# Native Title Hot Spots

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## Determination of native title

### *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory*

[2004] FCA 472

Mansfield J, 23 April 2004

#### Issue

Does native title exist over certain areas of land and waters south-east of Tennant Creek in the Northern Territory and, if so, who holds it? It was determined that native title did exist over much of the area covered by the claimant application considered. Note that the decision is subject to appeal (see below).

#### Background

This decision relates to a claimant application brought by the Alyawarr, Kaytetye, Warumungu, Wakay native title group (claim group). While the claim group was described by reference to these four language or tribal groupings, it also comprised seven landholding or estate groups (landholding groups), each associated with a particular part of the claim area—at [2] to [10] .

The area covered by the application (the application area) was made up of:

- an area subject to a Crown Lease Perpetual granted to the Conservation Land Corporation in 1993 (the principal claim area); and
- an area of vacant crown land set apart for the proposed town site of Hatches Creek but never established as a township (Hatches Creek township)—at [18] to [20] and [38].

The whole of the application area was previously subject to grants of non-exclusive pastoral leases.

#### Evidence from land rights claims

The application area was situated near areas that had been the subject of four determined claims made previously under the *Aboriginal Land Rights (Northern Territory) Act 1976* (land rights proceedings). Six of the seven landholding groups that made up the claim group in these proceedings had previously been found to be the 'traditional Aboriginal owners' in the land rights proceedings.

His Honour Justice Mansfield:

- received into evidence the reports and transcripts from the land rights proceedings under s. 86(a)(v) of the *Native Title Act 1993* (Cwlth) (NTA); and
- noted that it was necessary to have regard to such findings and evidence with some caution, given that there is no precise correspondence between the matters required to be proven in a claimant application made under s. 61(1) of the NTA and in land rights proceedings—at [41] to [49].

#### Aboriginal evidence generally

Substantial evidence was given by nearly 30 Aboriginal witnesses, largely on country. Apart from that given on country, the bulk of the evidence comprised expert reports, public records and witness statements tendered without formal proof. Four experts gave evidence on behalf of the applicant in relation to anthropological, historical, linguistic and archaeological issues—[23] to [26] and [79] to [88].

The evidence of the Aboriginal witnesses was not disputed and Mansfield J was satisfied that it was coherent and credible.

His Honour noted that the claim area contained only a small proportion of the traditional country of the seven landholding groups and admitted relevant evidence relating to areas outside of, but close to, the claim area—at [69].

### Relevance of anthropological evidence

While noting that the evidence of Aboriginal witnesses was central to the claim, his Honour also noted that:

- anthropological evidence may provide a framework for understanding the primary evidence of Aboriginal witnesses in respect of the acknowledgment and observance of traditional laws, customs and practices;
- it may observe and record matters relevant to informing the court of both the social organisation of a native title claim group and the nature and content of their traditional laws and traditional customs;
- by reference to other material, including historical literature and anthropological material, anthropologists may compare that social organisation with the nature and content of the traditional laws and traditional customs of the claimants' ancestors and interpret the similarities or differences; and
- there may also be circumstances in which an anthropological expert may give evidence about the meaning and significance of what Aboriginal witnesses say and do, so as to explain or render coherent matters which, on their face, may be incomplete or unclear—at [89].

### Inferences drawn

Mansfield J found that the evidence in this case permitted the drawing of reasonable inferences that:

- the claim group was descended from the original inhabitants of the area at the time sovereignty was asserted (which was 1788 in one part of the claim area and 1825 in the remainder) in that there was a 'substantial degree of ancestral connection' between them; and
- the original inhabitants of the area were, at sovereignty, both an identifiable community and an organised society under traditional law and custom—at [74] and [100] to [110].

His Honour noted that:

> [I]n practical terms I do not think that the different dates upon which sovereignty was established over the claim area are of significance in determining the native title claim. There was no European entry into the claim area or its environs until after 1825. There is nothing to indicate that the nature of indigenous use of the claim area, or areas around the claim area, altered in any way of significance to the present application between 1788 and 1825—at [63].

The evidence relied upon to draw these inferences included:

- archaeological evidence of pre-sovereignty occupation of the land; and
- historical records from the earliest European contact in 1860 that recorded 'many signs' of Aboriginal occupation in and around the claim area—at [102] to [103].

The finding that, at the time of contact—and by inference the time of sovereignty—the Aboriginal occupants of the claim area were members of an organised society, was said to be 'confirmed' by ethnographic work undertaken in the claim area in 1901, which noted the following:

- the use of spears, shields, boomerangs, vessels for carrying water and food, stone knives, necklets made of animal fur, head rings and human hair string;
- the existence of customs related to both burial and mourning, including both tree burial and burial in the ground;
- the belief in various Dreamtime ancestors or totems who created the landscape and the performance of complex associated rituals;

- initiation and circumcision ceremonies;
- the existence of sacred objects or Churinga (Atywerreng);
- the existence of named moieties, the ceremonial role of persons of the opposite moiety, and the existence of gender-based restrictions in respect of information and places;
- the existence of what the ethnographer called a 'class system', the role of classifactory siblings, the existence of marriage rules, a rule for the descent of leadership, interrelationship of different groups, and the existence of territoriality—at [108].

### Connection with claim area since sovereignty

His Honour found there was strong evidence that, since first contact (and by inference since sovereignty) to the present, the claim group's acknowledgement and observance of traditional laws and customs in relation to the claim area and its surrounds had continued in substantially uninterrupted fashion—at [111] to [128].

It was noted that:

> It is likely that Aboriginal presence upon, and occupation and use of, the claim area has not been uniform at or since first contact, and for the reasons given since sovereignty (whether 1788 or 1825), as it has been influenced no doubt by seasonal factors such as the availability of water and other resources, ceremonial obligations, and more recently the presence or absence of Europeans and other factors—at [107].

