Native Title Hot Spots

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Disclaimer

Recent Cases

New cases – Tribunal alert service

The Tribunal's library provides a bi-weekly service that alerts subscribers by email to unreported judgments and some other information dealing with native title and related issues. Hyperlinks are included. Subscribers will also be notified if and when judgments are reported. If you wish to subscribe, please email libraryperth@nntt.gov.au.

State of Queensland releases connection guide

The Native Title and Indigenous Land Services branch of Queensland's Department of Natural Resources and Mines recently released its new *Guide to Compiling a Connection Report for Native Title Claims in Queensland*. The introduction to the guide states that: 'The purpose of a connection report is to put before the State of Queensland key information used by the State to decide whether or not it is prepared to proceed towards a consent determination of native title'.

Public works and s. 47A

Erubam Le (Darnley Islanders) 1 v Queensland [2003] FCAFC 227

Black CJ, French and Cooper JJ, 14 October 2003

Issue

This case concerns two separate questions that were referred to the Full Court of the Federal Court under Order 29 Rule 2 of the Federal Court Rules, namely:

- whether native title has been extinguished by the construction or establishment of certain public works on land presently held in fee simple pursuant to a Deed of Grant in Trust (DOGIT); and
- if so, whether that extinguishment had to be disregarded by operation of s. 47A for all purposes under the *Native Title Act 1993* (Cwlth) (NTA).

In a unanimous decision, the Full Court decided (among other things) that the public works that were constructed or established before 24 December 1996 extinguished all native title to the area affected and that s. 47A did *not* apply. Therefore, the act of constructing or establishing these public works completely extinguished native title over the affected areas.

Background

The Erubam Le (Darnley Islanders) sought a determination of native title in respect of the island of Erub in the Torres Strait. The effect of certain works on native title was a 'sticking point' in reaching a proposed consent determination of native title. In order to break the deadlock, the applicants applied successfully to His Honour Justice Drummond under Order 29 Rule 2 of the Federal Court Rules, which provides that the court may make orders for 'the decision of any question separately from any other question, whether before or after any trial or further trial in the proceedings', for an order referring separate questions in respect of the impact of these works on native title to the Full Court for determination. The questions were referred in February 2003.

The area on which the works in question were situated was held in fee simple in trust 'for the benefit of Islander inhabitants' by the Erub Island Council (the council) pursuant to a DOGIT dated 17 October 1985. These works were (with the approximate date on which each was constructed or established in brackets):

- a windmill for the purposes of supplying water to residents (1977), a windmill, earth dam storage, reservoir and pipes (1985-1986), residential house (1993–94),

residential house (2000), reticulated sewerage scheme (2002); sport and recreation stadium (2002), all of which were the property of the council; and

- a state school (1988), where there was no lease of the area concerned to the state.

The questions

In summary, the questions were:

- putting to one side the operation of s. 47A of the NTA, whether the construction or establishment of the works in question extinguished native title in relation to the area affected by them; and

- if native title had been extinguished by the construction or establishment of any of these works, whether s. 47A mandated that such extinguishment must be disregarded for all purposes under the NTA, including for the purpose of making a determination of native title under s. 225.

Agreed facts

It is important to note that, for the purposes of dealing with the separate questions put to Black CJ, French and Cooper JJ, it was agreed that the works in question were:

- validly done – at [28]; and

- public works as defined in s. 253 of the NTA – at [6].

As a result, this case may be of limited precedent value and should, therefore, be treated with some caution. In this context, it is noteworthy that during the hearing, counsel for the applicants sought leave to withdraw their agreement that the works in question were public works as defined in the NTA. The court refused leave both because the application to withdraw was made so late in the proceedings and because granting leave would be to the detriment of the other parties who had acted on the understanding that this fact was agreed. In any case, the court was of the view that 'most of them fall indisputably within that definition' – at [6].

Q 1: Extinguishment of native title by the construction of the public works

As the High Court has emphasised (see *Western Australia v Ward* (2002) 191 ALR 1 and *Wilson v Anderson* (2002) 190 ALR 313), the starting point in any analysis in relation to the extinguishment of native title is the NTA and, in this case, its Queensland analogue, the *Native Title (Queensland) Act 1993* (Qld). As the latter adopts the provisions of the NTA in relation to acts that are attributable to the State of Queensland, the court chose to refer directly to the provisions of the NTA for the sake of convenience. However, the provisions of the Queensland analogue are the operative provisions.

Acts 'attributable' to the State of Queensland

The court accepted that the public works under consideration were all acts 'attributable to the State of Queensland' without any discussion of the issue. All bar one of the acts were done by, or on behalf of, the council. Section 239 provides that, in order for an act to be 'attributable' to the state, it must have been done either by the State of Queensland or by the council under a law of the State of Queensland. Whether or not the latter was the case was not discussed – at [19] but see [64].

Were the public works done pre-24 December 1996 previous exclusive possession acts?

An act is previous exclusive possession act if (among other things) it:

- consists of the construction or establishment of a public work where construction or establishment of the work commenced on or before 23 December 1996;

- is valid – as it was agreed that the acts in question were valid, no question as to why this was so arose for determination; and

- is not excluded from the definition of excluded previous exclusive possession act operation of s. 23B(9).

If the acts in question were previous exclusive possession acts, then the effect of them on native title was complete extinguishment – s. 23C(2).

Exclusions to the PEPA provisions

The applicants contended that the acts in question were not previous exclusive possession acts because s. 23B(9) applied to exclude them from the class of acts so defined. That subsection provides that an act is not a previous exclusive possession act if it is:

- the grant or vesting of any thing that is made or done by or under legislation that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders; or
- the grant or vesting of any thing expressly for the benefit of, or to or in a person to hold on trust expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; or
- the grant or vesting of any thing over particular land or waters, if at the time a thing covered by either of the preceding paragraphs is in effect in relation to the land or waters.

The applicants argued that the construction or establishment of a public work was a 'vesting' because the construction of a fixture vests title to that fixture in the owner of the freehold, which, in this case, was the council – at [31].

The court rejected this submission, saying that:

> The public work is neither 'granted' nor 'vested'. In truth, there is no change at all in the fee simple interest as such, even if the land becomes, as a practical matter, more valuable or more useful – at [32].

Their Honours supported their conclusion by referring to:

- the clear distinction drawn in the NTA between acts that are or consist of a grant or vesting and acts that consist of the construction or establishment of any public work;
- the definition of a public work in s. 253, which recognises that such works may become fixtures yet remain previous exclusive possession acts; and
- the fact that the approach contended by the applicants would create uncertainty since, in the context of ss. 23B(7) and (9), where the public work became a fixture, native title would not be extinguished but where it did not, native title would be extinguished – at [32] to [34].

The court also rejected an argument that s. 23D had any application in this case:

> The text of s 23D makes it clear that the section has no application to protect native title rights and interests from extinguishment by previous exclusive possession acts as provided for by s 23C; its only application is to protect reservations, conditions or rights and interests "other than native title rights and interests". Section 23D confirms that these other interests are not extinguished by previous exclusive possession acts, but it does not operate to restrict the extinguishment of native title rights and interests. The submission must therefore be rejected – at [36].

Conclusion on pre-24 December public works

Black CJ, French and Cooper JJ held that the public works that commenced to be constructed or established on or before 24 December 1996 were previous exclusive possession acts and completely extinguished native title – at [37].

Note that the court was not asked to and did not consider the operation of the extended definition of a public work found in s. 251D. Further, because it was agreed that the acts in question were valid, the court did not look to whether or not the construction or establishment of the works in question were past or intermediate period acts, which would be relevant to any question of compensation for extinguishment.

Did the public works done post 23 December 1996 extinguish native title?

As the answer to this question depended upon the nature of the act as defined in the NTA, the court dealt with each possible category in turn: past, intermediate and future act.

Extinguishment as a result of the effect of the validation of a past act

Most past acts occurred on or after the commencement of the *Racial Discrimination Act 1975* (Cwlth) on 31 October 1975 but before 1 January 1994, when the NTA commenced. However, in this case, the court had to determine whether the public works that were constructed or established after 23 December 1996 (when the previous exclusive possession act provisions cease to apply) were included in the definition of a 'past act' by operation of s. 228(9). This provision extends the definition of a past act to include certain acts that happened on or after 1 January 1994, where the act in question has a particular 'connection' with an act that happened before that date. If the public works in question here were past acts, then they would be category A past acts – see ss. 15, 228 and 229.

For the sake of the argument, the court assumed that native title existed in the relevant area at the time when the works in question were constructed or established, which satisfied the requirements of s. 228(9)(a).

Invalid to some extent but validated

For the public works in question to be past acts, they must have been acts that were 'invalid to any extent' but would have been valid to that extent if the native title did not exist at the time: s. 228(9)(a) and s. 228(2)(b). On this point, the court assumed 'for the sake of argument' that the construction of the public works in question was 'inconsistent with native title interests' and, implicitly, that this led to invalidity that was cured by the application of the past act provisions.

With respect, for the purposes of the past act provisions, it is not the fact that these acts created rights that were inconsistent with the native title that gives rise to the invalidity that is required in order to attract the past act provisions. Rather, it is the fact that, by operation of s. 10 of the RDA, the acts in question would have been invalid. Section 10 appears to have this effect only in circumstances where the statutory authority for doing the act in question allows for the 'uncompensated destruction' of native title rights and interests while leaving other titles intact. Therefore, it appears that while the creation of inconsistent non-native title rights is a necessary condition in defining a past act, it is not of itself sufficient. Acts creating inconsistent rights can be done after the RDA commenced without there being any question of the invalidity required to attract the past act provisions arising – see *Western Australia v Ward* (2002) 191 ALR 1 at [108]ff.

Connected to an earlier valid act relating to use for a particular purpose?

For the purposes of the analysis, the court assumed the DOGIT granted in 1985 was an 'earlier act' as defined in s. 228(9)(b). The question was then whether the grant of the DOGIT contained or conferred a:

> reservation, condition, permission or authority under which the whole or part of the land or waters to which the earlier act [the DOGIT] related was to be used at a later time for a *particular purpose* – see s. 228(9)(c), emphasis added.

The DOGIT, in part, stated that the 'grantee is to hold the said land in trust for the benefit of Islander inhabitants and for no other purpose whatsoever'. The court accepted that the phrase 'for the benefit of Islander inhabitants' was a 'purpose' – at [55],

The question then was whether there was a reservation etc. for a *particular* purpose within the meaning of s. 228(9)(c). The court held that the purpose of 'the benefit of Islander inhabitants' was not a 'particular' purpose in the sense contemplated by the NTA. It was emphasised that this conclusion was based on

the facts of the case in question, particularly the wording of the DOGIT itself – at [57].

