

# Compensation application by RNTBC dismissed

## *Walmbaar Aboriginal Corporation v Queensland* [2009] FCA 579

Greenwood J, 29 May 2009

### **Issue**

The issue in this case was whether a registered native title body corporate was authorised to make a compensation application under the *Native Title Act 1993* (Cwlth) (NTA). It was found that the decision to make the application was ‘taken without authority’ under the corporation’s rules and ‘in contravention’ of the NTA. The application was dismissed pursuant to s. 84C.

### **Background**

In November 2006, Walmbaar Aboriginal Corporation (Walmbaar) applied for a determination of compensation in respect of acts said to have extinguished or otherwise affected the native title rights and interests of the Dinggaal People, as determined in *Deeral v Charlie* [1997] FCA 1408 (the Hopevale determination). The compensation application indicated that Walmbaar was acting pursuant to ss. 58(c) and 61(1) of the NTA and ‘in accordance with its objects and rules’.

The Hopevale determination recognised the native title rights and interests held by 13 clans, including the Dinggaal People, in an area on the eastern side of Cape York. In February 2002, an order was made that Walmbaar ‘is the prescribed body corporate which, after becoming a registered native title body corporate, will perform the functions mentioned’ in s. 57(3) of the NTA ‘for the Dinggaal Clan’. The court noted that, for the purposes of both the rules and the Hopevale determination:  
[T]he Dinggaal clan means all persons born of a Dinggaal father or Aboriginal children adopted by a Dinggaal father and a Dinggaal father is a male person of patrilineal descent of the Baru, Yoren or Charlie families. The Dinggaal family means the Yoren and/or Baru and/or Charlie families of Hopevale and their patrilineal descendents— at [44].

In May 2007, five people, on their own behalf and on behalf of the Dinggaal People, became respondents to the compensation application. A sixth joined on his own behalf and on behalf of the Nguuruumungawarra People (the Indigenous respondents). They were all represented by the Cape York Land Council Aboriginal Corporation (CYLC). The indigenous respondents argued (among other things) that Walmbaar was not authorised to make the compensation application. Two of the Indigenous respondents sought an order pursuant to s. 84D(4)(b), dismissal of the application and an order that Gordon Charlie pay their costs because, as chairman of Walmbaar, he was seen to have caused Walmbaar to institute the application.

Walmbaar argued that it had standing to make the application and that it had done so consistent with the Hopevale determination and the NTA. It said that any issue as to compliance with its objects and rules was a question of internal governance and not a matter for the court.

Walmbaar was incorporated pursuant to the *Aboriginal Councils and Associations Act 1976* (Cwlth) in 1998 for the purposes of being a registered native title body corporate. The objects of the corporation include to:

- act as the prescribed body corporate through which Dingaal people can 'meet their duties and responsibilities for their country';
- act as agent of the common law holders in respect of matters relating to the native title;
- manage the native title rights and interests of the 'common law holders as authorised by the common law holders'; and
- perform any other functions in relation to the native title rights and interests 'as directed by the common law holders'.

Membership of the corporation is open to adult Aboriginal persons who are Dingaal people 'as noted on a genealogical record kept by the Public Officer'. According to his Honour, the list of 'members and adult common law holders' at Schedule A to the rules indicated all but one of the Indigenous respondents were members of Walmbaar—at [17].

The compensation application was supported by an affidavit sworn by Gordon Charlie in which he said (among other things) that the corporation made the application 'for the compensation claim group ... as agent for the Dingaal People as common law holders' and that Walmbaar was authorised by the compensation claim group to make the application:

[I]n accordance with ... its rules and objects by way of a resolution passed by more than 75% of its member common law holders at an Annual General Meeting which took place at Cooktown on 3 July 2005.

On 11 February 2008, Mr Black (acting for the Charlie family) wrote to the CYLC, enclosing a copy of Mr Charlie's affidavit and stating that Walmbaar relied on 'the matters set out therein'. On 28 May 2008, an affidavit of Mr Black was filed that annexed another letter from Mr Black to CYLC dated 27 May 2008. This second letter, which set out the authorisation process adopted by Walmbaar, stated (among other things) that:

- section 251B does not apply to a compensation application made by a prescribed body corporate;
- the functions of Walmbaar as an agent prescribed body corporate for the Dingaal People are set out in the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cwlth) (PBC Regs), which require Walmbaar to consult with and obtain the consent of the common law holders when making a 'native title decision';

- the decision-making process adopted by the common law holders for Walmbaar when it makes 'decisions regarding native title' is set out in Walmbaar's rules;
- Walmbaar's decision to make an application for a compensation determination was neither a 'decision regarding native title' under the rules nor a 'native title decision' under the PBC Regs;
- therefore, the decision to make the application must be made by the committee of Walmbaar under its powers in rules 7 and 12(1);
- the committee passed a resolution to proceed with a compensation claim at a meeting held on 4 July 2006.

As the court noted, Mr Black's letter seemed to:

[A]bandon the claim made in the affidavit of Gordon Charlie ... that Walmbaar is authorised to bring the compensation application by reason of a resolution passed by more than 75% of Walmbaar's member common law holders—at [43].

It was now said that the decision to make the compensation application was a matter for the committee exercising its powers under the rules.

### **Decision to commence proceedings governed by rule 9**

The court noted that rule 9 provided as follows:

In relation to the performance of performing its functions as a Prescribed Body Corporate ... [Walmbaar] shall make decisions regarding native title by notifying all common law holders of decisions to be made and after one week's notice, convene a meeting of common law holders and obtain the consent of 75% of them in relation to the performance of its functions and changing of the Rule.

