Amendment Bill 1997 [No. 2] supports this view:

> When a claimant application…is amended to replace the applicant with a new applicant, that new applicant must provide

> an affidavit showing authority…[referring to what became s 64(5)]. *A new applicant may be required*, for example, if…*one of the group* of persons that *together make up the applicant*, becomes *incapacitated or dies* — at [25.42], emphasis added.

When the amended application is referred to the Native Title Registrar by the court under s. 64(4), it is put through the registration test and, if accepted, the amendment (in this case, the change to the applicant) is entered onto the register. In this way, the Registered Native Title Claimant (those whose names appear on the register as the applicant) reflects the court's orders: see s. 190(3) and s. 190A. Absent the referral of an amended application and the application of the test, the Registrar does not appear to be empowered to amend the Register to reflect the court's order unless it is an order made under s. 66B(2) — see s. 66B(4).

Strike out application

Wharton on behalf of the Kooma People v Queensland [2003] FCA 790

per Emmett J, 18 June 2003

Issues

This decision deals with an application under s. 84C of the NTA to strike out a claimant application on the ground that the applicant was not authorised by the native title claim group to bring the proceeding.

Background

The claimant application in question was lodged in under the old Act by Wayne Wharton 'on behalf of all Kooma People'. Consequent to the 1998 amendments, a claimant application may be made only by a person who is authorised by all persons who, according to their traditional laws and customs, hold the common or group rights comprising the particular native title claimed: s. 61(1) of the new Act. If there is a failure to comply with this requirement, then a party may apply under s. 84C to strike out the proceeding — at [11].

In May 1999, the application (referred to here as Wharton) was amended. In March 2002, a second claimant application was filed that completely overlapped the area covered by Wharton (referred to here as Branfield). Branfield was also said to be made on behalf of the Kooma People. It was common ground that Branfield applicants are descendants of persons named as apical ancestors in Wharton.

In August 2002, the applicant in Branfield was joined as a party to the Wharton proceedings. Subsequently, and with leave of the court, the Branfield applicant applied to strike out the Wharton application on the ground that Mr Wharton was not authorised by the native title claim group.

Authorisation

Section 251B of the NTA deals with the question of authorisation. A person is authorised if:

- the person has been authorised by the group in a mandatory process for making decision of that kind under traditional law and custom; or
- there is no such decision-making process, then the person has been authorised by the claim group in accordance with a decision-making process agreed to and adopted by that group.

In this case, neither party suggested there was such a decision-making process under traditional law and custom. Mr Wharton relied on the second limb of s. 251B.

His Honour noted that s. 251B(b) does not require that all members of a relevant claim group must be involved in the decision:

> Still less does it require that the vote be a unanimous vote of every member. It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process: at [34], referring to *Lawson v Minister for Land and Water Conservation NSW [2002]* FCA 1517 at [25].

The original application was made as a result of resolutions passed by the Kooma Corporation, which was set up after a meeting of 34 people in 1994. One of its objects was to obtain secure tenure to the Kooma Tribes traditional land. At the same meeting, a resolution to make the original application was passed. There was evidence of a further meeting of the Kooma Corporation in 1999, attended by 40 people, where a resolution was passed that Mr Wharton was 'authorised by all people in attendance at the Kooma Native Title Meeting to deal with the Native Title Claim of Kooma and matters arising in relation to it'. There was also a resolution passed at that meeting stating that 'all Kooma people' agreed to use a consensus decision-making process. Notice of the meeting was sent to 180 members of the Kooma Corporation and the meeting was advertised on both local and national indigenous radio stations — see [19] to [29].

The question was whether authorisation had been given in accordance with a process of decision-making agreed to and adopted by the persons in the native title claim group described in the Wharton application as required under s. 251B(a) — at [18] to [30] and [33].

Decision

It was held that the evidence of authorisation was inconclusive and, as a result, the court was not persuaded that Mr Wharton was authorised by the native title claim group.