The DOGIT contained a number of other reservations and conditions (e.g. in relation to minerals, petroleum, forest products, quarry material and public purposes). It was held that the construction or establishment of the public works in question was not done pursuant to any of those reservations or conditions and, therefore, s. 228(9)(d) did not apply – at [62].

The court also briefly discussed the provisions of the *Community Services (Torres Strait) Act 1984* (Qld), which conferred the power under which the public works were constructed by the council. The court held that that Act did not impose any relevant reservation etc. that the land be used for a particular purpose and thus s. 228(9)(c) did not apply – at [63] to [66].

Therefore, it was concluded that the acts in question were not category A past acts.

Intermediate period acts

Since the acts in question were done after 23 December 1996, they could not (by definition) be intermediate period acts – at [67] and see s. 232A.

Future acts other than intermediate period acts

In considering the application of the future act provisions, the court focussed on Subdivision J of Division 3 of Part 2 of the NTA, pursuant to which native title may be extinguished as the result of the doing of a future act covered by that subdivision. The court assumed, for the purposes of this analysis, that the construction or establishment of the public works in question were future acts – at [71] to [74], referring to s. 233(1).

The relevant provision in this case was s. 24JA(1)(d), which is similar to, but broader than, s. 228(9)(c) discussed above. It provides as follows:

> [T]he earlier act [the DOGIT] contained, made or conferred a reservation, proclamation, dedication, condition, permission or authority (the reservation) under which the whole or part of any land or waters was to be used for a particular purpose – emphasis added.

Essentially for the same reasons given above in relation to past acts, the court concluded that s. 24JA(1)(d) was not satisfied – at [77].

Assumptions in relation to future acts

In making the assumption that the acts in question were future acts, the court again used inconsistency as the touchstone for invalidity, when this does not (with respect) appear to be the correct analysis – see s. 233(1). The court also spoke of a future act being either 'valid' or 'validated'. Again, with respect, this does not appear to be the correct analysis. In most cases, a future act (other than an intermediate period act) is either valid when done because the conditions of the relevant subdivision of the future act regime are met or it is invalid. The fact that the doing of the act creates inconsistent rights is not relevant. If a future act (other than an intermediate period act) had been done invalidly, then it can only be validated under a registered indigenous land use agreement – see s. 24AA, s. 24OA and s. 233(1)(c).

Other future act provisions not considered

There was no discussion of the other subdivisions of the future act regime, such as Subdivision K, that may have been relevant at least to the construction of the reticulated sewerage scheme – see s. 24KA(1)(b)(ii). However, this may have been because the question before the court was whether or not the public works in question (which it was agreed were valid) extinguished native title. A future act covered by Subdivision K is one to which the non-extinguishment principle found in s. 238 applies. Therefore, it was not relevant to the question the court was asked. The only other subdivision of the future act regime that may have been relevant and pursuant to which native title may be extinguished is Subdivision M, which deals with compulsory acquisitions. However, it appears that this subdivision was not relevant in the circumstances of this case

both because there was nothing to indicate that any such acquisition had occurred and because it had been agreed that the acts in question was valid. Under Subdivision M, the latter could not be the case in the absence of the former.

Extinguishment at common law

The court was of the view that it was not necessary to consider the application of the common law test for extinguishment (the inconsistency of incidents test) because extinguishment brought about by the construction or establishment of a public work is now governed by the provisions of the NTA – at [78].

Conclusion on Q 1

Black CJ, French and Cooper JJ unanimously concluded that, in the circumstances of the questions put to it:

- the construction or establishment of public works before 24 December 1996 extinguished native title rights and interests in respect of the land on which they are situated; and

- the construction or establishment of public works after 23 December 1996 did not extinguished any native title rights and interests that might otherwise exist.

Q 2: Must extinguishment caused by pre-24 December 1996 public works be disregarded?

Section 47A is a special provision of the NTA that only operates in relation to, essentially, lands expressly held or granted for or on behalf of Aboriginal peoples or Torres Strait Islanders. It was agreed between the parties and 'clearly the case' that, as the grant made under the DOGIT resulted in the area concerned being held on trust expressly for the benefit of Torres Strait Islanders, s. 47A(2)(a) applied to the grant made by the DOGIT. Therefore, any extinguishment of native title that occurred by reason of that grant must be disregarded for all purposes under the NTA – at [82].

The question was whether s. 47A(2) applied to the construction or establishment of the public works in question here. If so, then all extinguishment brought about by the construction or establishment of those works would also have to be disregarded for all purposes under the NTA, including for the purposes of making a determination of native title under s. 225. The relevant provision was s. 47A(2)(b), which provides, among other things, that any extinguishment of native title brought about by the creation of 'any other prior interest' must be disregarded for all purposes under the NTA. In this case, the issue was whether or not the construction or establishment of a public work could be characterised as the 'creation of any other prior interest'.

Black CJ, French and Cooper JJ noted that:

> Taken in isolation, the definition of "interest" [in s. 253] extending, as it does, beyond legal and equitable interests to "any other right" in connection with land, might extend to the right that the owner of land has to deal with things that have become parts of the land such as dams, pumps, houses, pipes and other such things which, in this case, are in the nature of public works. It seems to us however that in the context of the Native Title Act such a consequential or derivative interest cannot fall within the definition, wide though it is, of "interest" and it certainly sits uncomfortably with the notion of "the creation of any other prior interest" for the purposes of s 47A(2)(b) – at [89]

However, the court was of the view that it did not need to resolve this question because it could not be said that the construction or establishment of the public works in question were 'properly to be characterised **as** "the creation of a prior interest" in the land'. Therefore, s. 47A(2)(b) did not apply – at [90], emphasis in original.

Conclusion on Q 2

It was unanimously decided that s. 47A(2) did not apply to the public works in question. Therefore, any extinguishment brought about

by the construction or establishment of public works prior to 24 December 1996 was *not* to be disregarded under the NTA.

Comment

The referral of separate questions to the court was effectively by way of a stated case. As noted above, certain assumptions were made to facilitate this process and the analysis of the questions put. They were:

- the acts in question were valid;
- they were attributable to the State of Queensland (see s. 239);
- the acts affected native title.

These assumptions affected the conclusions reached. For example, there was no need to conduct any analysis of whether the acts in question 'affected' native title (a requirement under the definition of a future act found in s. 233) to any greater degree than did the grant made under the DOGIT. While that would not have affected the conclusion in relation to pre-24 December 1996 public works, it may have rendered the post-23 December 1996 analysis unnecessary. Similarly, if any of the acts in question could not be characterised as 'acts attributable' to the state, then they would not have been previous exclusive possession acts because of s. 19 of the *Native Title (Queensland) Act 1993* and s. 23E of the NTA. While this is unlikely in this case, in another case, such an analysis would need to be undertaken.

In applying the NTA in this case, the court was assessing how extinguishment could arise on the agreed facts. As noted, the result was that it was unnecessary to look at other future act provisions in relation to the post-24 December 1996 acts where the non-extinguishment principle would apply, for example s. 24KA(4). It was also unnecessary to resolve the question of whether the acts in question, if future acts, were done validly because it was agreed, for the purposes of this case, that the acts in question were valid. (An invalid future act cannot extinguish native title.) Therefore, as noted above, in terms of precedent value, the case should be treated with some caution except in so far as it relates to the application of s. 47A to valid public works.

Special leave sought

On 10 November, an application for special leave to appeal to the High Court against this decision was made on behalf of the Erubam Le (Darnley Islanders).

Application for separate question on s. 47B rejected

Griffiths v Northern Territory of Australia [2003] FCA 1177

per Mansfield J, 31 October 2003

Issue

An application was made to the Federal Court to have it determine, as a separate question under Order 29 Rule 2 of the Federal Court Rules (FCR), whether s. 47B of the NTA applied to a particular area in Timber Creek so that any extinguishment that had occurred in relation to that area had to be disregarded for all purposes under the NTA. In declining to determine this question, the court gave some useful guidance as to the principles applying in relation to applications made under Order 29 Rule 2

Background

The applicants claimed 'exclusive' native title rights and interests over all of the vacant Crown land in Timber Creek. That land had previously been subject to a commonage reserve and a pastoral lease, both of which may have extinguished certain native title rights and interests if they existed at the time the reserve was created or the lease granted.

Application of s. 47B

Subsection 47B(2) of the NTA provides that:

> For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by the creation of any prior interest in relation to the area must be disregarded.

However, s. 47B has a limited application. It only applies if, when a claimant application is made in relation to the area, one or more members of the native title claim group occupied the area and the area was not:

- covered by a freehold estate or a lease; or
- covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a state or a territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose; or
- subject to a resumption process, as defined in s. 47B(5)(b).

The town boundary of Timber Creek had been gazetted. Without determining the issue, the court noted that this gave rise to the issue of the area was 'covered by a proclamation…made or conferred by the Crown in any capacity under which the land is used for public purposes or for a particular purpose'.

Section 47B has been applied to land within the Alice Springs town boundary: *Hayes v Northern Territory* (1999) 97 FCR 32 at [162]–[168]. However, in *Daniel v State of Western Australia* [2003] FCA 666, Nicholson J found that s. 47B did not apply to the Karratha townsite area both because that area was covered by a temporary reserve and because it was:

> "…covered by a… proclamation, [and/or] dedication… made or conferred by the Crown in any capacity… under which the whole… of the land… in the area is to be used for public purposes or for a particular purpose." The original declaration of the…townsite was made by the Governor…who is "the Crown in any capacity". The boundaries of the townsite were defined…and set apart as town and suburban lands…which constitutes a proclamation or dedication. A townsite is a public purpose, as well as a particular purpose – at [970] to [971].

In this case, the applicants contended that the decision in *Daniel* was either specific to certain land in Western Australia or was in error and that the proclamation excising the Timber Creek from a commonage reserve did not have the effect that the land 'be used for public purposes or for a particular purpose'. The Northern Territory argued that it was inappropriate to determine the proposed preliminary question.

Other proceedings

The claimant applications in this case were made in response to notice of a proposal to compulsorily acquire the area given under s. 32 of the *Lands Acquisition Act (NT)* (the LAA). The compulsory acquisition went ahead but the applicants successfully challenged the validity of the acquisition notice in the Supreme Court of the Northern Territory: see *Griffiths v Lands and Mining Tribunal* [2003] NTSC 86 per Angel J, which was summarised in *Native Title Hots Spots* Issue 6. That decision is subject to an appeal to the Full Court of the Supreme Court.