Consent of 75% of the common law holders, will constitute the consent of the Dingaal clan and this Corporation.

As Greenwood J pointed out:

There can be no doubt that in performing its functions as a prescribed body corporate for the purposes of the Hopevale determination, [rule 9 requires that] decisions taken by Walmbaar "regarding native title" are to be made by notifying "all common law holders" of decisions to be made and securing, at a duly convened meeting, the consent of 75% of them to the decision—at [44].

The rules did not define 'decisions regarding native title'. According to the court, the rules were to be construed and interpreted to give effect to:

[T]he important practical consideration that decisions regarding the native title rights and interests of the common law holders as determined by the Hopevale determination are to be taken at all times with the interests of all common law holders kept firmly in mind—at [45].

It was found that the decision to make the compensation application should have been made in accordance with rule 9:

A decision to commence a proceeding for compensation and engage, on behalf of the native title holders, an analytical process which seeks to identify any loss,

diminution, impairment or other effect of an act *on* their native title rights and interests is necessarily a decision *regarding* native title for the purposes of Rule 9(1). The use of the word “regarding” in the context of the Rules and the functions to be performed by Walmbaar is necessarily a word of wide application. It is intended to have a wide application, in its context—at [46], emphasis in original.

In this case (among other things):

- there was no evidence as to whether the ‘common law members’ were given notice of the proposal to make the application, whether they had expressed their views about it or whether they were consulted, formally or informally, about it;
- the members of the Walmbaar committee were not identified and no minutes of the committee meeting were produced;
- neither Mr Charlie (chairman of Walmbaar) nor Ruth Schaefer (its public officer) give evidence as to the process followed ‘notwithstanding that each of them might have spoken directly to the events in issue’;
- rules 6(1) and 6(2), which set out the objects of the corporation, taken in conjunction with rule 12, which sets out the powers of the committee, did not confer power upon the committee to make decisions regarding native title without complying with rule 9(1)—at [48].

It was also noted that Reg 7(1) of the PBC Regs required Walmbaar:

to act as the agent of the common law holders in respect of matters relating to the native title rights and interests of the common law holders;  
to manage those rights and interests as authorised by the common law holders—at [49].

Further, ‘Walmbaar must do so by operation of s 57(3)(b)’ of the NTA which: [E]ngages an obligation ... to manage decision-making to commence a compensation determination application by ensuring compliance with the decision-making process contained in Rule 9(1), as the source of the authority in Walmbaar to commence the proceeding—at [55].

It was found that the decision to commence the compensation proceeding was ‘taken without authority’ and was ‘in contravention’ of the NTA because Walmbaar failed to comply with rule 9(1) and failed to discharge its functions arising under s. 57(3)(b) and Reg 7(1) of the PBC Regs—at [60].

#### **Not a ‘native title decision’ under Reg 8**

Reg (8)(1) of the PBC Regs defines a ‘native title decision’ to mean a decision: to surrender native title rights and interests in relation to land or waters; or to do, or agree to do, any other act that would affect the native title rights or interests of the common law holders.

It was found that the decision to make a compensation application is not a ‘native title decision’ because it did not involve:

- the surrender of native title rights and interests;

- a decision to do ‘any other act that would affect the native title rights or interests of the common law holders’ — at [52] and [54].

### **Not necessary to decide whether s. 251B applied**

The indigenous respondents also relied on s. 251B of the NTA in relation to ‘authorisation’ to make a compensation application pursuant to s. 61(1). Under that subsection, a compensation application may be made by:

- a registered native title body corporate (if any); or
- a person or persons authorised by all the persons (the compensation claim group) who claim to be entitled to the compensation, provided the person or persons are also included in the compensation claim group.

The second note to s. 61(1) states that: ‘Section 251B states what it means for a person or persons to be authorised by all the persons in the compensation claim group’. Section 251B stipulates how authority is to be given by ‘all persons in a compensation claim group’. According to the court:

section 61 ‘seems to treat’ a registered native title body corporate as ‘a person’, in which case s. 251B(b) ‘would contemplate authority being conferred upon Walmbaar as an applicant person’ in accordance with ‘a process of decision-making agreed to and adopted by the persons in the compensation claim group’; it may be that s. 251B(b) has ‘a role to play’ in determining whether Walmbaar had authority to make the compensation application — at [60], emphasis in original.

However, it was not necessary to decide that question in this case, given the findings in relation to rule 9(1), s. 57(3)(b) and Reg 7(1) of the PBC Regs — at [60].

### **Claim could not exceed area covered by determination**

Greenwood J also found that: ‘To the extent that the compensation application goes beyond the land and waters the subject of the Hopevale determination, it must necessarily fail’ because, before the court can make a compensation determination, there must be a determination of native title in relation to the relevant lands and waters — at [61], referring to *Jango v Northern Territory* (2006) 152 FCR 150; [2006] FCA 318; *Jango v Northern Territory* (2007) 159 FCR 531; [2007] FCAFC 101 at [66] to [74] and [83], summarised in *Native Title Hot Spots Issue 19* and *Issue 25* respectively.

### **Decision**

The application was dismissed pursuant to s. 84C of the NTA because the decision to make the compensation application was taken without authority and in contravention of the NTA, i.e. Walmbaar failed to comply with rule 9(1) and failed to discharge its functions arising under s. 57(3)(b) and Reg 7(1) of the PBC Regs. Costs were reserved for determination ‘in the light of further submissions’ — at [60] and [62] to [63].