The following matters were noted:

- there was no evidence concerning the circumstances surrounding the convening of the initial meeting in 1994. While an inference that those present were members of the native title claim group described in the Wharton application could be drawn:
  - the court had no way of knowing who was informed of the proposal to convene the meeting; and
  - there was nothing in the minutes of that meeting to suggest that those present were agreeing to, and adopting, the procedures of the proposed Kooma Corporation as a means of decision-making on behalf of the native title claim group
- Mr Wharton needed to establish that all the members of the native title claim group were given the opportunity of attending the initial meeting in 1994 that resulted in the creation of the Kooma Corporation and the lodging of the original application. Evidence that all those people had also been given the opportunity to become members of the Kooma Corporation was also required;
- it was common ground that at least 40 members of the claim group were not members of the Kooma Corporation — at [38].

His Honour was not satisfied that the authorisation process relied upon by Mr Wharton satisfied s. 251B(b). This was because the evidence did not enable the court to conclude that a process consisting of a resolution of the *members of the Kooma Corporation* was a process of decision-making agreed to and adopted by the current descendants of the apical ancestors named in the application who made up *the native title claim group*. Therefore, the application did not comply with s. 61 and should be struck out pursuant to s. 84C of the NTA.

However, before making any order, his Honour thought it appropriate to allow the parties an opportunity to consider his conclusions and the reasons for them. His Honour was persuaded to take that course of action because it had been suggested in the course of argument that similar difficulties may arise in the Branfield application — at [44].

Subsequent developments—the transitional provisions

On 5 August 2003, the matter came before his Honour again. Counsel for Mr Wharton, who was unable to appear at the time, had filed submissions in court apparently seeking to argue that cl 21 of Application, Saving or Transitional Provisions of the *Native Title Amendment Act 1998* (Cwlth) (the transitional provisions) applied to the Wharton application. Clause 21 provides that:

> Section 84C of the new Act applies where the main application mentioned in that section was made either before or after the commencement of that section. If the main application was made before the commencement, the reference in that section to section 61 or section 62 is a reference to section 61 or section 62 of the old Act.

If cl 21 applies, then the strike out application must be decided on the basis of s. 61 of the old Act. In those circumstances, it may be that Mr Wharton does not need to show that he was authorised pursuant to the new Act. The issue before the court now is whether amendments to the application made after the commencement of the new Act mean that cl 21 no longer applies. His Honour made directions in relation to the filing of written submissions on this point and indicated that he would publish the reasons for his conclusions on the application of cl 21 as soon as practicable after any submissions are filed.

Colbung v State of Western Australia [2003] FCA 774

per Finn J, 29 July 2003

Issue

This decision deals with an application under s. 84C of the NTA to strike out two claimant applications on the grounds that those applications did not comply with the requirements of s. 61(1) because:

- the native title claim group was not properly constituted; and
- the applicant was not properly authorised to make the application.

Background

Those bringing the strike out application — the applicants to a claim brought on behalf of the South West Boojarah — are referred to here as the Colbung claimants. They sought strike out of two overlapping claimant applications, referred to here as the Harris and Isaacs applications, for failure to comply with s. 61(1).

Harris application

The Harris application was amended under s. 64 of the NTA after the 1998 amendments to the NTA. It was amended subsequent to those amendments and so was now subject to the requirements of the new Act — at [7], relying upon *Dieri People v South Australia* [2003] FCA 187 at [18], including s. 61(1).

While the title of the application stated that it is brought 'on behalf of the Harris Family', the court noted that the claimants are nineteen named people and the biological descendants of their children.

The Colbung claimants contended that the claimants in the Harris application are part of the broader Noongar group that holds common or group rights to the area covered by the Harris application. Therefore, the Harris application was neither brought by a properly constituted claim group nor properly authorised by that group: see *Risk v National Native Title Tribunal* [2002] FCA 1589 and *Tilmouth v Northern Territory* [2001] FCA 820).

Schedules E and F of the Harris application stated (among other things) that:

- the rights and interests claimed are 'the rights *together with other Noongar people who are native title holders* to the possession, occupation, use and enjoyment as against the whole world (subject to any shared right of exclusivity) of the area and any right or interest included within the same' (emphasis added); and
- the claimant group are descended from 'the Noongar people who occupied the claim area at the time of sovereignty';
- the traditional laws and customs acknowledged by the claimant group are derived from and based on the traditional laws and customs acknowledged and observed by the Noongar people who occupied the claim area at the time of sovereignty;
- the rights and responsibilities of the claimant group in relation to the claim area

are recognised by others and '*the claimant group recognise other family groups who also hold rights and interests in the claim area'* (emphasis added).