Separate questions

Order 29 r 2(a) of the FCR provides that the court may make orders for 'the decision of any question separately from any other question, whether before or after any trial or further trial in the proceedings', which includes any question of law or fact in issue in the proceeding – see O 29 r (1). His Honour Justice Mansfield identified the following matters as being relevant to the exercise of the discretion available under O 29 r 2:

- while there are circumstances when it will be in the interests of justice for the separate trial of a question in a proceeding, '[t]here should be some identifiable benefit in directing the separate trial of a question;
- generally, the question should be one that, if determined, would or may make a substantive hearing unnecessary or lead to the real prospect of informal resolution of the entire proceeding;
- it is unlikely that a separate trial of a question would be ordered in cases where there was potential overlap of factual issues

on separate questions arising in the proceeding;

- unless it leads to an overall resolution of the proceeding however answered, resolution of a separate question in a proceeding may delay the proceedings if the parties pursue appeal rights;
- where the separate question sought to be tried was (as in this case) a question of law, it was 'desirable that facts upon which that question of law is to be tried should be clearly and definitively established';
- there was a risk that the preliminary trial of the issue would become pointless, or may need to be qualified if the factual foundation upon which a separate question was determined shifted or was expanded as a result of evidence later given at the trial;
- it was also undesirable that the separate trial of a question should be ordered where the background and factual matrix on which the question arises is not agreed or might not be fully determined – at [4] to [8].

Decision

Mansfield J decided that it was inappropriate to make the order sought because:

- the resolution of the question would not lead to the determination of the proceedings. The nature of native title rights and interests which may exist in relation to the area would still need to be determined and there may be other issues as to extinguishment;
- if the question was determined consistently with Daniel, the case would proceed in any event and the benefit of having the issue determined at this point 'would not be substantial';
- if the point was so significant, it would be unlikely that the determination of the issue by a single judge would not be subjected to appeal proceedings that could take a considerable time to resolve;
- this case was likely to be listed for hearing soon. Dealing with the separate question now might cause considerable delay in allocating it for listing, particularly if appeal proceedings were taken;
- resolution of the question would not make any significant impact upon the preparation of the matter for trial;
- the basis upon which the application was made was insufficiently clear to warrant the separate question being tried at this stage. There was no agreement between the parties as to the facts upon which the question should be determined;
- if the appeal in the Supreme Court was successful and restored the validity of the compulsory acquisition process, that might put an end to the claimant applications in a practical sense:

  [T]he process of having determined the validity of the acquisitions should be permitted to proceed before the trial of issues in this matter, except for its general preparation towards a hearing. If the proposed acquisitions are held to be valid, the question which is now sought to be asked will become academic – at [22] to [25].

Kenyon v Northern Territory of Australia [2003] FCA 1178

per Mansfield J, 31 October 2003

Issue

The Northern Territory sought an order under Order 29 Rule 2 of the Federal Court Rules to have a preliminary question be determined before the hearing and determination of the substantive application. As in *Griffiths*, summarised above, the question was whether or not s. 47B applied to the land subject of the substantive application.

Background

The facts and circumstances of this case are, in relevant respects, the same as in *Griffiths*. The claimant application in this case was made

over land in the town of Adelaide River that had been compulsorily acquired by a notice of acquisition given under the LAA. Counsel for the Territory acknowledged that, subject to Angel J's decision in *Griffiths v Lands and Mining Tribunal* [2003] NTSC 86 being reversed by the Full Court of the Supreme Court, it applied to the purported acquisition in this case.

Section 47B

The question sought to be separately tried was whether the proclamation of the town of Adelaide River in 1975 was a proclamation made by the Crown under which the whole of the land is to be used for public purposes or for a particular purpose. If it was, then s. 47B would not apply.

Decision

Manfield J declined to allow the separate question to be determined, essentially for many of the same reasons to those given in *Griffith* above. However, in this case, there was ongoing mediation between the applicants and the respondent through the Tribunal. While it was not clear how that mediation is progressing, his Honour was of the view that:

> [I]t may be undesirable for the Court to take steps to have issues determined which may adversely impact upon the prospects of resolution of such a mediation, at least where resolution of such issues may itself be a prolonged process including appeal processes – at [9].

Vesting of Lake Victoria was a previous exclusive possession act

Lawson v Minister for Land & Water Conservation NSW [2003] FCA 1127

per Whitlam J, 17 October 2003

Issue

This was a case in which a single 'knock-out' question was asked in advance of the hearing of the matter. The question was whether the vesting of the area known as Lake Victoria for an estate in fee simple in the State of South Australia by gazettal was a 'previous exclusive possession act' attributable to the State of New South Wales, as defined in s. 20 of the *Native Title (New South Wales) Act 1994* (NSW) (the NSW Act). If it was, then native title to that area was wholly extinguished.

Background

A claimant application and a compensation application, both made under the old Act on behalf of the Barkandji People, were said to cover 'land and water known as Lake Victoria'. The questions put to the court as separate questions for decision related to:

- the identification of the precise area covered by the applications;
- the characterisation of certain 'acts' attributable to New South Wales, in particular, did the appropriation, resumption and vesting of the area covered by the applications involve the doing of a 'previous exclusive possession act' as defined in s. 20 of the NSW Act; and
- the effect of s. 20 of the NSW Act.

Area covered by the applications

The written description of the area covered by the application as 'land and water known as Lake Victoria in the Parishes of Wangumma, Walkminga, Wannawanna, Victoria and Warpa in the County of Tara, New South Wales' was 'not very informative'. Two maps were attached to the application, one of which was a drawing made in 1984 by the South Australian Engineering and Water Supply Department depicting the general layout of the Lake Victoria Storage. The claimants acknowledged that the area covered by the application was that vested in the State of South Australia in fee simple pursuant to a notice in the New South Wales Government Gazette, No. 166 dated 1 December 1922 (the gazette notice).

Previous exclusive possession act

All of the parties accepted that the effect of the publication of the gazette notice was to vest the area taken in the State of South Australia for

an estate in fee simple. However, New South Wales Native Title Services Limited (NTS) argued that the vesting was not a previous exclusive possession act because it conferred only a radical title and the resumptions were qualified by the reservation of certain rights under an agreement. Among other things, his Honour Justice Whitlam found that:

> This submission pays no regard to the terms of s 23B of the Act (NTA) and completely fails to come to grips with the central proposition…that the vesting of an estate in fee simple in the Crown will extinguish any native title over the subject land – at [21], referring to *Western Australia v Ward* (2002) 191 ALR 1 at [204].

Whitlam J was of the view that it was 'perfectly plain' that the gazette notice satisfied the three requirements set out in s. 23B(2)(a), (b) and (c)(ii) of NTA, namely:

- it was valid;
- it took place on or before 23 December 1996 (in fact, in 1922); and
- it consisted of the grant or vesting of a freehold estate – at [22].

The court noted that the exception found in s. 23B(9C) in relation to Crown to Crown grants did not apply because the gazette notice was:

> valid and effective to extinguish native title at common law, that is, 'apart from this Act'. The Gazette notification was thus a 'previous exclusive possession act' within the meaning of s 23B – at [22].

Decision

His Honour held that:

- the area covered by the applications was the area notified in gazette notice on 1 December 1922 which appropriated and resumed the area under the *Public Works Act 1912* (NSW) for the Lake Victoria works;
- the gazette notice was a previous exclusive possession act within s. 23B NTA and extinguished native title in the claim area; and
- there was no utility in answering the other questions stated; and
- no compensation was payable under the NTA for that extinguishment – at [22] to [25] and proposed answer 12 in NG6167 of 1998 (the compensation application).

The matter was stood over to a date when Whitlam J will make orders to give effect to his decision. The court noted that, while this matter has been dealt with in the absence of the applicants:

> The future conduct of these proceedings will doubtless be affected by the fact that the answers seem to provide…a 'knock-out' point. Accordingly consideration will need to be given to the involvement of the applicants in their disposition – at [26].

Reserving separate questions

His Honour noted that the reserving of questions for separate decision may pose problems where findings of fact establish the ambit of any native title rights and interests have not been made. However, the court noted that it is possible to determine issues of extinguishment in advance of such findings where, as in this case, the extinguishing act relied upon is the grant of an estate in fee simple – at [26], referring to the majority of the High Court in *Wilson v Anderson* (2002) 190 ALR 313 at [36].

Appeal in relation to registration of an ILUA

Murray v Registrar of the National Native Title Tribunal [2003] FCAFC 220

per Spender, Branson and North JJ, 24 September 2003

Issue

The issue before the court was whether an agreement was an Indigenous Land Use Agreement (ILUA), as defined by s. 24CA of the NTA. To be an ILUA, the agreement must (among other things) satisfy s. 24CD.

Subsection 24CD(1) requires that all the persons in the 'native title group' must be parties to the ILUA.

In this case, the mandatory parties were 'any person claiming to hold native title' in relation to the area (s. 24CD(3)(a)). Therefore, the major issue before the court was whether the word 'any' in that paragraph required that *all* persons claiming to hold native in relation to the area must be a party to the ILUA or only that any *one or more* persons claiming to hold native title in relation to the area must be a party to the agreement.

Background

This is an appeal on a limited basis from the decision of his Honour Justice Marshall handed down on 20 December 2002 in *Murray v Registrar of the National Native Title Tribunal* [2002] FCA 1598. A summary of major aspects of that decision is provided in *Native Title Hot Spots* Issue 4.

The relevant provisions in defining the mandatory parties to the ILUA in this case were:

- *all* persons in the 'native title group' – as defined in subsection (2) or (3) – in relation to the area must be parties to the agreement – s. 24CD(1), emphasis added;
- as subsection (2) did not apply, the **native title group** was to consist of one or more of the following:
  - *any* person who claims to hold native title in relation to land or waters in the area;
  - *any* representative Aboriginal/Torres Strait Islander body for the area – s. 24CD(3)(a) and (b), emphasis added.

No representative body was a party to the ILUA.

The appellant, Sonia Murray, submitted that s. 24CD(3)(a), when read in conjunction with s. 24CD(1), required that all persons who claim to hold native title in relation to land or waters in the area must be parties to the agreement if they have not authorised a party to enter into the agreement pursuant to s. 24CG(3)(b). Therefore, it was argued that Ms Murray should have been a party to the ILUA because she was a person claiming to hold native title in relation to the area and she had not authorised a party to enter into the agreement pursuant to s. 24CG(3)(b). Since she was not a party to the agreement, it was submitted that the agreement was not an ILUA and should not have been registered.