### Claim group an identifiable native title community

Whether the evidence established that the claim group were the persons who, according to their traditional laws and customs, held the common or group rights comprising the native title was a primary point of contention at trial.

The applicant contended that the claim group was a recognisable composite, communal native title group, of which the estate groups were subgroups with particular more local affiliations—at [11] and [72].

The Northern Territory contended that the native title rights and interests were held at the level of each landholding group, rather than at the level of a more expansive community comprising the seven landholding groups or the four language or tribal groups in combination, arguing that the claim group was:

- a recently formed 'confederation caused by the fragmentation of remaining areas of traditional use and occupation due to European utilisation of the claim area'; and
- not connected to the application area in accordance with traditional laws and traditional customs of previous indigenous inhabitants—at [54] to [55], [75] and [112].

His Honour found:

- the claim group constituted an identifiable community;
- its members identified and recognised those persons within the description of the claim group as members of the broader community despite their different subgroups;
- its members lived under a common set of laws and customs;
- within the claim group, there were different subgroups or persons who have a particular responsibility for particular parts of the claim area or particular sites;
- there was a significant sharing of such responsibilities across particular persons from different landholding subgroups which arose under the broader communal laws and customs; and
- the claim group was not a new community different from that which existed at sovereignty. The claim group had its

ancestral source in the community which occupied the claim area sovereignty—at [129] to [150].

Mansfield J referred to the finding of the majority of the Full Court of the Federal Court in *Western Australia v Ward* (2000) 170 ALR 159 (the Full Court in *Ward*) at [204] that the evidence showed a communal title shared by a composite community of the Mirriuwung and Gajerrong estate groups under the traditionally-based laws and customs as 'currently acknowledged and observed by it' and stated that:

> The particular issue was not directly raised before the High Court in *Ward [Ward v Western Australia* (2002) 191 ALR 1], but the majority reasons indicate that the existence of the communal group holding native title must exist both at the time of sovereignty as well as at contemporary time, and during the continuum. That is not to require that there be a mirror reflection of all features of the traditional laws and customs, or the manner of their exercise, at the two temporal bookends for the reasons already given. But the communal rights and interests cannot be transferred from one communal group existing at sovereignty to a different communal group formed sometime thereafter, so that the new communal group may assert under the NT Act native title rights and interests which it holds and which are recognised by the common law under s 223(1)(c) of the NT Act—at [131].

It was noted that:

- the existence of different individual rights in respect of different parts of the claim area does not mean that the claim group does not enjoy communal rights and interests over the claim area; and
- the claim group, by its members and through its traditional decision-making processes, could collectively assert against non-members the right to enforce its native title rights and interests—at [132] to [133].

### Historical pastoral leases

The whole of the application area had previously been subject to a series of non-exclusive pastoral leases, with the majority having been granted prior to the commencement of the *Racial Discrimination Act 1975* (Cwth) (RDA) on 31 October 1975—at [232] to [244].

All but two of the historic leases were granted subject to a reservation in favour of the Aboriginal inhabitants of the Northern Territory, giving them the right to:

- enter the leased land;
- access the springs and natural surface water;
- erect and make wurlies and other dwellings;
- take and use for food native birds and animals—at [232] to [246].

His Honour was satisfied that the various reservations that applied were all essentially the same in both meaning and effect, despite some changes in the wording of the reservation over time—at [265] and [268].

### Other historical pastoral tenure

Parts of the claim area had also been subject to other pastoral interests, including pastoral permits and grazing licences. His Honour was of the view that the grant of these interests did not have any further extinguishing effect beyond that brought about by the pastoral leases—at [227], [237] and [260].

### Extinguishing effect of non-exclusive pastoral leases

It was held that all of the pastoral leases granted over the claim area were previous non-exclusive possession acts (PNEPAs), being valid non-exclusive pastoral leases granted on or before 23 December 1996. A PNEPA that is not also a category A past act has the effect of extinguishing native title to the extent that it involves the creation of rights and interests that are inconsistent with the native

title rights and interests in relation to the leased area: s. 9M of the Validation Act—at [217], [221] to [225], [249], [255] and [256].

### Inconsistency of incidents test applied

Mansfield J applied the inconsistency of incidents test set out by the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 (High Court in *Ward*) at [78] to [79] and [82], i.e. the question of whether the rights of a pastoral leaseholder are inconsistent with native title rights and interests is determined by an objective inquiry which requires identification of and comparison between the two sets of rights. His Honour considered that, in order to determine the legal incidents of a pastoral lease, it was necessary to examine both the relevant statutory provisions and the terms and conditions of the lease as a whole, including any reservation in favour of Aboriginal people—at [223] to [224] and [261] to [263].

The Territory submitted that determining the extinguishing effect depended on the 'act of granting' a pastoral lease, which was said to demonstrate an assertion by the Crown of its entitlement to determine who would have the rights of occupation, possession, use and enjoyment of the claim area. His Honour rejected this submissission:

> In my view, that contention does not correspond with the inconsistency of incidents test…[T]he exercise of the power [to grant the lease] extinguished native title only to the extent that the rights then granted were inconsistent with the pre-existing native title rights and interests—at [215].

### Territory submissions on effect of grant of pastoral leases

As noted, the Territory argued that any native title right to make decisions about the use and enjoyment of the land by others, and to control their access to the land, was extinguished by the grant of the pastoral leases. As to the effect of the reservation, the Territory submitted that:

- it was clear from the terms that no bare 'right to make decisions' was preserved as a separate right—conceptually, such a right must be linked with a right to occupy, use and enjoy the land;
- the scope of any native title right to make decisions which is preserved upon the grant of a pastoral lease must be limited by the scope of the reservation, i.e. limited to the right to make decisions about the use and enjoyment of the land by the native title holders for the purposes which fall within the reservation; and
- no right to control access by others was preserved by the reservation—at [258] and [259].