The court found that the evidence provided a further indication that the Harris application clearly acknowledged that there are a number of families with connection to the area the subject of the Harris application and that the laws and customs relied upon in that application are commonly held and shared by other Noongar families.

Decision on Harris

The Honourable Justice Finn dismissed the application for strike out on the basis that:

- it asked the court to anticipate or predetermine what might be the outcome of the Harris application after a full hearing, which the court was not prepared to do. There was enough in the application to preclude it being doomed to failure as a claim by a sub-group (or family within) a larger group;
- there is no descriptive uncertainty in the identification of the claim group and the application did not make an exclusive claim. Rather, it recognised that other family groups also hold rights and interests in the area;
- the evidence was very limited and did not demonstrate any matter that was fatal to the claim;
- the application merely asserts that the particular rights and interests claimed by the Harris family group are held in virtue of their membership of that group and that group alone;
- the description of the rights and interests claimed found in Schedule E has in it a level of ambiguity which, on a strike out application and in the early state of evidence, should be interpreted in favour of the Harris claimants;
- The characterisation of the claim area in Schedule F as 'the family lands of the claimant group' support such an interpretation. It may be that the Harris family are able to establish rights to the whole or part of that area where other Noongar people cannot — at [21] to [27].

Isaacs application

As this was an old Act application, the motion was decided in light of s. 61 in its pre-amendment form. The application was brought on behalf of 'the Isaacs Family and other Related People including George Webb'.

On 28 March 2001 Mr Webb (now deceased) swore an affidavit denying that he had authorised the Isaacs application to be brought on his behalf and confirming that he was a named claimant in the Colbung application.

Decision on Isaacs

Finn J struck out the application on the basis that it did not comply with s. 61, finding that the description of the native title claim group was:

- inadequate because the words 'family' and 'related' are capable of a variety of interpretations;
- ambiguous in that it was unclear whether the formula was intended to be definitive (i.e. a related person was a member) or permissive (i.e. included those related persons who wished to participate in the claim); and
- too uncertain and was not one in whose favour a determination of native title could be made — at [38] to [42].

Comment

The comments made here in relation to the Harris application may have some impact on the application of the principles in *Risk v Native Title Registrar* [2000] FCA 1589 to the registration test. The Registrar is currently considering the matter. However, as a preliminary comment, these were strike out proceedings where the traditional approach of the court is one of extreme caution unless the matter is, prima facie, completely without merit. The role of the Registrar when applying the registration test can be distinguished from the role of the court in strike out proceedings and, in any case, was not before the court in this matter, as it was in *Risk*.

Grant v Minister for Land and Water Conservation NSW [2003] FCA 621

per Wilcox J, 20 June 2003

Issue

This concerns an application to strike out a claimant application on the ground that the applicant had not been properly authorised to make the application.

Background

Overlapping claimant applications were lodged in respect of the same area of land at Lake Cowal in central-west NSW. One, filed by Florence Grant, was for a native title determination in relation to the land at Lake Cowal. The application stated that Ms Grant was:

> authorised by the Wiradjuri Council of Elders to lodge this claim on its behalf representing Wiradjuri People and is entitled to make this application as an authorised representative of the Wiradjuri Council of Elders.

Mr Neville Williams, who was the applicant in an overlapping application, made on behalf of the Mooka People (a sub-group of the Wiradjuri People), became a respondent. He later filed a strike out motion seeking an order under s. 84C NTA on grounds that Ms Grant was not authorised to make the application as required by s. 62(1). Authorisation must be given either according to a process of decision-making under the traditional laws and customs of the claim group mandated for making decisions of that kind or, in the absence of such a process, by an agreed and adopted decision-making process — see s. 251B(b).

The claimant application brought by Ms Grant described the decision-making process of the Wiradjuri people as remaining traditional but existing 'in a contemporary context'. It referred to a process of voting by elders present at a Wiradjuri Council of Elders meeting which amounted to an attempt to achieve consensus through extensive and often prolonged discussion and consultation. The affidavit evidence filed indicated general acceptance that the local Wiradjuri group responsible for Lake Cowal was the Condobolin Aborigines, or the Condo people. It also showed that there was a division between supporters of Ms Grant and Mr Williams amongst the Condo people. There was also evidence of four formal meetings, including two meetings of the Wiradjuri Council of Elders and a general meeting of Wiradjuri people funded by a prospective mining lessee in relation to the application area.