The second and third respondents (the developer and the native title party to the agreement respectively) contended that s. 24CD(1) did not require that all persons who claim to hold native title in relation to land or waters in the area be parties to the agreement. Rather, it was submitted, that *all* 'persons in the native title group' within the meaning of s. 24CD(1), meant that all persons in that group may, in accordance with s. 24CD(3), be constituted of one or more of the persons or bodies identified in s. 24CD(3)(a) and (b). Further, since other persons claiming to hold native title were parties to the ILUA, then there was no requirement that the appellant also be a party.

The court thought it unlikely that s. 24CD(3) required that *all* persons claiming to hold native title in the agreement area must be parties to the ILUA:

> As Division 3 [of the NTA] implicitly recognises…it may be impossible in a practical sense to identify all persons who hold, or may hold, native title in relation to land or waters in an area. At least equivalent practical difficulties, and possibly greater practical difficulties, would attend any attempt to identify every person who claims to hold native title…in an area. It seems for this reason unlikely that s 24CD(3) was intended to require the identification of all such persons. Were s 24CD construed so as to require the identifying and naming of all such persons, the consequence would seem to be that a

late discovery of a previously unidentified claimant could deprive even a registered agreement of its character as an indigenous land use agreement (see s 24CA). This inconvenient result should not lightly be found to have been intended by the legislature – at [18].

It was held that, when s. 24CD is read as a whole, it is clear that s. 24CD(3) does not require the identification of all persons who claim to hold native title in relation to land or waters in an area – at [19] and [20].

Decision

The Full Court unanimously came to the conclusion that, on the proper construction of s. 24CD of the Act, if subsection (2) does not apply, then the native title group consists of:

- any one or more person or persons who claim to hold native title in relation to land or waters in the area;
- any one or more representative Aboriginal/Torres Strait Islander body or bodies for the area; or
- any one or more person or persons who claims to hold native title in relation to land or waters in the area together with any one or more representative Aboriginal/Torres Strait Islander body or bodies for the area – at [29].

As a result, the appeal was dismissed with costs.

Strike-out applications

Wilkes v State of Western Australia [2003] FCA 1140

per Wilcox J, 8 October 2003

Issue

This decision deals with an application under s. 84C of the NTA and Order 20 rule 2(1) of the Federal Court Rules (FCR) to strike out two claimant applications on the basis that the applicants were not the traditional owners of the area the subject of the application (application area).

Background

In bringing the strike-out application, Mr Christopher Bodney asserted that his family, being the last remaining persons in the Aboriginal societies known as the Ballarruk and Didjarruk Peoples, were the traditional owners of the application area. Mr Bodney submitted that the application should not be allowed to proceed and would inevitably fail as the applicants were not associated with the traditional owners of the application area. Mr Bodney did not suggest that the application failed to comply with the NTA.

Decision

His Honour Justice Wilcox accepted that Mr Bodney's opinion was genuinely held but stated that he could not act on the basis of that opinion, whether it be well-founded or not, in considering a strike-out application. In finding that he was not satisfied that there was any basis on which it could be said that the application did not comply with s. 61 or s. 62 of the NTA, his Honour noted that whether the application would succeed was a matter to be resolved after the evidence is complete and submissions have been made. It was held that Order 20 rule 2(1) of the FCR did not apply as, even though the application may ultimately fail, it was not possible to say that the proceeding was frivolous, vexatious or an abuse of process – at [9] to [11]. For these reasons, the strike-out application was dismissed.

Bodney v Western Australia [2003] FCA 890

per Wilcox J, 25 August 2003

Issue

The Federal Court was asked to strike out five claimant applications (the Bodney applications) on the basis that those applications did not comply with the requirements of s. 61 of the NTA.

Background

Three of the Bodney applications were made under the old Act and were unamended (the old Act applications). The remaining two

Bodney applications, although filed under the old Act, were amended under the new Act (the new Act applications). His Honour Justice Wilcox applied the rule stated in *Quall v Risk* [2001] FCA 378 at [65], which requires that the question of compliance with s. 61 is to be determined by reference to the terms of the new Act (if an application was amended after the new Act commenced).

The strike-out applications were brought by the applicants in what are commonly called the Combined Metro applications. These claimant applications are located within or near the Perth metropolitan area and overlap the Bodney applications. At the time of the hearing of the strike-out applications, considerable evidence concerning both the Bodney and Combined Metro applications had been heard.

The old Act applications

Subsection 61(3) of the old Act required that an application made by a person or persons claiming to hold native title with others 'must describe or otherwise identify those others'. The old Act Bodney applications variously identified the native title group as 'Ballaruk People–Bodney Family Group' or 'Ballaruk Family Group'.

The new Act applications

It was clear from the evidence that a larger group, namely the Ballarruk and Didjarruk people, held the relevant native title rights and interests at sovereignty. The new Act Bodney applications were made on behalf of the biological descendants of Mr Bodney's parents, a sub-group of the larger group. His Honour likened the situation in this case to that considered by His Honour Justice O'Loughlin in *Risk v National Native Title Tribunal* [2000] FCA 1589 – at [36] to [38].

Wilcox J decided the matter on the lack of requisite authorisation by that subgroup as provided for in the two limbs of s. 251B. Mr Bodney relied on both limbs. His Honour found on the evidence that there was no assertion of the existence of any traditional process of decision-making among the descendants of Mr Bodney's parents and so s. 251B(a) was not applicable. Nor was there satisfactory evidence as to the representative nature of a meeting Mr Bodney asserted was held to confirm his authority so as to meet the requirements of s. 251B(b) – at [41] and [42].

Decision

In relation to the old Act applications, his Honour found that the descriptions of the claim group, absent further explanation, did not meaningfully describe or identify the people who fell within that group. They were 'uninformative'. Therefore, it was held that they did not comply with s. 61(3) of the old Act. In relation to the new Act applications, his Honour concluded that they did not comply with the relevant requirements of s. 61 of the new Act and that the situation could not be cured by further evidence because 'the deficiencies are contained in the applications themselves' – at [19] to [21]and [46]. As a result, all five Bodney applications were dismissed.

The sub-group issue

Wilcox J did not think it necessary to express a concluded view on whether it is possible for a person to make a claimant application on behalf of himself or herself alone, or a small group, in respect of rights and interests that are held by a wider group – at [41].

However, his Honour made some observations on the implications arising from the view taken by O'Loughlin J in *Tilmouth v Northern Territory* [2001] FCA 820; 109 FCR 240 and Mansfield J in *Landers v South Australia* [2003] FCA 264 (summarised in *Native Title Hot Spots* Issue 5) to the effect that s. 61(1) does not permit the making of a claim by a subgroup of the 'real' native title claim group. In his Honour's opinion, if such a view is correct:

- it would be extremely difficult for a claimant application to succeed where the native title claim group is limited to descendants of a couple who are removed only a generation or two from the present;

- it effectively gives a veto right to any significant body of members of a group that allegedly holds native title rights and interests that and does not wish to support the claim of a particular putative applicant;

- it is difficult to reconcile these outcomes with the reference in s. 223(1) of the Act to 'individual' native title rights and interests – at [39] to [40]. (The reference in s. 223(1) appears to a reference to *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 63, where Brennan J (as he was then) referred to 'the native titles [sic] claimed by the Meriam people – communally, by group or individually'. If so, then s. 223(1) is a reference to the rights that an individual may have by virtue of being a member of a wider group.)

Application to vacate on basis of lack of representation

Harrington-Smith v Western Australia (No 6) [2003] FCA 663

per Lindgren J, 26 June 2003

Issue

The applicants sought to vacate programming orders for the fourth and final tranche of hearing dates and for the hearing to be adjourned 'until further order of the Court'. Most respondents opposed the motion. The issue was whether a complex case that had significant implications for other proceedings and that was already well advanced in hearing should continue to a conclusion if the applicants faced the prospect of being left without a legal representative due to a lack of funding.

Background

Both the applicant for the 'Wongatha People' and the applicants in four overlapping claimant applications were represented by the Goldfields Land and Sea Council (GLSC). These applications are not in 'competition' with each other. However, a further four overlapping claims were in 'competition'. His Honour Justice Lindgren is hearing the Wongatha application along with the others mentioned to the extent of their overlap with the Wongatha application, as required under s. 67 of the NTA.

This proceeding is the first in the so-called 'Goldfields cases'. The Wongatha People are said to be part of the 'Western Desert bloc'. Parts of the area in question have been the subject of numerous claimant applications since 1994 and many hundreds of right to negotiate matters.

The Wongatha application was chosen to be heard first both because of the numerous interests involved and because of its likely precedent value in relation to other claimant applications in the area. The proceeding had already occupied approximately 65 hearing days and considerable oral and documentary evidence had been given. The fourth and final part of the hearing was fixed for six weeks commencing 4 August 2003.

The GLSC had relied exclusively upon Commonwealth funding through the Aboriginal and Torres Strait Islanders Commission (ATSIC) under s. 203B and s. 203BB of the *Native Title Act 1993* (Cwlth).

The Wongatha applicant submitted that funding from ATSIC for further legal representation in the proceeding was not available at present. The GLSC presented extensive affidavit evidence to that effect. ATSIC was assessing an application for further funding at the time of the hearing of this application to vacate. A decision was expected only one working day before the scheduled resumption of the hearing – at [12] to [31].

Points in favour of an indefinite adjournment

Lindgren J noted that, in the event of the matter proceeding without ATSIC funding, the applicants would be forced, through no fault of their own, to become self-represented litigants. This would be unsatisfactory, given the complex nature of the case – at [32].

Points against an indefinite adjournment

On the other hand, his Honour noted that if the orders sought were made:

- the applications would 'hang over the heads' of all other parties and the applications of the four native title respondents would be at a standstill;
- the great difficulty in obtaining another bloc of six weeks for further hearing dates would mean, when time reserved for judgment was included, that at the very least there would be no decision before 2005. No litigation 'should linger on in that way';
- the longer it takes to finalise the case, the greater the risk that witnesses will cease to be available;
- other native title applications in the Western Australian Goldfields are dependent on the conclusion of this proceeding; and
- there would remain great 'uncertainty' as to whether and where native title exists in the application area, the content of that native title and who holds it. This would have implications for the right to negotiate regime and other future act processes – at [34] to [41].

Extent of disadvantage to the applicants if they were unrepresented

His Honour analysed the extent of possible disadvantage as follows:

- the voluminous tenure documents to be tendered by the state in relation to extinguishment of native title could be analysed whenever legal representation was obtained in the future;
- the applicants would not be 'greatly disadvantaged' during the conclusion to the cross-examination of three Indigenous witnesses;
- it was 'difficult to believe' ATSIC would decline to fund the attendance of the applicant's expert witnesses; and
- the 'hot tub' method of giving expert evidence adopted in this matter would still enable the applicant's expert witnesses to give useful evidence.