### Findings on effect of reservation in favour of Aboriginal inhabitants

His Honour was of the view that:

> [A] reservation in favour of Aboriginal people in the pastoral leases…indicates clearly that native title rights described in the reservation were held back from the grant and could continue to be enjoyed by Aboriginal people. Moreover, the reservation indicated clearly that the pastoral leases did not extinguish all native title rights and interests or substitute for them statutory rights. The reservations firstly defined the scope of Aboriginal rights and interests which were preserved upon the grant of a pastoral lease. Native title rights, not in terms included in the reservation in the pastoral leases, were susceptible to extinguishment, and were extinguished 'to the extent of inconsistency of rights granted under the pastoral leases'—at [246], citing the Full Court in *Ward* at [340] and [342] (on this, see comment below).

His Honour concluded that, in preserving the express reserved rights to Aboriginal persons, including to enter and remain on the pastoral land and to continue certain activities on the land incidental to their presence, it was not intended that the leases would preclude Aboriginal persons from doing all other things not expressly provided for in the reservation—at [268].

### Residual right to make decisions about access and use

Mansfield J recognised a non-exclusive native title right to control access to the application area by, and make decisions about its use in respect of, persons other than those having such rights under the pastoral lease or statutory rights of entry for particular 'explicit' purposes. However, his Honour went on to say that:

> I do not consider that it is inconsistent with such rights that the native title right to control access to the land should survive to exclude persons who might wish to enter the land to do things unrelated to the pastoral lease or without some other reserved or statutory rights—at [270].

His Honour held that:

- native title rights to control access to the claim area and to make decisions about its use are not, of themselves, inconsistent with rights of a pastoral lessee to make decisions about the land for pastoral purposes;

- such rights are extinguished only to the extent that they are inconsistent with the rights of a pastoral lessee to make decisions concerning those matters—at [270] and [274] to [277].

Mansfield J's application of the inconsistency of incidents test was as follows:

> Let it be supposed that only one pastoral lease had been granted over the claim area and that lease had survived only one year. To the extent that it empowered the pastoral lessee and the lessee's invitees to enter upon the claim area, the grant of the lease would be inconsistent with the exclusive native title right to control the access of persons to the claim area…But the inconsistency arises because the pastoral lease authorised the entry of a definable group of persons under it. It did not authorise the entry of all or any persons under it. The lessee could exclude uninvited persons, subject to the reservation in favour of Aboriginal persons. That right would run in tandem with the right in the native title holders to control access: s 44H of the NT Act. Once the lease came to an end, the…native title holders would have whatever rights survived to control access to the claim area. Their right would have been extinguished to the extent that it was exclusive for the reason already given…But it does not follow…that the right of a definable group of persons under the lease to access the claim area is inconsistent with (and so extinguishes) the non-exclusive native title right to control access to the claim area in respect of persons outside that definable group of persons—at [271].

Examples given by Mansfield J as to the exercise of these residual rights included:

- control of access e.g. persons seeking to enter the land to film a sacred site or commercially exploit a bush food resource; and

- decisions about use e.g. fishing or camping area restrictions—at [271] and [277].

His Honour found that:

- although the reservation referred generally to 'Aboriginal inhabitants', it was not intended to extend the range of Aboriginal persons who could exercise rights beyond those who, according to traditional laws and traditional customs, were entitled to do so, noting that this was consistent with the language used in the reservation, such as: 'in such manner as they would have been entitled to if this demise had not been made';

- Aboriginal people, other than those who constitute the claim group, had under native title laws and customs no right of entry to the claim area, and could be excluded from it, except upon permission being sought in an appropriate way from one or other of the members of the claim group; and

- it was consistent with the reservation that the native title holders, in accordance with their traditional practices, would continue to control entry to their country by other

> Aboriginal people to the extent that that right was not otherwise inconsistent with rights under the pastoral leases—at [272].

On this last point, compare *Daniel v Western Australia* [2003] FCA 666 at [586], where his Honour Justice R D Nicholson rejected a submission that the extinguishment of a right to control access was limited to controlling those entering pursuant to rights granted under a pastoral lease, as that was not what the High Court in *Ward* intended, i.e. that the native title right to control access was extinguished for all purposes, including controlling access by other Aboriginal people. It should be noted that the reservation considered in that case was the one found in Western Australian pastoral leases, which is differently worded.

Mansfield J relied upon the Full Court in *Ward* at [340] to [342]. However, the High Court in *Ward* specifically addressed and rejected the Full Court's findings, at least in relation to [340], stating that:

> [T]he reservations in favour of Aboriginal people did not define or confine the rights that native title holders could exercise in the manner suggested by the majority of the Full Court. However, the grants of the respective pastoral leases were inconsistent with the continued existence of the native title right to control access to and make decisions about the land. Those rights were inconsistent with the right of the pastoral lessee to use the land for pastoral purposes. The respective pastoral leases were not necessarily inconsistent with the continued existence of all native title rights and interests. ... the pastoral leases ... did not confer upon the lessee the right to exclude native title holders from the land.'

However, Mansfield J addressed this by noting that it was 'significant' that:

> [T]he Full Court [his Honour appears to mean the High Court] in the passage immediately quoted above did not qualify its comment that the native title rights were inconsistent with the right of the pastoral lessee to use the land for pastoral purposes by the addition of the words 'by others'—at [276].

While the pastoral lessees' rights included excluding some people from the leased area, his Honour noted that:

> Such rights were, in no sense, absolute. The native title right holders have a right to make decisions about the use and enjoyment of the land for purposes that fall within the reservation, such reserved rights being rights held back from the grant. A more general right to make decisions about the use and enjoyment of the land, subject to the rights of pastoral lessees and to other persons who may use the land under statutory or other entitlements, is not of itself inconsistent with the rights of a lessee to make decisions about the land for pastoral purposes. Examples may be given, such as decisions that a type of bush food should not be exploited in certain areas at particular times of the year, or fishing area restrictions, or the location and timing of ceremonies and the like. They might also include restrictions on members of the public as to where they might camp, if at all, in relation to significant sites—at [277].