The nature of authorisation process

Mr Williams relied upon s. 251B(b) NTA, asserting that the evidence of the meetings failed to indicate notice was given to every member of the Wiradjuri People and that the resolutions passed were inadequate to confer the proper authority required by s. 61. Ms Grant relied upon s. 251B(a) NTA, asserting that her authority did not derive from the meetings. Rather, it came via her own initiation of a process of long consultation and discussion with elders and Wiradjuri people of the Condobolin area and, more generally, in an effort to achieve consensus in accordance with traditional Wiradjuri custom and tradition. Ms Grant tendered affidavit evidence as to these discussions and decisions.

Decision

The Honourable Justice Wilcox accepted that:

- there was a traditional decision-making process under the traditional laws and customs of the Wiradjuri People and that it was one of discussion between elders and heads of families;
- Ms Grant's unchallenged affidavit evidence was that she had obtained her authorisation to act through this traditional process — at [29] to [30].

His Honour concluded Ms Grant was authorised to make the claim in accordance with s. 251B(a) NTA, thus satisfying the requirements of s. 61 and, accordingly, dismissed the notice of motion — at [31] to [33].

Party status

Davis-Hurst v Minister for Land and Water Conservation NSW (2003) 198 ALR 315

per Branson J, 4 June 2003

Issue

Whether a person seeking to be joined as a respondent to a claimant application had an interest that may be affected by a determination in the proceedings as required under s. 84(5) of the *Native Title Act 1993* (Cwlth).

Background

The two claimant applications relevant to these proceedings were made by Patricia Davis-Hurst on behalf of the Kattang People of the Manning Valley over an area known as Saltwater. The person seeking to be joined to the proceedings, Keith Kemp, argued (among other things) that:

- the group represented by Ms Davis-Hurst was a 'cognitive illusion' and that there had been a failure to properly identify the traditional owners of Saltwater;
- while some or all of the Kattang people may be the traditional owners of Saltwater, this was because their ancestors were, like his, Pirripaayi people — at [11] to [15].

Mr Kemp indicated to the court that, if he became a party to the proceedings, then he would seek (among other things) to have the two claimant applications struck out. His concerns included that any determination in favour of Ms Davis-Hurst and her group would:

- give formal recognition to a version of history that does not recognise the Pirripaayi people as the traditional owners of Saltwater;
- give an unwarranted appearance of legitimacy to laws and customs that he claims may be of relatively recent origin;
- adversely affect his ability to share the knowledge he has acquired about the Pirripaayi people and his capacity to keep alive Pirripaayi language and customary laws — see [15] to [19].

The court considered that the issues raised by Mr Kemp revealed two underlying concerns that were relevant to the making of any determination of native title. The first was in relation to the identity of the persons making up the group holding the common or group rights comprising native title. The second related to the identification of the traditional laws and customs under which that title is held: see s. 225(a).

Her Honour Justice Branson noted that the nature of the 'interest' required to give a person the right to be joined as a party to native title proceedings need not be a proprietary interest but must be:

- greater than that of a member of the general public;
- genuine;
- not indirect, remote or lacking substance; and
- an interest that may be affected by any determination — at [6], quoting *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1 at 6 to 8.

Decision

Her Honour found that any impact a determination in the proceedings may have on Mr Kemp's interests in establishing and maintaining the integrity of his own research and disseminating his knowledge of Pirripaayi language and culture was too indirect to warrant joinder — at [26].

However his interest as a descendant of the Pirripaayi people in seeking to avoid a determination that discounted the traditional connection that he asserted his people had with Saltwater went to the heart of s. 225(a), which requires that a determination of native title must identify persons, or each group of

persons, holding the common or group rights comprising the native title. An interest of this kind can be clearly defined and is capable of being affected in a demonstrable way by a determination in relation to the relevant proceedings – at [27].

Her Honour ordered that Mr Kemp be joined as a respondent to the proceedings as it would no be in the interests of justice to refuse his application. However, in making that order, the court noted that is was regrettable that the application for joinder was determined long after the filing of the claimant applications and at a time when there were well advanced indigenous land use agreement negotiations taking place between the present parties — at [28].