Cross-examination of witnesses by the applicant on extinguishment issues was more problematical. However, his Honour said he would ensure what clarity in testimony he could, but hoped ATSIC funding would come to the rescue – at [43] to [47].

Decision

The notice of motion was dismissed with his Honour noting that it was best that the hearing proceed and problems be overcome as they arose, with the court taking a more interventionist approach. Lindgren J again urged the parties to consider mediation.

Objections to expert evidence

Harrington-Smith v Western Australia (No 7) [2003] FCA 893

per Lindgren J, 20 August 2003

Issue

The court was faced with a difficult case management problem – how to manage 1426 objections to various aspects of 30 separate expert reports contained in 35 volumes, written by fifteen separate expert witnesses, within the close timetable of the closing stages of a long and complex native title proceeding.

Background

See *Harrington-Smith v Western Australia (No 6) [2003]* FCA 663, which is summarised above.

Consideration of expert evidentiary issues

His Honour Justice Lindgren decided to indicate the principles that would govern the court's approach to the objections and to direct the parties to identify any objections on which they consider rulings to be necessary. His Honour asked the parties to consider his proposal that the experts' reports be 'subsequently admitted (when adopted by their authors in the witness box) on the basis that all objections notified and

not ruled upon will be taken into account by me as going to weight' – at [5].

Principles of evidence

Lindgren J indicated that he would not exercise the discretion given to him under s. 82(1) of the NTA and so the objections fell to be determined in accordance with the rules of evidence – at [6] to [15].

Expert reports

His Honour gave some useful guidance on the preparation of the expert reports, which, in summary, was that:

- lawyers should be involved in relation to the form in which expert reports are written in order to ensure that the legal tests in relation to the admissibility of evidence are addressed. It is not the law that admissibility is attracted by nothing more than writing a report in accordance with the conventions of the expert's field of scholarship;
- expert reports must clearly expose the reasoning leading to the opinion arrived at;
- the expert reports must distinguish between the assumed facts on which an expert's opinion is based and the opinion itself;
- the format of the reports in this matter made it difficult to apply the principles of s. 79 of the *Evidence Act 1995* (Cwlth) so as to determine whether or not an opinion is based on 'specialised knowledge, study or experience':

  Substantial parts of them can be described as undifferentiated combinations of speculation, summary description of facts, opinion,…hearsay, unsourced assertion and sweeping generalisation;
- each paragraph of the report should be numbered, derived statements should be adequately sourced and a careful outline of the witness's field of specialised knowledge should be included – at [19] to [32].

Some of the anthropologists' reports contained things the anthropologists were told by other, often unidentified, sources. Lindgren J adopted the approach of His Honour Justice Cooper in *Lardil v State of Queensland* [2000] FCA 1548 and took into account the hearsay nature of the evidence as going to its weight as evidence of the facts intended to be asserted by the representations – at [33] to [39].

In relation to historians' reports, 'the distinction between the analysis, synthesis and summary of factual…material on the one hand and the drawing of inferences on the other, can be difficult'. These reports raised the 'question as to how much of them is admissible as evidence of expert opinion' as distinct from submissions as to the interpretation the court should place on historical data – at [40] and [42].

Decision

The court directed that all parties review their objections to the experts' reports prior to the commencement of the giving of expert evidence in the light of the principles outlined. Eventually, 184 objections were pressed. Lindgren J took some ten hours to decide the objections and three hours to give rulings on them – at [5] and [43] to [47].

Authorisation of a claimant application

Walker v Minister for Land & Water Conservation (NSW) [2003] FCA 947

per Hely J, 10 September 2003

Issue

This decision deals with objections to an application to amend a claimant application lodged prior to the 1998 amendments to the (NTA) (i.e. under the old Act). The issue was whether authorisation of amendments by a potentially narrower native title claim group were fatal to the formal validity of the amendment application.

Background

On 27 November 1996, a claimant application was lodged with the National Native Title Tribunal by Della Laurie Walker and Joyce

Caroline Clague (nee Mercy) on behalf of the Yaegl, Bundjalung and Gumbaynggirr people in which native title was said to be held by all members of the Yaegl, Bundjalung and Gumbanyggirr peoples.

As this application was made prior to the 1998 amendments, there was no requirement that the applicant have the authority of a native title claim group before making an application on behalf of that group.

The NSW Farmers Association and the State Minister for Land and Water Conservation (NSW) objected to three of the proposed nine amendments. The objections related to amendments to:

- clarify on whose behalf the application was brought;
- clarify the manner in which the 'applicant's' were authorised to make the claim; and
- add 'five further applicants'.

The basis for the objections was that the proposed amendments changed the description of the native title claim group by eliminating references to the Bundjalung and Gumbaynggirr People without that change being authorised by all those on whose behalf the original application was made. It was argued that authorisation by those who would form the new and more restricted native title claim group was insufficient.

Schedule R of the amendment application provided that:

- those named as the applicant were members of the native title claim group and were authorised to make the application and to deal with matters arising in relation to it, by all other persons in the native title claim group;
- an advertised meeting held on 21 and 22 June 2003 had been open to all members of the native title claim group and was attended by all members of the native title claim group, including elders;
- the applicants were authorised by the traditional decision making process of the Yaegl people to amend the application in the manner set out in Schedule S of the proposed amended application.

On whose behalf is the application brought and did they properly authorise persons to make the amended application?

The amended application was brought on behalf of the Yaegl people. There was no reference in the proposed amended application to the Bundjalung or Gumbaynggirr people, on whose behalf the original application was also made.

While His Honour Justice Hely accepted the possibility that the claim group had, in fact, not changed, absent any evidence to the contrary, the court assumed for the purposes of this matter that the claim group described in the proposed amended application was made up of a different group of people from those on whose behalf the original application was made – at [14].

Hely J decided that the fact (assuming it to be a fact) that the proposed amended application was not brought on behalf of, or with the authority of, the same people on whose behalf the original application was brought was not fatal to its formal validity – at [15].

The respondents' contention that it was essential to the validity of the amended application that it should be authorised by the native title group referred to in the original application was rejected. The respondents' submission that if this was not so, then the application would no longer be authorised by, and made on behalf of, the native title claim group referred to in s. 61(1) was similarly rejected. Hely J considered that this submission overlooked the fact that communal authorisation was not required for the original application – at [13].

His Honour held the applicant for the purpose of the application for leave was constituted by the two persons who lodged the original

application with the Tribunal. The purpose of the application for leave to amend was to bring the application into conformity with the requirements of the new Act. One of the things that needed to be done to achieve that result was the identification of a native title claim group and the authorisation of particular persons to bring the application. That was not a requirement of the old Act. In this case, the group was identified in the proposed amendment application as the Yaegl people and seven people were proposed as the applicant – at [16].

Five further 'applicants'

The affidavit evidence given in support of the application to add five people to the group named as the applicant asserted that:

- each was a member of the native title claim group;
- each was authorised by all the persons in the native title claim group to make the application and to deal with all matters arising in relation to it; and
- the basis on which they and others were authorised to make the amended application was set out in Schedule R, and included via a meeting on 21 and 22 June 2003.

Hely J held that s. 64(5), which provides that, if a claimant application is amended so as to replace the applicant with a new applicant, then the application must be amended to reflect the change and an affidavit going to authorisation of the new applicant must be filed, did not apply in the circumstances of this case. An original applicant is not replaced by a new applicant. The original applicants remain, but others are added. (On this point, see the comment below.) Nor was there any application to replace the applicant under s. 66B on foot – at [17].

Decision

The amendments were allowed.

Comment

With respect, his Honour's finding that s. 64(5) did not apply may not be correct. 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. Therefore, it would seem that adding people to that group alters the constitution of that entity and, in this sense, makes a 'new' applicant. Under the NTA, this would be an amendment to the application and s. 64(5) would apply.

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 '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 a 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 one representative from each of 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.

Button v Chapman [2003] FCA 861

per Kiefel J, 20 August 2003

Issue

The question in this case was whether a lack of unanimity as between those persons authorised to represent a native title claim group constitutes an abuse of the Federal Court's process.

Background

The applicant on the motion (Mr Button) sought an order striking out the Wakka Wakka Peoples' claimant application (the claimant application) as an abuse of the process of the court under Order 20 Rule 2(1)(c) of the Federal Court Rules (FCR). The motion was supported by three of the sixteen people named as the applicant in the claimant application.

Mr Button submitted that the claimant application was doomed to fail because those named as the applicant could no longer act in unity as required by 61(2), s. 62(2)(a) and s. 62(2)(c) of the NTA. He argued that the other thirteen Wakka Wakka people included in the group named as the applicant would not be able to continue effectively without the support of the members of the rest of the people in that group and that replacement of the applicant pursuant to s. 66B would be not be a successful or appropriate course.

Decision

In dismissing the motion, her Honour Justice Kiefel noted that:

- the basis for the motion was misconceived. A native title claim is not an abuse of the court's process because there is a lack of unanimity as between those said to represent the native title claim group. In particular, that there may be difficulties experienced in moving the application forward given the authorisation requirements under s. 66B does not render it an abuse of process;
- this was not a case where it could be said (and it was not contended) that the claim itself had no merit;
- the position of an applicant, in cases such as this, does not involve a personal right. The proceedings are largely representative in nature;
- it did not appear that the removal of those in dissident would leave the native title claim group not properly represented;
- the court had power (of its own motion) to remove 'an applicant' under Order 6 of the FCR if their role has become untenable and the proceedings and the interests of others delayed – at [6] to [9].

However, Kiefel J declined to exercise the power available under Order 6, preferring to give the 13 'co-applicants' an opportunity to consider the course they wanted to take and whether they wished to continue with the claim in its present form in the light of the anthropological evidence that was available, which identified 15 descent groups within the larger group. Therefore, they were directed to confer as to the course they wished to take in the circumstances. The matter will be listed for directions if no application is brought within the time ordered.

Comment

In relation to her Honour's finding that the court could, of it own motion, remove 'an applicant', see the comments in the summary of *Walker v Minister for Land & Water Conservation (NSW)* [2003] FCA 947 noted above. Further, the removal of a person from the group named as the applicant under Order 6, absent an order under s. 66B, does not appear to relieve those who remain in the group that now makes up the applicant of the obligation that arises under s. 64(5) i.e. the application must be amended to reflect the order and an affidavit going to authorisation of the newly constituted applicant must be filed.