## Comment

With respect, his Honour's finding appears to be at odds with the approach taken by other judges at first instance subsequent to the High Court in *Ward*. For example, in *Neowarra v Western Australia* [2003] FCA 1402 at [473] to [480] (*Neowarra*), his Honour Justice Sundberg refused to recognise residual native title rights to control use and access on a pastoral lease that were framed in substantially similar terms to the right considered by Mansfield J because (among other things) such rights were not traditional rights existing at sovereignty:

> [N]ative title rights and interests must reflect the normative system that was in existence at sovereignty. It is not surprising that the evidence does not establish the amended right. The subject-matter of the qualification

(a pastoral leaseholder and a person exercising a statutory right) did not then exist—at [475].

That said, it is, of course, entirely proper for there to be such differences of opinion at first instance, particularly in cases where the language used in the legislation considered differs.

In any event, Mansfield J's findings on the native title rights that survive the grant of a non-exclusive pastoral lease in the Teritory may be somewhat limited because:

- the decision appears to turn on the statuory regime, in particular the wording of the reservation. Therefore, it may have limited or no application outside of the Territory and, perhaps, South Australia, where a similarly worded reservation applies. Note that his Honour states that: 'The reservations contained no geographical limitation excluding enclosed or improved areas'—at [269]. Although not clear on the face of the reasons, this is a direct reference to the wording of the reservation applying to Western Australian pastoral leases;

- in practice, persons entering a pastoral lease for a particular purpose, other than as of right under the lease or some other statutory authority (except, possibly, other Aboriginal persons) are generally required to hold some form of permit or licence or to be acting under some other valid authority. For example, one of the objects of the *Pastoral Lands Act 1992* (NT) is to provide reasonable public access to 'waters and places of public interest' on pastoral lands, including the right to camp in certain areas for up to two weeks without any requirement for the lessee's consent: see ss. 4(d) and 78 to 81. Licences would have to be, and can be, obtained to commercially exploit bush food, one of the other examples given by his Honour: see s. 84. Note that an unlawful entry or use is not relevant to the making of a native title determination—see High Court in *Ward* at [78]; and

- the native title right recognised may, in practice, be somewhat empty of content, given that: (1) the determination recognises that non-native title rights and interests prevail over native title rights and interests; and (2) the future act regime in the NTA applies whether before or after a determination that native title exists and so the native title holders may only have the procedural rights available under the future act regime in any case.

### Crown lease perpetual 1117

The area that was the subject of CLP 1117 (the perpetual lease), which incorporated the principal claim area, comprised a portion of a pastoral lease surrendered to the Territory by the pastoral lessee in February 1993 pursuant to an agreement (the surrender agreement) between the Territory, the Conservation Commission of the Northern Territory (the commision) and the pastoral lessee—at [20], [243] and [244].

The perpetual lease was granted to a statutory authority in September 1993 for the purpose of a proposed national park in one area and for the establishment of a proposed tourist facility and camping ground in another.

Section 20(1) of the *Parks and Wildlife Commision Act* (NT) (the Commission Act) gave the commission the power to do all things necessary for the performance of its functions, including occupying, using, managing and controlling the principal claim area. However, this was subject to s. 122 of the *Territory Parks and Wildlife Conservation Act* (NT) (TPWC Act), which provided that Aboriginal people who had traditionally used the area could continue to do so in accordance with their traditions for hunting, food gathering (other than for sale purposes) and for ceremonial and religious purposes (the s. 122 reservation)—at [278] and [285].

The proposed national park had not been declared under the TPWC Act.

### Effect of perpetual lease on native title

At [287], Mansfield J held that the the perpetual lease had the same effect as a similar Crown lease perpetual considered by the High Court in *Ward*:

> [T]here was a conferral of exclusive possession [when the lease was granted] with the consequence that so much of native title rights and interests as had survived the loss of the right to be asked permission to use or have access to the land, consequent upon the preceding pastoral leases, was, subject to the operation of the RDA, extinguished—at [439], Gleeson CJ, Gummow, Gaudron and Hayne JJ.

Applying the RDA and NTA, it was then found that the grant of the lease was a category D past act to which the non-extinguishment principle found in s. 238 of the NTA applied. However, because of insufficient findings of fact, the High Court was not able to determine whether (in respect of the native title rights and interests that had survived the grant of pastoral leases) the subsequent grant of the perpetual lease was 'wholly or partly inconsistent with the continued existence, enjoyment and exercise of the native title rights and interests in question' for the purposes of the application the non-extinguishment principle—at [448], High Court in *Ward*, noted at [287] by Mansfield J.

It is somewhat difficult to reconcile the finding that the grant of the lease would, absent the intervention of of the RDA and NTA, have wholly extinguished any remaining native title rights and interests on the basis of the inconsistency between that grant and those rights and interests, with a requirement to then go on to determine the extent of inconsistency.

However, this appears to be what the High Court said and so it fell to Mansfield J to consider whether the grant of the perpetual lease was an act that was wholly or partly inconsistent with the continued existence, enjoyment and exercise of the native title rights and interests. This was because:

> If wholly inconsistent, the effect of s 238(3) is that the native title continues to exist in its entirety but the rights and interests have no effect in relation to the grants. If there is partial inconsistency, there is the continued existence of native title in its entirety but, by force of s 238(4), the rights and interests have no effect in relation to the grants "to the extent of the inconsistency"—High Court in *Ward* at [448].

Mansfield J was of the view that the perpetual lease was wholly inconsistent with continued existence of a non-exclusive native title right to:

- control access of persons to the principal claim area; and
- make decisions about the principal claim area—at [289], having noted that those rights were not expressly within the terms of the s. 122 reservation.