Remitter proceedings

Western Australia v Ward [2003] FCAFC 124

per North J, 3 June 2003

Issue

This case relates to orders made to settle a new timetable of the steps to be taken prior to hearing, made necessary by a number of unforeseen events, including the need to reconstitute the Full Court bench and an inability of the parties to agree on a timetable.

Background

The decision in *Ward v State of Western Australia* (1998) 159 ALR 483 in relation to the Miriuwung and Gajerrong people's claimant application in the Kimberley region of Western Australia was appealed on various grounds to the Full Court of the Federal Court (see *State of Western Australia v Ward* (2000) 99 FCR 316). Leave was sought, and obtained, to appeal to the High Court against various findings of the Full Court. As part of the of the decision of the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1, a number of matters were remitted to the Full Court of the Federal Court.

The remitter has been the subject of a number of directions hearings, during which it became apparent that the proposed date for commencement of the hearing was not achievable. Therefore, the Honourable Justice North ordered the parties to prepare minutes of proposed orders, attempt to agree on a timetable of dates leading to trial and to consider mediation. However, agreement between the parties could not be reached — at [1] to [7].

Decision

North J made orders based upon the draft proposals filed by the State of Western Australia. His Honour indicated the court will be ready to hear any further evidence and the substance of the appeals in the Northern Territory lands in September/October 2003 and the substance of the appeals in the Western Australian lands, if required, in November 2003 or February 2004. The orders made, which are set out at [8], include separate referrals to a Deputy District Registrar of the Federal Court for mediation in relation to the area in Western Australia affected by the remittal and that in the Northern Territory.

Compulsory acquisition of UCL

Griffiths v Lands & Mining Tribunal [2003] NTSC 86

per Angel J, 31 July 2003

Issue

This decision is about an application brought on behalf of the Ngaliwurru and Nungali people under s. 45A of the *Lands Acquisition Act 1978* (NT) (LAA) seeking orders:

- setting aside a decision of the Minister for Lands, Planning and Environment (the Minister), to compulsorily acquire unalienated Crown land under the LAA; and
- restraining the Minister from acting on that decision.

Background

Three notices were issued under s. 32 of the LAA by the Minister, who sought to compulsorily acquire certain unalienated Crown lands (the lands) and 'all interests including native title rights and interests' therein. The plaintiffs, as registered native title claimants over the lands, objected to the acquisition. The objection was heard by the Lands and Resources Tribunal, which recommended that the Minister compulsorily acquire the land.

The plaintiffs made application to the Supreme Court of the Northern Territory, submitting (among other things) that:

- the Minister had no power to acquire native title rights and interests under the LAA for the purposes identified in the notices (essentially, in order to grant term leases for pastoral, agricultural or commercial purposes, some of which could later be surrendered in exchange for a freehold grant);
- to the extent that the LAA purported to permit the acquisition of native title for those purposes, it disadvantaged the native title holders as compared to those holding 'ordinary title' (freehold — see s. 253 of the NTA) and was, therefore, invalid to the extent that it was inconsistent with s. 24MA of the NTA, which deals with the future acts consisting of the acquisition of native title;
- the principle question for the court was whether the power of acquisition contained in the LAA is 'completely untrammelled as to purpose, or whether it is limited by reference to the objects and scope of the LAA and the limits on the Territory's Executive power to expropriate private interests in lands' as sourced in various Acts, such as the *Northern Territory (Self-Government) Act 1978* (Cwlth) and the *Racial Discrimination Act 1975* (Cwlth);
- as one of the purposes of the acquisition here was to extinguish native title in order to grant interests to third parties, the question was whether the LAA authorised the use of the power of acquisition 'for the purpose of depriving one citizen of rights of ownership [i.e. the native title holder] in order to confer interests on another', when the acquisition served no relevant purpose 'in relation to the Territory' — at [6] to [10].

The Minister relied upon s. 43 of the LAA which states that 'the Minister may acquire land under this Act for any purpose whatsoever' and argued that the purpose of the acquisition was irrelevant and power of acquisition under the LAA was untrammelled.