Application under s. 66B to replace old Act applicant

Dingaal Tribe v Queensland [2003] FCA 999

per Cooper J, 17 September 2003

Issue

This case concerned an application under s. 66B of the NTA to replace the applicant in a claimant application.

Background

The application on behalf of the Dingaal tribe was originally made under the old Act and was unamended when this matter was heard. Gordon and Jonathon Charlie were named as the applicants. The people named as the registered native title claimants for the purposes of the old Act were the same people who brought the s. 66B application (the s. 66B applicants).

His Honour Justice Cooper took the view that Item 25 of Schedule 5 to the *Native Title Amendment Act 1998* (Cwlth) (the transitional provisions) applied so as to make Gordon and Johnathon Charlie 'applicants authorised' for the purposes of the new Act i.e. people authorised 'to maintain the claim and make decisions in relation to the issues relating to it on behalf of the native title claim group' – at [9] to [10], referring to s. 62A.

With respect, Item 25 deals only with ensuring that those who were registered native title claimants under the old Act retain that status in relation to any future act matters unless and until the application is amended and an applicant is authorised as required under the new Act. If the amended application is accepted for registration, then those named on the Register of Native Title Claims as the applicant in the amended application are then, by definition, also the registered native title claimant – see s. 253. Item 25 does not have any effect on who is the *applicant* for the purposes of either the old or the new Act.

The s. 66B application

The s. 66B applicants sought an order that they replace Gordon and Jonathon Charlie on the grounds that they were no longer authorised by the claim group to make the application and to deal with the matters arising in relation to it. Gordon Charlie opposed the application and presented affidavit evidence to the effect that:

- under the traditional law and customs of the Dingaal people, he was the only person entitled, and thereby authorised, to make the claim for native title on behalf of the claim group;
- no meeting, however constituted, could remove that authority or make any decision authorising any other person if he did not attend the meeting and did not consent to being replaced;
- the interests of the Charlie subgroup were not sufficiently represented at the meeting or in the resolutions passed to replace Gordon and Jonathon Charlie – at [18].

On the evidence, the court was satisfied that no traditional law or custom of the group existed that would prevent the termination of the authority of Mr Charlie and authorise others to act in his stead or bring an application under s. 66B – at [17] and [30].

His Honour was satisfied that those who were to constitute the new applicant satisfied the requirements of s. 66B and addressed the relevant criteria considered by O'Loughlin J in *Ward v Northern Territory* [2002] FCA 171:

- notice of the meeting concerning the authorisation of those bringing the s. 66B application, with a full agenda, was given to all existing members of the claim group or potential members;
- a sufficient period of notice was provided;
- adequate transport arrangements were made for all persons to attend;

- reasonable offers of travel and accommodation were made to Gordon Charlie and his associates – at [19], [20], [24] and [32].

Cooper J was satisfied that:

- the minutes of the meeting were a full and correct record of the proceedings and gave him no cause for concern that the final resolutions were other than 'the considered decisions of those attending the meeting, after a process of discussion and consultation';

- that the Charlie clan was represented among the new applicant;

- those attending the meeting understood that Gordon and Jonathon Charlie remained as members of the claim group and could participate in future conduct of the claim as members of that group – at [21], [22], [26] and [28] to [29].

The authorisation issue

His Honour ultimately relied upon s. 251B(b) (on the basis that no process of decision-making based on traditional laws and customs existed) and applied the criteria set out by O'Loughlin J in *Ward*. However, although not relying upon it, Cooper J was prepared to accept the expert opinion of an anthropologist that 'the meeting was conducted in accordance with contemporary Aboriginal law and custom which is based on traditional ways and evolving contemporary practices' – at [31].

Decision

The court made an order that Gordon and Johnathon Charlie be replaced as the applicant by those who made the s. 66B application.

Programming orders and representation

Johnson v Minister for Land and Water Conservation (NSW) [2003] FCA 981

per Stone J, 17 September 2003

Issue

This decision relates to programming orders in relation to mediation similar to those made in *Frazer v Western Australia* [2003] FCA 351, summarised in *Native Title Hot Spots* Issue 5. The matter of separate representation for members of the group making up the applicant representation is also considered.

Background

Two claimant applications, Barkandji (Paakantyi) People #6 and Barkandji (Paakantyi) People #7, were made in 1997 and have been the subject of ongoing intra-Indigenous disputes resulting in attempts to have the persons named as the applicant separately represented. In particular, attempts have been made for Ms Dorothy Lawson and Mr Philip Lawson to be represented by Mr Mark Dengate (who is not legally qualified), with the other applicants to be separately represented. The applications were referred to the Tribunal for mediation under s. 86B of the NTA in July 2001, with a request that the mediation focus initially on the resolution of intra-Indigenous disputes. The disputes were not resolved through mediation.

On 19 August 2003, New South Wales Native Title Services Ltd (NTS) filed notices of motion seeking dismissal of the applications or, in the alternative, orders along the lines of those made in *Frazer*. The motions were filed with the agreement of members of the native title claim group following a meeting of that group on 28 July 2003 (the meeting) at which the fact that the claims were crippled by the lack of appropriate representation for the group was considered. The Lawsons and Mr Dengate were not present at that meeting.

Interlocutory orders

Her Honour Justice Stone made interlocutory orders that:

- those named as the applicant jointly nominate a legally qualified representative no later than 1 October 2003;
- the applicant, the State of New South Wales and NTS, in conjunction and consultation with the Tribunal, prepare a program for the negotiation and mediation of the application over a period of 12 months commencing 30 October 2003; and
- in the event that either a mediation program could not be agreed by 30 October 2003 or a nomination for legal representation is not received by 1 October 2003, those named as the applicant in these matters and other interested parties to show cause why the application should not be dismissed.

Her Honour concluded that both the claim group and the Federal Court would benefit from the appointment of a legally qualified person to represent the applicants, noting that, unless the applicant had professional representation, it would be impossible to both resolve the many procedural difficulties that beset the applications and restore the substantive issues – at [16].

The court was prepared to make the programming orders sought by NTS for the same reasons French J expressed in *Frazer,* namely that the court is 'concerned that there be a more systematic and focussed approach to the progression of native title claims than has occurred up to this point'. Her Honour noted that the claimant group would be advantaged by the focussing of all the parties' minds by means of the mediation program – at [17].

The court was not prepared to dismiss the applications because the programming orders had the capacity to give clear direction to the claims for the first time since their inception – at [18].

In obiter, Stone J noted that:

> the attempts to have the applicants separately represented revealed a fundamental misunderstanding of the role of applicants in native title determination applications. Such applicants are representatives of the claimant group; they have no personal interest other than as members of the claimant group and for this reason their interests do not differ from each other or from the claimant group and separate representation is inappropriate and unacceptable – at [8].

Case management of claims in the South West of WA

Anderson v Western Australia [2003] FCA 1058

per French J, 2 October 2003

Issue

This case reflects the Federal Court's intention to develop a process for the more orderly management of a number of claimant applications filed in respect of the South West region of Western Australia.

Background

His Honour Justice French dealt with seven groups of claimant applications which were, for the most part, represented by the South West Aboriginal Land and Sea Council (SWALSC). Prior to the hearing of this matter, a single Noongar claimant application was filed. This provided the impetus to reconsider programming orders made in some of the earlier applications. SWALSC proposed a mediation-based approach to all South West applications, having regard to the filing of a single Noongar claim and the possibility of a comprehensive regional agreement to settle that claim. The State of Western Australia's position was that there had already been a lengthy period of mediation and negotiation in the area without useful outcomes. Any further mediation must be closely supervised by the court. Other non-indigenous respondents

broadly supported the state's position – at [16] to [19].

His Honour noted that

> [T]he South West region of Western Australia has been bedevilled for many years with intra-indigenous conflict which has effectively prevented meaningful progress in the mediation of native title determination applications in that area. It is too early to venture any opinion on whether the first Noongar claim, which has now been filed, represents a breakthrough in this regard…. It… presents an opportunity to give new impetus to the development of a comprehensive resolution of native title issues in the South West of Western Australia – at [24].

Decision

With respect to five small 'polygon' applications, French J expected them to be subsumed in the single Noongar claim. In relation to South West Area 2 (comprised of the Southern Noongar and Wagyl Kaip applications), the applicants were ordered to make applications under s. 64 of the *Native Title Act 1993* to combine their applications with the single Noongar application to the extent of any geographical overlap. In relation to the remainder, French J ordered the applicants and the state, in conjunction with the National Native Title Tribunal, prepare a program of negotiation and mediation to commence on 1 January 2004.

Amendment to combine claimant applications

Wilkes v State of Western Australia [2003] FCA 1206

per Wilcox J, 9 October 2003

Issue

This decision relates to orders for the combination of two claimant applications pursuant to s. 64(2) of the NTA, together with programming orders for trial.

Background

The claimant applications dealt with in decision were:

- a claim by Richard Wilkes and others within or near the Perth metropolitan area (the Wilkes claim); and
- a recent claim by Anthony Bennell and others on behalf of the Noongar People (the single Noongar claim) that apparently overlaps the Wilkes claim.

WAG 142 of 1998 was one of several claims in respect of the Perth metropolitan area. It was part heard, with further evidence to be taken in October 2003.

On 2 October 2003 His Honour Justice French in *Anderson v State of Western Australia* [2003] FCA 1058 (summarised above) made orders to combine certain other claimant applications with the single Noongar claim. These orders included the preparation of a detailed program for the mediation and negotiation of the combined applications.

A motion to amend WAG 142 of 1998 to combine it with WAG 6003 of 2003 and a companion motion to amend WAG 6003 of 2003 were before the Honourable Justice Wilcox in this matter. There was no real opposition to the motions to combine, the issue being the manner in which the combined application would proceed to its earliest determination.

Decision

In respect of the motions to combine, Wilcox J ordered that:

- leave be given to amend WAG 142 of 1998 pursuant to s. 64 of the NTA so that it is combined with and included in WAG 6006 of 2003; and
- leave be given to amend WAG 6006 of 2003 pursuant to s. 64 of the NTA so that it is combined with and included in WAG 142 of 1998;

- in each case, the amended application be in the form of WAG 6006 of 2003;

- both applications be conducted as one application, with WAG 6006 of 2003 to be the lead application.

In relation to the progress of the combined application, Wilcox J noted the importance of mediation under the NTA and considered it desirable to allow a reasonable opportunity for further mediation of that part of the combined application as relates to the land and waters covered by WAG 142 of 1998 (the Perth section claim) – at [17] and [24]. His Honour ordered that:

- subject to any contrary order by a judge, the part of the application over Perth be heard in a separate proceeding to commence during the first week of October 2004; and

- the directions made by French J in *Anderson* (summarised above) apply in respect of the Perth area.