This was primarily because the area came under the care, control and management of the commission:

> The powers in s 20(1) of the Commission Act to use and manage and control the principal claim area are so broad as to be inconsistent with the native title rights to which I have referred.

The effect of this finding is that such rights continue to exist but have no effect 'in relation to the act'—at [288], [289] and [292] and see s. 238(3) NTA.

In relation to the other native title rights and interests found to exist in respect of the principal claim area, Mansfield J found that:

- the perpetual lease created no greater inconsistency than that brought about by the grant of the various pastoral leases; and
- section 44H of the NTA applied, so that the exercise of rights under the perpetual lease would prevail over native title rights but would not extinguish them—at [292].

Note that the grant of the perpetual lease was not a previous exclusive possession act

(PEPA) because s. 23B(9A) and the Territory analogue expressly state that acts done for the purposes of preserving the natural environment are not PEPAs.

### Public works — roads

As to the meaning of 'road', his Honour held that:

- certain access roads were 'roads' within the definition of 'public work' in s.253(a)(ii) of the NTA because they were constructed for motor vehicle access and involved significant earthworks and the re-alignment from a pre-existing track; and

- a very rough four-wheel drive track, apparently following natural contours, was not a 'road'. Section 253 contemplates 'some permanent substantial and clearly identifiable physical features'—at [301] to [302].

His Honour found that:

- two access roads, the construction of which commenced on or before 23 December 1996, extinguished native title because they were public works validated as category A intermediate period acts, fell within the definition of a previous exclusive possession act (PEPA) and, therefore, also wholly extinguished native title; and

- applying s. 251D, native title also wholly extinguished over the land and waters adjacent to the two roads used for their construction, establishment or operation. This area included a corridor on either side as necessary to maintain them—at [308].

Note that, as areas subject to PEPAs were excluded from the application area (as they must be under s. 61A), those areas were also excluded from the determination under s. 225—see the Schedule to the determination at [328].

### Public works — campsite infrastructure

The Territory contended that certain campsite infrastructure within the principal claim area, including platform tables, timber bollards, barbeques and an interpretive shelter, were PEPAs, i.e. public works, the construction of which commenced on or before 23 December 1996 that were validated as either category A past or intermediate period acts.

### Public works — fixtures

The definition of 'public work' relevantly includes 'a building or other structure that is a *fixture* that is constructed or established by or on behalf of a statutory authority of the Crown'—s. 253(a)(i), emphasis added.

The infrastructure in question was constructed by the commission. Having regard to the purpose of the lease and the powers of the commission in relation to the leased area, Mansfield J held that the works were valid, despite the fact that there had been no declaration of a proposed national park—at [300].

His Honour found that the campsite infrastructure, other than the interpretive shelter, were not 'fixtures' because:

- a fixture requires a degree of annexation to the land and the intention that it be permanent; and

- there is nothing in the NTA to indicate that the term 'fixture' is used other than in its normal common law sense—at [303] to [307].

While the hard stand area on which the interpretive shelter was constructed was laid prior to 23 December 1996 (hard stand work), the shelter itself was not contracted for construction until June 1997. His Honour held that the hard stand work was a step prior to the construction of the public work—at [309].

However, the applicant accepted that the construction of the interpretive shelter was a valid future act under s. 24ID(1)(a) of the NTA to which the non-extinguishment principle applied because it was to give effect to, or was because of, the surrender agreement—at [310].

### Application of s. 47B to Hatches Creek township

Mansfield J considered it common ground that s. 47B may apply to the Hatches Creek township area on the basis that, at the time the application was made, that area was not covered by a proclamation under which it was to be used for public purposes or for a particular purpose—at [228]. Note that there is no consideration given to the other matters raised in s. 47B((1)(b)(ii).

There was no direct evidence before the court as to the requirement in s. 47B(1)(c) that, at the time the application was made, one or more members of the claim group occupied the area. The Territory submitted this requirement was not met.

Mansfield J inferred from the evidence that members of the claim group occupied Hatches Creek township for the purpose of s. 47B(1)(c), noting that:

- claim group members resided nearby and hunted and traversed the surrounding land including, by inference, Hatches Creek township;
- the presence of Aboriginal persons on the application area, and their occupation of it, would be influenced by seasonal factors, ceremonial obligations and the presence of non-Aboriginal persons; and
- Hatches Creek township had no physical features of significance to suggest it was continually occupied, in the sense of having permanent residents, at the time of the making of the application—at [313], referring to Olney J in *Hayes v Northern Territory* (1999) 97 FCR 32 at [162].

### Right to possess, occupy, use and enjoy

His Honour, referring to the High Court in Ward, found it was not necessary or appropriate to express the rights and interests in such terms—at [170] and [319].

### Right to control disclosure of cultural knowledge

Mansfield J recognised the right to control the disclosure (otherwise than in accordance with traditional laws and customs) of spiritual beliefs or practices, or of the 'paraphernalia' associated with them (including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of or place on the land or waters.

The Territory argued that the claimed right did not meet the requirement of s. 223(1)(b). His Honour found that the 'critical question' under s. 223(1)(b) was whether the claim group, by the traditional laws and customs which give rise to the particular native title rights and interests, had a connection with the claim area:

> The expression of the claimed right is more refined, or more specifically directed to meeting the requirement of s. 223(1)(b), than those considered by the High Court in *Ward* …The evidence discloses that certain of the spiritual beliefs or practices of the claim group are 'site specific', and the activities conducted pursuant to them relate to particular locations in the claim area. As expressed, the proposed right firstly *relates only to the spiritual beliefs which concern particular locations in the claim area.* And secondly it seeks to 'control' the disclosure of those beliefs and the material objects and other 'paraphernalia' associated with them. *It is not directed to controlling the use of some intellectual property, but to controlling its acquisition…*As expressed, I do not consider the right is 'something approaching an incorporeal right akin to a new species of intellectual property'—at [324]. (Emphasis added and see High Court in *Ward* at [64], where it was said that what was required for s. 223(1)(b) was (a) the identification of the *content* of traditional laws and customs and (b) the characterisation of the *effect* of those laws and customs as *constituting* a connection of the people to the claim area.)