Compulsory acquisition only in accordance with the Crown Lands Act

According to his Honour Justice Angel, the first question to be asked was whether the Minister could compulsorily acquire unalienated Crown land. His Honour was of the view that notices in question seemed to 'demonstrate some confusion as to the nature of Crown lands, of compulsory acquisition, and the interplay between' the LAA and the *Crown Lands Act 1992* (NT) (CLA), going on to state that:

> Unalienated Crown land is land in which there is only radical title. This is not to be confused with beneficial ownership of the land… Beneficial ownership of an estate in unalienated Crown land can only be acquired by alienation in compliance with the *Crown Lands Act* (NT) — at [13] and [14].

The LAA was the means by which the Minister could acquire the *beneficial interest* of another, thereby extinguishing that interest and vesting the beneficial interest in the land acquired in the Territory 'freed and discharged of all interests'. In relation to unalienated Crown land, there were no interests apart from the Crown's radical title. As his Honour noted: 'One cannot acquire what one already has' and it would be pointless for the Crown to purport to acquire what is already Crown land as defined in s. 3 of the CLA (which encompasses both radical title and a beneficial interest in the Crown). As the land was already Crown land, the notice under the LAA could not be effective to vest that land in the Territory — at [14] to [18].

His Honour distinguished cases dealing with an acquisition of unalienated Crown land in a state or a territory by the Crown in right of the Commonwealth, as this was done under an express statutory power to acquire Crown lands — at [17].

Angel J summarised the position generally as being that, in the absence of an express power to do so, land in which the Crown has radical title or in which the Territory holds the only beneficial interest cannot be compulsorily acquired. Where there is an unregistered interest in Crown land that is *not* derived from the Crown (such as native title), the Crown may compulsorily acquire that interest but not the land in which that interest is held — at [23].

Decision

It was found that unalienated Crown lands may only be alienated in the manner prescribed under the CLA. In the absence of an express statutory power to acquire Crown land, the LAA cannot be used in the manner contemplated by the Minister in this case. Therefore, the notices of proposal for an acquisition were invalid — at [21].

The plaintiffs obtained judgment in their favour. Questions of the appropriate form of relief and costs remain to be resolved.

Determination of prescribed body corporate

Brown v Western Australia (No 2) [2003] FCA 556

per French J, 4 June 2003

Issue

Whether the body corporate nominated by the native title holders complied with the requirements of the NTA and the Native Title (Prescribed Body Corporate) Regulations 1999 (the Regulations).

Background

Section 55 of the NTA requires the Federal Court, at the time of determining that native title exists, to make a determination under either s. 56 (which deals with holding the native title on trust by a prescribed body corporate) or s. 57 (which deals with non-trust functions of prescribed bodies corporate). Section 59 provides for making regulations to prescribe the appropriate body corporate — see r. 4 of the Regulations.

Following a consent determination of native title recognising that the Kiwirrkurra People were the common law holders of native title to the determination area, the Tjamu Tjamu Aboriginal Corporation (Tjamu Tjamu) was nominated as the prescribed body corporate to hold native title on trust for the common law holders — see s. 56(2)(a).

The material before the court included:

- affidavit evidence from Jimmy Brown deposing (among other things) to the fact that he was authorised by the common law holders to nominate Tjamu Tjamu and describing the manner in which he came to be so authorised;
- a document evidencing the written consent of Tjamu Tjamu to act as trustee, as required by s. 56(2)(a);
- the certificate of incorporation of Tjamu Tjamu under the *Aboriginal Councils and Associations Act 1976* (Cwlth), the method of incorporation prescribed by the Regulations;
- the rules of Tjamu Tjamu;
- affidavit evidence from the native title holders' legal representative relating to meetings held to finalise the rules of the proposed corporation and to decide that the native title should be held in trust by Tjamu Tjamu. The evidence was that the motion proposing Tjamu Tjamu act as trustee for the common law holders was carried unanimously.

Membership clause

The membership clause of Tjamu Tjamu's Rules of Association provided that 'all adult Traditional Owners shall be eligible to be members of the

Association'. Rule 8, which dealt with eligibility for membership, defined a traditional owner 'in relation to Kiwirrkurra Land' as:

> A Kiwirrkurra person who, in accordance with Aboriginal law and tradition, has social, economic and spiritual affiliations with, and responsibilities for, the Kiwirrkurra Land or any part of them. A reference to a traditional owner *includes* a reference to a native title holder (emphasis added).

Paragraphs 4(2)(a) and (c) of the Regulations limit the membership of a prescribed body corporate to those who are determined to be native title holders.