His Honour also made certain programming orders to facilitate the hearing of the Perth section claim.

Comment

The approach taken by Wilcox J in respect of the motions to combine differs from that generally taken by the court, which is that only one of the applications is amended so as to combine it with the others. In this case, his Honour made an order to amend each application to combine it with the other. In *Bropho v State of Western Australia* (2000) 169 ALR 365, His Honour Justice French said:

> It is important to bear in mind that s 64 of the Act treats combination as a species of amendment of one of them. That is to say that an application can be amended by combining it with another application or applications…Amendment by combination must be amendment of one application by combination with others. *It is not amendment of all of them.* The latter characterisation is a prescription for chaos – at [25], emphasis added.

Western Australia v Strickland (2000) 99 FCR 33 at [6], the Full Court of the Federal Court referred to and endorsed French J's views on this issue. Wilcox J appears not to have taken this view.

Determination of prescribed body corporate

Ngalpil v Western Australia [2003] FCA 1098

per Carr J, 9 October 2003

Issue

His Honour Justice Carr was required to consider whether the Tjurabalan Native Title Land Aboriginal Corporation (the Corporation) was a duly nominated prescribed body corporate and whether the requirements of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations) had been satisfied.

Background

On 20 August 2001, Carr J made a determination of native title by consent in relation to the Tjurabalan People. In compliance with s. 56 of the NTA, orders were made requesting a representative of the common law holders of native title to indicate whether they intended to have the native title held in trust and if so, to nominate in writing the prescribed body corporate to be the trustee.

The applicant's solicitor filed certain documents, including one headed 'Nomination of the Tjurabalan Native Title Land Aboriginal Corporation as the Prescribed Body Corporate'. Three other documents were attached, namely:

- a copy of a certificate of incorporation;

- a copy of the objects and rules of the corporation; and

- a copy of a letter on corporation letterhead

signed by the 'Chairperson' of the corporation nominating the corporation as the prescribed body corporate.

It was held that there were three questions before the court:

- whether a representative of the common law holders had made the nomination in writing;
- whether the corporation was a 'prescribed body corporate'; and
- whether the corporation had given its written consent to be the trustee of the native title rights and interests – at [12] to [14].

Decision

Carr J decided that:

- the written nomination of the corporation by its 'elected Chairperson' was made by that person as the representative of the common law holders for the purpose of making that nomination;
- the corporation met the four requirements prescribed in Regulation 4 of the PBC Regulations, namely that:
  - the corporation was incorporated under the *Aboriginal Councils and Associations Act*;
  - all members of the corporation were included in the native title determination as native title holders;
  - the objects of the corporation expressly stated its purpose as a registered native title body corporation;
  - all members of the corporation were persons who have native title rights and interests in relation to the determination area – Reg 4(1)(a) and Reg 4(2).
- the court would accept the written nomination of the corporation by its 'elected Chairperson' as also being the written consent of the corporation to be trustee of Tjurabalan land and, therefore, the native title holder as defined in s. 253 of the NTA – at [17] to [19] and [21] to [37].

Although not considering it necessary given the orders made in the consent determination, his Honour formally determined that 'the Corporation is to hold the native title rights and interests from time to time comprising the native title in trust for the common law holders' – at [38].

Comment

In relation to the terms 'Tjurabalan People' and 'Determination Area' defined in clause 2 of the rules of the corporation, his Honour observed that:

> Those definitions mirror the definitions of 'Tjurabalan People' and 'Determination of the Area' in the Third and First Schedules respectively to the Determination. Both sets of definitions are framed in exclusive and exhaustive terms – at [26].

His Honour Justice French has previously expressed concern that the membership class of a prescribed body corporate be textually aligned precisely with the definition of the native title holders in the relevant native title determination: *James v Western Australia (No 2)* [2003] FCA 731 at [16] and [17]. See also *Native Title Hot Spots* Issue 6.

Cessation of mediation sought

Walker v Queensland [2003] FCA 960

per Allsop J, 9 September 2003

Issue

The issue for the court was whether to continue a long running mediation, either in whole or in part, in circumstances where some parties, who wished to withdraw from the mediation, were urging the court to act under s. 86C of the *Native Title Act 1993* (Cwlth) to order that mediation cease or, at least, cease insofar as it affected those parties.

Background

This matter was allocated substantively to His Honour Justice Allsop's docket in June 2002 and then referred to mediation under s. 86B. By June 2003, it appeared that mediation was unlikely to be successful if not concluded by

September 2003. Some of the parties urged the court to order the mediation to cease, either in whole or part. The applicant and some other parties (including the state) wanted the matter to remain in mediation until a directions hearing in December 2003.

His Honour noted the conflicting policy considerations:

> There comes a point in the disposition of matters filed in court when the public interest and the confidence in the due and timely administration of justice requires that matters be brought to finalisation and resolution. It goes without saying that to the extent that parties can mediate and resolve their disputes without the expensive intervention of the cumbersome dispute resolution mechanism of the traditional courts, such resolution is to be encouraged. However, the allowing of a matter to drift in mediation against the wishes of some of the parties is not in the public interest and militates against the confident administration of justice – at [7].

Decision

Allsop J stood the matter over until directions in December 2003, when he will hear argument as to the procedural steps to be taken to bring this matter on for hearing in June 2004, with parties that do not wish to appear and who will abide by any order of the court as to the conduct of the matter, to indicate this beforehand. His Honour observed this would permit some further time to allow mediation to continue to a 'fruitful' conclusion, should this be possible – at [8].

Right to hunt in Canada

R v Powley 2003 SCC 43

per McLachlin CJ, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ, 19 September 2003

Issue

The issue raised in this Canadian case was whether a particular Métis community enjoyed a constitutionally protected right to hunt for food under s. 35 of the *Constitution Act 1982* that overrode the licensing and other hunting restrictions of the Canadian *Game and Fish Act RSO 1990.*

Background

The matter came before the Supreme Court of Canada on appeal from the Court of Appeal for Ontario, which had upheld a decision of the trial judge to acquit the respondents (who were Métis) of a charge of unlawfully hunting a moose. The Métis are 'distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognisable group identity separate from their Indian or Inuit and European forebears'. The court considered it only necessary for the purposes of this case to verify that the claimants belonged to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right – at [10] and [12].

The respondents relied upon s. 35(1) of the Canadian *Constitution Act 1982*, which recognises and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada, including the Métis peoples. This was interpreted in a purposive manner by the court as indicating a commitment to recognise the Métis and enhance their survival as distinctive communities. Practices that were historically important features of these distinctive communities were to be protected – at [13].

In deciding how the aboriginal rights recognised and affirmed by s. 35(1) should be defined, the court modified its approach to

reflect the distinctive history of the Métis and consequent differences between Indian and Métis claims. The significant constitutional feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control – at [16] to [18] and [37].

In dealing with a matter of this kind, the court must:

- characterise the relevant right. In this case, the respondents shot bull-moose within traditional hunting grounds for the purpose of providing meat for winter. The relevant right was therefore characterised not as a right to hunt moose but a right to hunt for food within a designated territory;

- identify the historic rights-bearing community. The evidence supported the trial judge's finding of a historic Métis community at Sault Ste. Marie;

- identify the contemporary rights-bearing community. It was said that, because aboriginal rights are communal rights, they must be grounded in a historic and present community and must be exercised by virtue of an individual's ancestrally-based membership in the present community;

- verify the claimant's membership of the relevant contemporary community – at [19] to [24]

The court saw this last point as crucial and, noting the need for clearly identified membership standards for Métis communities, indicated the important criteria for a future definition of who is Métis for the purpose of asserting a claim under s. 35:

- self-identification (and not merely for the purpose of claiming Constitutional rights);

- ancestral connection (by birth, adoption or other means) with demonstrable ancestral connection being crucial to verifying membership;

- acceptance by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed, as demonstrated by past and ongoing participation in a shared culture and distinct customs and traditions – at [29] to [34].

The court was also required to:

- identify the relevant time frame. In this case, it was found that the Métis emerged in the time between first contact and effective European control. Therefore, pre-contact test in relation to practices, customs and traditions was not appropriate. Rather, a pre-control test should be applied in relation to the Métis, given the constitutional imperative of s. 35 to recognise and affirm their aboriginal rights;

- determine whether the practice in question (in relation to hunting) was integral to the claimants' distinctive culture. The evidence established that the practice of subsistence hunting and fishing was a historical constant in the Métis community. It was an important aspect of life and a defining feature of their special relationship with the land in the period immediately prior to European control;

- establish continuity between the historic practice and the contemporary right asserted. The court acknowledged that a certain margin for flexibility might be required to ensure that aboriginal practices can evolve and develop over time;

- determine whether or not the right was extinguished. No evidence of extinguishment was forthcoming in this case;

- determine whether an aboriginal right was being infringed. It was held that Ontario's lack of recognition of any Métis right to hunt for food, and the consequent application of the challenged provisions of the *Game and Fish Act*, infringed the right of the respondents to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community;

- determine whether the infringement was justified. The court was of the view that the Crown's justification of conservation may make out a case for regulation but not denial of the aboriginal right to hunt moose for food. Interestingly, the Métis were entitled to a priority allocation to satisfy their subsistence needs, even if the moose population of the region was under threat – at [37] to [50] and see *R v Sparrow* [1990] 1 SCR 1075..

Invisibility no bar

The court found that the fact that the Sault Ste. Marie Métis community was, to a large extent, an 'invisible entity' from the mid-19th century to the 1970s did not mean it had ceased to exist or disappeared entirely. The advent of effective European control over the area interfered with, but did not eliminate, the Sault Ste. Marie Métis community and its traditional practices. 'There never was a lapse; the Métis community went underground, so to speak, but it continued' – at [27].

Decision

The court dismissed the appeal, finding that:

- members of the Métis community in and around Sault Ste. Marie had an aboriginal right to hunt for food under s. 35(1) of the *Constitution Act 1982* – at [53].

- section 46 and s. 47(1) of the *Game and Fish Act*, R.S.O. 1990, c. G.1, as they read at the relevant time, were of no force or effect with respect to the respondents, being Métis, in the circumstances of this case by reason of their aboriginal rights under s. 35 of the Constitution Act, 1982 – at [55].