### Right to trade traditional resources

Mansfield J recognised a right to share, exchange or trade subsistence or other traditional resources obtained on or from the land and waters in respect of both the Hatches Creek township and principal claim area, i.e. on an exclusive and non-exclusive basis respectively. Note that in *Commonwealth v Yarmirr* (1999) 101 FCR 171 at [250]; (1999) 168 ALR 426 at [250], the majority of the Full Court commented that it seemed logical to view the right to trade as an integral part of a right to exclusive possession. At first instance, Olney J had commented that a right to trade consisting of a right to an exchange of goods was not a right or interest in relation to land or waters as required by s. 223(1): *Yarmirr v Northern Territory* (1998) 156 ALR 370 at [119]. In *Neowarra* at [510], Sundberg J was satisfied that this was a right in relation to land and waters (although no such right was recognised in that case).

### Right to maintain and protect areas of importance

The Territory contended that a right to 'protect' may involve controlling access and making decisions in a manner that was inconsistent with rights granted under a pastoral lease and, therefore, that it was extinguished to that extent—at [176].

Mansfield J recognised the right as claimed on the basis that the word protect:

> [C]ontemplates conduct in relation to those places in a way which may well fall short of controlling access to those places in a way which is inconsistent with previously granted rights, and the exercise of the right to be recognised is subject to the prevailing activities under the exercise of other rights: s. 44H NTA—at [322].

### Right to determine and regulate membership of landholding group

Mansfield J determined that the native title holders had such a right, despite noting the applicant's acceptance that it was more appropriately recognised as part of their laws and customs rather than being a native title right or interest in relation to the claim area—at [173] and [325].

### Right to bury

Mansfield J recognised a right to bury, formulated in the context of a right to engage in cultural activities in relation to both the the primary claim area and Hatches Creek township, i.e. on both an exclusive and non-exclusive basis. It appears the Territory did not contest the recognition of such a right.

### Determination that native title exists

Subject to excluding areas where it had been found native title was extinguished, his Honour determined that native title existed in relation to:

- the principal claim area, on a non-exclusive basis; and
- the area of Hatches Creek township, on an exclusive basis.

### Native title holders

His Honour determined that the persons who hold the communal or group rights comprising the native title as the common law holders are the Aboriginal persons who are:

- members of one or more of the seven landholding groups because of specified descent based connections;
- those people recognised by the above persons as members of one or more of the seven landholding groups because of non-descent based connections, including adoption or birthplace affiliation; and
- spouses of persons referred to in the two categories above and who are recognised by the persons referred to in the first category as having native title rights and interests in the determination area.

### Native title rights and interests determined to exist

Mansfield J determined the nature and extent of the native title rights and interests in relation to the determination area as required under s. 225(b) to be:

- the right to hunt and fish, to gather and use the resources of the land such as food and medicinal plants and trees, timber, charcoal, ochre, stone and wax and to have access to and use of water on or in the land;

- the right to live on the land, to camp, erect shelters and other structures, and to travel over and visit any part of the land and waters;

- the right to engage in cultural activities on the land, to conduct ceremonies and hold meetings, to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters and to participate in cultural practices relating to birth and death, including burial rights;

- the right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements;

- the right to make decisions about access to the land and waters by people other than those exercising a right conferred by or arising under a law of the Territory or the Commonwealth in relation to the use of the determination area;

- the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources of those land and waters, by people other than those exercising a right conferred by or arising under a law of the Territory or the Commonwealth in relation to the use of the land and waters;

- the right to share, exchange or trade subsistence and other traditional resources obtained on or from the land and waters;

- the right to control the disclosure (otherwise than in accordance with traditional laws and customs) of spiritual beliefs or practices, or of the paraphernalia associated with them (including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of or place on the land or waters;

- the right to determine and regulate the membership of and recruitment to a landholding group.

Note that the native title rights and interests are held subject to, and are exercisable in accordance with, the traditional laws and customs of the common law holders.

### Relationship between native title and other interests

His Honour determined the general relationship between the native title rights and interests and the non-native title interests as required under s. 225(d) to be they coexist but, to the extent of any inconsistency:

- the native title rights and interests do not prevent the doing of any activity by or under the non-native title interests; and

- the non-native title rights and interests, and the doing of any activity giving effect to those rights and interests, prevail over the native title rights and interests but do not extinguish them—at [328].

Mansfield J also specified the source of particular rights and interests conferred by, or arising under, the perpetual lease and, in relation to the principal claim area:

- determined the particular native title rights and interests that were not inconsistent with the non-native title interests determined in relation to the area; and

- noted that the right to make decisions about access by, or use and enjoyment of, the land by people other than those exercising a right under a law of the Territory or the Commonwealth were inconsistent with the rights granted under the perpetual lease and, therefore, continue to exist but have no effect in relation to the grant—at [328] and see s. 238.

### Prescribed body corporate

In orders 9 and 10, it was found that native title is not to be held on trust (i.e. it is held by the common law holders) and the applicant was ordered to nominate a prescribed body corporate within three months of the orders.

### Decision on appeal

The Territory has raised more than 50 grounds in its appeal against aspects of this decision filed in the Federal Court shortly after judgment was delivered, including:

- the nature and composition of the native title holding group;
- the recognition of particular native title rights and interests, including the right to trade in resources and the residual right to control access to and use of a non-exclusive pastoral lease;
- the application of s. 47B to Hatches Creek township; and
- matters relating to the form of the determination.