Decision

The Honourable Justice French noted that the definition of 'traditional owner' in Rule 8 could be read as covering a class wider than that of the native title holders the subject of the determination. However, given the linkage of membership to social, economic and spiritual affiliation with, and responsibilities for, the Kiwirrkurra land in accordance with Aboriginal law and tradition, his Honour was satisfied that there was no case in which a traditional owner would be other than a native title holder as contemplated by the determination — [12].

To put the matter beyond doubt, French J recommended the definition of 'traditional owner' be amended to coincide with the class of native title holders in the determination. Notwithstanding his suggested amendment, French J was satisfied it was a body in respect of which he could make a determination under s. 56 — at [12] to [13].

James v Western Australia (No 2) [2003] FCA 731

per French J, 17 July 2003

Issue

Whether the body corporate nominated by the native title holders complied with the requirements of the NTA and the Native Title (Prescribed Body Corporate) Regulations 1999 (the Regulations).

Background

Section 55 of the NTA requires the Federal Court, at the time of determining that native title exists, to make a determination under either s. 56 (which deals with holding the native title on trust by a prescribed body corporate) or s. 57 (which deals with non-trust functions of prescribed bodies corporate). Section 59 provides for making regulations to prescribe the appropriate body corporate — see r. 4 of the Regulations.

Following a consent determination of native title recognising that the Martu People (along with, in relation to a particular area, the Ngurrara People) were the common law holders of native title in relation to the determination area, Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu) (the corporation) was nominated as the prescribed body corporate to hold native title on trust for the common law holders of native title in the determination area (i.e. both the Martu and Ngurrara people) — see s. 56(2)(a).

The nomination was made by Colin Peterson as the representative of the common law holders. Annexed to the nomination were:

- a document evidencing the written consent of the corporation to act as trustee, as required by s. 56(2)(a);
- the certificate of incorporation under the *Aboriginal Councils and Associations Act 1976* (Cwlth), the method of incorporation prescribed by the Regulations;
- a copy of the rules of the corporation; and

- an affidavit supporting the nomination from a solicitor engaged to assist the common law holders in developing and registering the corporation that also detailed the lengthy process of consultation within and between the Martu and Ngurrara people, according to traditional laws and customs, that led to the formation of the nominated corporation — see [4] to [10].

Decision

His Honour was satisfied the corporation complied with the NTA and Regulations in that:

- it was properly incorporated for the purpose of being the subject of either a s. 56 or s. 57 determination;
- its objects set out its purpose of becoming a registered native title body corporate;
- all members of the corporation are persons who are included in the native title determination as common law holders of native title;
- the membership clause in the rules does not allow for anyone other than a person who is in the class of native title holders defined in the determination of native title to become a member of the corporation — at [14] to [20].

His Honour noted that it would be desirable if the membership class of a prescribed body corporate be 'textually aligned precisely' with the definition of the native title holders in the relevant determination of native title. While this is not an express requirement, doing so would avoid any doubt as to compliance with the Regulations — at [16].

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 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 www.nntt.gov.au/futureact/Info.html.

Future act determinations

Townson Holdings Pty Ltd/Harrington-Smith and Ashwin/Western Australia, NNTT WF03/2, [2003] NNTTA 82

DP Sumner, 9 July 2003

Issue

Whether or not the grantee party had negotiated in good faith prior to making an application for a future act determination.

Background

A s. 29 notice relating to the grant two mining leases was issued in 1996. Negotiations conducted between the native title parties, the government party and the grantee party as required under s. 31(1)(b) ceased in 1997. In 2001, negotiations resumed but no agreement was reached. In January 2003, the grantee party made an application to the Tribunal under s. 75, pursuant to s. 35, for a future act determination under s. 38 in relation to the grant of the proposed mining leases. Negotiations continued, with the government party requesting mediation by the Tribunal under s. 31(3). Mediation took place between February and May 2002 but was terminated as there remained fundamental issues that could not be resolved — at [33] to [44].

Late challenge to jurisdiction

The Tribunal is not empowered (or has no jurisdiction) to make a future act determination if it is satisfied that the government or grantee party did not negotiate in good faith — at [7]. See also ss. 31(1)(b) and 36(2).