Comment

This case highlights some important differences between Australian and Canadian law, namely that:

- there is a constitutional basis for the recognition or protection of site-specific aboriginal rights in Canada but not in Australia;

- there is no recognition of a group such as the Métis, with its origins post-contact but pre-'effective control', under the NTA despite the fact that, prior to the assertion of sovereignty in some areas of Australia, a similar population existed;

- the Supreme Court of Canada adopts a more systematic approach to determination of membership of the requisite group than has been the case in Australian native title decisions;

- the apparent disappearance of a group for a time (going 'underground' or being 'invisible') is no bar to showing continuity. This issue has not been raised in Australia;

- although, superficially, the outcome of this case seemed similar to that in Yanner v Eaton (1999) 201 CLR 351, there are key points of distinction. Regulation, even to the point of extinguishment, does not have to be justified under Australian law. Absent statutory intervention, there is only the requirement to show an inconsistency between the sovereign act and the native title right – see *Western Australian v Ward* (2002) 191 ALR 1 at [82], summarised in *Native Title Hot Spots* Issue 1;

- the subsistence hunting rights of the Métis were accorded priority over the Province's regulatory scheme. Priority for native title rights generally under Australian law is still to be addressed, although the NTA does address this in part – see, for example, s.23G(1)(a), s. 44H and s. 238.

Oral evidence in New Zealand

Takamore Trustees v Kapiti Coast District Council AP191/02

per Young J, 4 April 2003

Issue

This was an appeal in the High Court of New Zealand from a decision of the Environment Court regarding approval for the construction of a link road. As most of the case is not relevant in Australia, only the issue in relation to the treatment of oral history is summarised below.

Background

The Environment Court of New Zealand had upheld a decision by Hearing Commissioners appointed by the Kapiti Coast District Council to grant an application for a 'notice of requirement' for a designation for the link road. The decision was appealed on a number of grounds by the Takamore Trustees and the Waikanae Christian Holiday Camp.

The Takamore Trustees represent local iwi (traditional owners) who did not want the road built through an area at Takamore identified as waahi tapu (a sacred site). They said the area contained taonga (treasures) and included koiwi (human bones). Ground 3 of the appeal was characterised as a failure by the Environment Court to give reasons for its conclusion that it was not satisfied on the balance of probabilities that there were koiwi buried in swamps at Takamore – at [42] and [52].

The Environment Court rejected oral evidence going to the existence of taonga and koiwi in the Takamore wetlands for a number of reasons. Among these, it was of the view that the evidence was 'cryptic and assertive, bereft of any back-up history or tradition'. The court expressed surprise at the 'sparseness' of the evidence. It had heard evidence from three witnesses accepted as 'koumatua', said to hold the collective oral tradition of the iwi – at [53] and [62] to [66].

On appeal

His Honour Justice Young of the High Court of New Zealand observed 'it is difficult to see, given that the court was concerned with an oral history which pre-dates European presence, how more specificity is reasonably possible'. Even though the evidence was 'cryptic', this was not a reason for rejecting it – at [67].

Young J went on to say that:

> The (Environment) Court complains about a lack of 'backup history' or 'tradition'. Again, it is difficult to understand what this means. Those…entrusted with the oral history of the area have given their evidence. Unless they were exposed as incredible or unreliable witnesses, or there was other credible or reliable evidence which contradicted what they had to say, accepted by the Court, how could the Court reject their evidence. The Court complained it was bereft of 'evidence' and had 'assertion' only of the presence of koiwi. The evidence was given by koumatua based on the oral history of the tribe. What more could be done from their perspective. The fact no European was present with pen and paper to record such burials could hardly be grounds for rejecting the evidence – at [68].

Decision

Young J was of the view that no 'rational' reason was given by for rejecting 'the clear evidence of the koumatua of the presence of koiwi in the swamps of Takamore and thus potentially in the area of the proposed road'. Therefore, his Honour held that the Environment Court 'wrongly concluded there was no evidence of the presence of koiwi in the Takamore swamp area' – at [69] and [79].

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

Yarran/Hamill Resources Ltd/ Western Australia [2003] NNTTA 99

per Sumner, DP, 11 September 2003

Issue

This is a decision in a preliminary inquiry by the National Native Title Tribunal (the Tribunal) to determine whether expedited procedure objection applications lodged on behalf of the Ballardong People were properly authorised. This is the first time this question has arisen in right to negotiate proceedings before the Tribunal.

Background

The relevant objections were lodged by Robin Yarran on behalf of the Ballardong People. A challenge to his authority to lodge objections on behalf of the Ballardong People was made by the South West Aboriginal Land and Sea Council (SWALSC). Mr Yarran is one of the 14 people who jointly comprise the applicant on the Ballardong People's claimant application for determination of native title, which was registered by the Tribunal on 10 July 1997. The earliest of the relevant objection matters was lodged with the Tribunal on 5 July 2001.

On 15 April 2002, SWALSC filed a notice of motion in the Federal Court which, among other things, sought to remove Mr Yarran as one of these named as the applicant on the Ballardong application and to replace him with a group that included Justin Kicket. His Honour Justice French dismissed the application due to insufficient evidence in support, particularly in relation to proof of questions of withdrawal of authorisation, excess of authority and authorisation of the proposed replacement applicant required in terms of s. 251B of the NTA. SWALSC conceded that the evidence before the court was insufficient to justify the orders sought.

On 4 March 2003, a member of the Tribunal was appointed to preside over a conference convened pursuant to s. 150 of the NTA to try to resolve any matter that was relevant to the inquiry into the expedited procedure objection applications. On 18 June 2003, the presiding member terminated the mediation because it was apparent that it was not going to achieve resolution of the issues between the parties.

At the preliminary inquiry, Mr Yarran contended that, at a Ballardong meeting some years ago, he had volunteered to carry out the function of lodging objections and had carried out this function ever since. He also contended that, both as one of those named as the applicant and Ballardong elder, he was entitled to perform this function.

The SWALSC admitted that, at some point, Mr Yarran did have authority to lodge objections but submitted that this authority was subsequently withdrawn. Evidence to support this submission included evidence pertaining to:

- a Ballardong working party meeting of 17 October 2001, where a motion was carried to have the NLC remove Mr Yarran as an applicant;

- a Ballardong community meeting of 15 November 2001, where a resolution was passed for the replacement under s. 66B NTA on the grounds that Mr Yarran was no longer authorised to make the claimant application and deal with matters arising in relation to it and had exceeded his authority in relation to it;

- a Ballardong meeting of 12 March 2002 where SWALSC was instructed to proceed with opposition to all of the objections lodged by Mr Yarran because he did not have a right to represent the Ballardong claim or speak for Ballardong country;

- a Ballardong community meeting on 6 May 2003, which resolved to inform the Tribunal that, while Mr Yarran was a member of the Ballardong community, they did not support him lodging objections on their behalf without proper consultation.

The authorisation of an applicant

The Honourable Deputy President Sumner held that the failure of a s. 66B application to replace the applicant was not necessarily determinative of the issue. In this matter, the Tribunal had to consider whether or not there was sufficient evidence to support a finding that Mr Yarran was not authorised to bring objections on behalf of the group, not whether there was evidence to support a s. 66B application

Sumner DP held both that the purpose of the NTA and its workability would be severely compromised if each person named as one of those constituting the applicant and, therefore, the registered native title claimant (see s. 253), could lodge objections and then seek to negotiate separate agreements in relation to them. The Tribunal's approach to making consent determinations in circumstances where one of the people in the group named as the registered claimant (see s. 253) refused to sign a s. 31 agreement against the wishes of others so named and the native title claim group would no longer be possible – at [36].

The applicability of s. 251B of the NTA

Sumner DP considered that matters arising in relation to a claimant application included matters involving right to negotiate applications – see s. 62A and s. 75. Consequently, the authorisation requirements in s. 251B govern the procedures adopted by the claimant group to determine who has authority to act in relation to right to negotiate inquiries. In addition, the presiding member held that, even if s. 251B did not apply to right to negotiate matters, because they do not strictly relate to the claimant application, it was nevertheless appropriate to apply the principles of that provision. As a matter of commonsense, in a situation where there are traditional laws and customs of a group governing its decision making, they should be applied – at [37].

Decision

Sumner DP held that the evidence produced by Mr Yarran amounted to little more than an assertion of an authority to lodge objections solely because he is a traditional owner and elder of one family group that constitutes part of the Ballardong claimant group. There was no evidence of the existence of either Aboriginal traditional law and custom or the manner of its operation in making decisions on whether expedited procedure objections can be lodged on behalf of the Ballardong native title claim group – at [39].

The Deputy President was satisfied that:

- there existed a Ballardong working party established by the claimant group to manage the native title claims and any related future acts;

- Mr Yarran was not now authorised by the Ballardong claim group to lodge objections to the expedited procedure and that any previous authorisation he had to lodge and deal with objections had been withdrawn – at [55].

Therefore, the objections in questions, that where lodged by Mr Yarran, were dismissed under s. 148(a) of the NTA. Further, the

Deputy President indicated that it is likely that the Tribunal will dismiss any future objections lodged by Mr Yarran, unless they were accompanied by satisfactory evidence that he was properly authorised by the Ballardong Claim group to make the objections – at [47] and [58].

Little/Western Australia/Seaprince Holdings Pty Ltd [2003] NNTTA 108

Hon. C.J. Sumner, 24 October 2003

Issue

Whether the terms of an agreement that was referred to in the minute of consent but not provided to the Tribunal would become conditions of the Tribunal's determination that the futre act in question may be done.

Background

The parties submitted a minute of consent determination to the Tribunal, in which consent to the future act in question (the grant of a mining lease) was given pursuant to an agreement entitled a Native Title Deed (the deed) made between native title party and the grantee party. The Tribunal had no knowledge of the contents of the deed.

The Tribunal noted that its broad power to make determinations under s. 38 NTA has express limitations regarding imposing conditions for payments to native title parties based on profits made, income derived or things produced by the grantee party as a result of the doing of the future act – see s. 38(2). Without knowledge of the contents of the deed there was a possibility that the Tribunal could make a determination which was not within power – at [7].

The parties agreed to modify the minute of consent by removing reference to the deed. The Tribunal noted that:

- other s. 35 applications had been resolved with the native title party relying on an ancillary agreement with the grantee party that was not mirrored in the Tribunal consent determination; and

- making the terms of an agreement the conditions of a determination would not enhance the rights which a native title party would have under the agreement as a determination subject to conditions has the effect as if the conditions were terms of a contract among the negotiation parties – s. 41(1) NTA.

Decision

The Tribunal was satisfied that the native title party consented to the determination and noted that any effect of the future act on native title will be minimized by the provisions of the deed.

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