## Application to replace applicant and to combine applications

### *Bolton v Western Australia* [2004] FCA 760

French J, 15 June 2004

### Issue

The main issues dealt with in this case were whether applications made under s. 66B(1) to replace the applicants in several claimant applications and to amend to combine some of those applications into a single application were duly authorised.

### Background

This case relates to several claimant applications in the South West of Western Australia. The native title representative body for that area, the South West Aboriginal Land and Sea Council (SWALSC), had been trying for some time to resolve overlaps between the various applications, including by seeking orders to combine applications as provided for in s. 64(1A) of the NTA.

As part of this process, orders were sought under s. 66B(2) of the NTA to replace those named as the applicants in six of the applications and then to combine all of those applications plus several others into a single 'lead' application (referred to as the Southern Noongar Claim) covering the bulk of the South West area. (On 'lead' applications, see *Bropho v Western Australia* (2000) 96 FCR 453 at [25], French J.)

### Authorisation process

Prior to making these applications, SWALSC had held a series of meetings for each affected application at which resolutions were passed to, among other things, bring the s. 66B(1) applications and seek orders for combination, both of which involved questions of authorisation under s. 251B of the NTA.

The meetings were advertised in various newspapers, with the advertisements specifying the general nature of the proposed resolutions. All the members of SWALSC who identified as part of the relevant claim group as generally described (e.g. Wagyl Kaip, Yued, South West Boojarah) were sent an agenda that included the proposed resolutions, as were members of various working parties and certain Aboriginal organisations in the region. The court noted that the number of people who attended the meetings was often much lower than the number of SWALSC members who identified as part of a particular claim group and had been personally notified (e.g. 27 out of 212, 20 of 82, 37 of 233).

The court was critical of the process adopted to obtain authorisation for a number of reasons, including:

- there was no affidavit evidence from the people who were to be removed from the group named as the applicant—see s. 61(2);
- while the native title claim group in each application was defined by reference to apical ancestors, the biological descendants of those persons and persons adopted by them, the advertisements and notices for the meetings did not refer to the relevant native title claim groups except by

use of the generic title of the applications in question, e.g. Southern Noongar, Wagyl Kaip, Yued;

- there was no affidavit evidence disclosing the basis upon which members of SWALSC identified as claimants nor any evidence as to those members of the group who were not members of SWALSC;

- there was no direct evidence to show that those who attended the meetings and passed the various resolutions fell within the native title claim group as described in the application;

- there was no evidence before the court to explain the 'composition, origins or purpose of' the working parties notified;

- the evidence before the court did not demonstrate that those who attended the meetings were members of the relevant native title claim group. Rather, the evidence indicated that there was 'an asserted self-identification'; and

- the connection between those who attended the meetings and the respective claim group as described in the relevant application was not established in respect of either notification or, 'more importantly', attendance—at [11] to [41] and [45].

### Court's power to amend constrained

His Honour Justice French cited a number of authorites which indicate that, while the court has a general power to amend applications under O 13 r. 2 of the Federal Court Rules, that power is subject to the constraints imposed by ss. 64 and 66B of the NTA. It was noted that s. 66B(1) provides for an application to be made to the court for an order to replace the applicant in a claimant application and that s. 64:

- specifically authorises the amendment of applications made under s. 61(1) to reduce the area covered by them;

- prohibits amendments to applications that result in the inclusion of any area not covered by the original application, unless the application is a claimant application and the amendment combines it with one or more other claimant applications; and

- expressly contemplates amendments to change those named as the applicant in a claimant application—at [6] and [7].

### Conditions of exercise of discretion under s. 66B(2)

French J noted that the conditions under which an order will be made under s. 66B(2) are:

- there is a claimant application;

- each applicant for an order under s. 66B(2) is a member of the native title group;

- the person to be replaced is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it;

- alternatively, the person to be replaced has exceeded the authority given to them by the claim group;

- the persons making the application under s. 66B(1) are 'authorised' (see s. 251B) by the claim group to make the application and to deal with the matters arising under it; and

- a decision made by a representative or other collective body exercising authority on behalf of the claim group under customary law or, absent applicable and mandatory customary law, by an agreed and adopted process, will suffice to prove the decision-making processes required—at [42], citing *Daniel v Western Australia* (2002) 194 ALR 278 at [17], French J and *Anderson v Western Australia* (2003) 204 ALR 522 at [39], French J, summarisied in *Native Title Hot Spots* Issue No 2 and Issue No 8 respectively.

### Authorisation for s. 66B(2)

The issue of authorisation in relation to the s. 66B(1) applications proved to be the crucial point. His Honour repeated what he said in

*Daniel v Western Australia* (2002) 194 ALR 278 at [11] that:

> [I]t is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title—at [43].

If, 'as may well be the case', there is no relevant and mandatory traditional decision-making process applicable to the making and conduct of a claimant application, then a process 'agreed to and adopted by the persons in the native title claim group' will suffice as the source of authority for an applicant representing members of a claim group—see s. 251B.

However, his Honour emphasised that this is 'no light requirement':

> It means that the authorisation process must be able to be traced to a decision of the native title claim group who adopt that process. The conferring and withdrawal of authority for the purposes of a s. 66B application must be shown as flowing from the relevant native title claim group—at [44].

His Honour warned against:

> [A]ccepting a constructed 'decision-making' process which cannot be demonstrated, to reflect in any legitimate sense, the informed consent of the members of the native title claim group or persons properly representing them as a substitute for the authorisation required by the Act—at [46].

### Decision on s. 66B(1) applications

His Honour found with 'regret' that:

- the evidence and the processes adopted in this case were not adequate to meet the conditions necessary to make an order under s. 66B(2); and
- each of the motions for amendment suffered from the same 'fatal deficiency', namely, there was no evidence that meetings held where authorisation was purportedly given were, 'in any sense', fairly representative of the native title claim groups concerned, i.e. the group as defined in the relevant application.