Shortly before the hearing of this matter, one of the native title parties submitted the grantee had failed to fulfil its obligation to negotiate in good faith and contended that the future act determination application should be dismissed on that basis. This raised a jurisdictional issue that would usually be dealt with much earlier in proceedings of this kind. The government party submitted that such a late challenge raised the question of whether there was a point at which the opportunity for raising a jurisdictional issue was no longer available — at [11].

While the Tribunal was of the view it was unsatisfactory to raise the question of a lack of good faith negotiations at this late stage with no adequate reason to explain the delay, the situation was novel. Reference was made to the discussion of the Tribunal's obligations in relation to jurisdiction found in *Anaconda Nickel Ltd & Ors v Western Australia* (2000) 165 FLR 116 at [21] to [69].

It was determined that, despite any inconvenience it may cause, the Tribunal usually has no alternative but to consider and resolve a challenge to its jurisdiction or authority, such as a failure by the grantee or government party to negotiate in good faith, whenever it is made before the Tribunal has made and delivered its determination in relation to the matter. The only possible exception noted was where a late challenge irreversibly prejudices another party — at [12] to [15].

After considering the native title party's contentions, the Tribunal held the grantee party had fulfilled its obligation to negotiate in good faith and, therefore, that the Tribunal had jurisdiction to conduct an inquiry and determine the matter.

Lack of evidence of effect on native title

In considering the s. 39 criteria, the Tribunal noted:

- the lack of evidence from the native title parties relevant to the criteria; and
- that current and historical mining and pastoral interests would have affected the manner in which the registered native title rights and interests are exercised.

Given the lack of particularity in the evidence, the Tribunal was unable to make findings on the particular effect on the proposed mining leases on the enjoyment of native title or any other s. 39(1) matters — at [83] to [95].

Payment into trust

The Tribunal determined that the lack of evidence as to the effect of the future act on native title meant there was no basis for imposing a trust condition — at [98]. On payment into trust, see *Anaconda Nickel Ltd/Western Australia/Thomas & Ors,* NNTT WF98/7, Hon. CJ Sumner, 19 March 1999.

Determination

The determination was made that the future acts could be done.

Strategic Minerals Corporation NL/Kynuna/Queensland, NNTT QF03/1 [2003] NNTTA 83

Hon. CJ Sumner, 9 July 2003.

Issues

What approach should the Tribunal take if a native title party asserts that the grantee party has not been honest or reasonable in s. 31(1)(b) negotiations and has, in fact, negotiated with the intention to induce the native title party to accept its offer by deceiving that party?

What obligations do the grantee party have in relation to supplying information about the proposed future act to the native title party during the negotiations?

Allegations of dishonesty

Dishonest or deceitful conduct, if established, would amount to bad faith in the subjective sense, in that the grantee party would not have conducted itself in an open and honest way during the negotiations as required — at [39].

Where an allegation of this kind is made, the Tribunal is of the view that the onus of establishing it would normally rest with the party making the allegation. It was noted that, when considering an allegation of dishonesty, the standard of proof is the civil standard (i.e. on the balance of probabilities). However, in applying that standard, the Tribunal must be conscious of the gravity of the allegations — at [40].

Provision of information to the native title party

The Tribunal was of the view that, if the information provided by the grantee party is insufficient to assess any impact on native title rights and interests, then this may impact on whether negotiations in good faith can occur. However, every case must be considered on its merits. The Tribunal noted that:

- it is 'desirable and indicative of good faith in negotiations' for a grantee party to keep a native title party up-to-date on relevant developments during the course of the

negotiations and to disclose any relevant new information to the native title party, such as the company's annual reports or reports to the Australian Stock Exchange;

- a failure to disclose relevant information or documents may amount to a failure to negotiate in good faith. For example, deliberately or inadvertently failing to disclose information that is in the sole possession of the grantee may provide such an indication;
- where the relevant information is publicly available, it is not unreasonable to expect representatives acting for the native title parties to search for that information — at [178] to [182].

Decision

Among other things, the Tribunal was not satisfied that the allegations of dishonesty or deceit had been established. Nor was it determined that the failure to provide certain publicly available information relevant to the proposed mine indicated a lack of bad faith.

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.
A wide range of information is also available online at www.nntt.gov.au

Native Title Hot Spots is prepared by the Legal Services unit of the National Native Title Tribunal.