The 'deficiency' arose because the evidence was insufficient to demonstrate that:

- there had been notification to members of each native title claim group *as defined in the relevant claimant application;* or
- those who attended belonged to the relevant native title claim group; and
- even if it was accepted that each of the members who attended each of the meetings was a member of the relevant native title claim group, it was not established that they were, in any sense, representative of the various components of the native title claim group concerned—at [45] and [46].

His Honour was at pains to note that:

> It may be that there is a chronic difficulty that cannot be overcome despite its [SWALSC's] most heroic efforts because of the apathy, lack of interest, or divided opinions held by members of the relevant native title claim groups—at [46].

French J observed that, if this proves to be the case, then this 'may be a reason for reconsidering' whether the claimant applications dealt with in this case 'should proceed at all'—at [46].

### Decision on combination

French J found that:

> The difficulties underlying the s 66B motions in this case go to the heart of the proposed combination applications. Counsel for the applicants in each of the matters… accepted, without making any formal concession that failure to achieve the orders sought under s 66B would have the

practical consequence that there would be no authority to proceed with the combination applications. In my opinion, that is a correct appreciation of the position. The combination motions cannot succeed as they want authority. They must therefore be dismissed— at [54].

### Amendment to reduce

His Honour had earlier given directions that an amended motion be filed in the Ballardong application. The proposed amendment subsequently filed involved contracting the Ballardong application so as not to overlap the Single Noongar Claim. His Honour observed there were 'internal difficulties among the applicants and the absence of evidence of a truly representative meeting' and, therefore, the order sought could not be made—at [57]. French J has earlier considered an application to amend the Ballardong application and observed similar 'internal difficulties'—see *Anderson v Western Australia* (2003) 204 ALR 522, summarised in *Native Title Hot Spots* Issue No 8.

### Comment

The s. 66B(1) applications were dismissed, 'save for' the removal of the names of certain deceased persons from the group named as the applicant. Given his Honour's finding that authority was lacking, it is not clear on what basis these orders were made, since (as French J noted) under both ss. 64(5) and 66B(2), authorisation is central to the exercise of the court's powers to amend to change the constitution of 'the applicant' as defined in s. 61(2).

### On appeal

On 22 June 2004, the applicants filed an application for leave to appeal against French J's decision in the Federal Court.

## Amendment to reduce application area late in proceedings and costs

### *Walker v Queensland* [2004] FCA 640

Allsop J, 17 May 2004

### Issue

The issues here were:

- should the court allow an amendment to a claimant application that would have the effect of excluding the area covered by certain pastoral interests at a fairly late stage of the proceedings; and
- if the amendment was allowed, should the pastoralists be removed as respondents to the application and should there be any order as to costs?

### Background

The applicant in a claimant application made in 1994 on behalf of members of the Eastern Ku-Ku Yalanji People sought an order under s. 64(1) of the NTA to the application to remove areas covered by four pastoral leases. As a consequence of the amendment application, the applicant also sought orders to remove the pastoral lessees as parties pursuant to s. 84 of the Act and that each party bear their own costs, relying on s. 85A of the NTA.

His Honour Justice Allsop noted that:

- considerable time, effort and costs had gone into the claim insofar as it related to the four pastoralists: time, effort and money of the four pastoralists themselves, the applicant, the court and the National Native Title Tribunal all funded by public funds;
- much energy had been directed to obtaining, by agreement, an indigenous land use agreement (ILUA);
- while there had been various attempts to reach agreement between the applicant and the leaseholders, at times the process of negotiation had been strained;

- the matter was allocated to Allsop J in 2002 and, in 2003, the court was told it would settle but this did not happen. Late in 2003, some of the parties sought an order that mediation cease. While the court refused to do this, his Honour indicated that the parties should understand that, while the court was anxious to see a resolution by agreement, so much time had passed since the application was made that the parties were now required to start preparing the matter for trial;

- it appeared that such emphasis had been placed on the negotiation of the ILUA that preparation for hearing was an urgent task to be picked up; and

- preparation for hearing 'necessarily' underpinned the work that would otherwise have to be done in coming to a consent determination—at [4] to [10].

The applicant submitted that:

- there were funding constraints and the time, effort and energy and funds being taken up in reaching agreement with the pastoralists were disproportionate to the benefit that they may end up gaining through a consent determination; and

- a negotiated outcome over a substantial area could be reached over the balance of the area—at [4] and [6].

The pastoralists opposed the amendment, largely because:

- they were concerned that another claimant application could be made over their leases at some time in the future; and

- they had already expended much time, effort and money in negotiations that, in their view, had made some real progress—at [5].

(For further background, see also *Walker v Queensland* [2003] FCA 960, summarised in *Native Title Hot Spots* Issue 7.)

### Amendment application

Allsop J considered the application for withdrawal and discontinuance at such a late stage in the proceedings would not, if this were 'ordinary litigation', be allowed 'other than on the clearest terms that no further proceeding could be brought'—at [10].

However, his Honour concluded that, given the terms of s. 64(1A) of the NTA, this approach was not possible. Subsection 64(1A) provides that:

> An application may at any time be amended to reduce the area of land or waters covered by the application. (This subsection does not, by implication, limit the amendment of applications in any other way.)

### Decision on amendment

His Honour was of the view that:

> The plain structure and meaning of those words [i.e. s. 64(1A)] is…to give a statutory right to amend the claim to reduce the area…covered by the application. The subsection is directed not to an applicant approaching the Court for permission to do anything; rather it is directed to the application which it is said by Parliament may at any time be amended in the fashion identified…
>
> Therefore, most reluctantly because I have no choice, I am prepared to allow the amendment to the extent that my allowance has anything to do with the operation of s 64—at [11] and [12].

It was noted that, under ss. 61(1) and 225, the pastoralists could file a non-claimant application seeking a determination that there was no native title over their leasehold interests. Counsel for the pastoralists indicated that, if the amendment was allowed, then those applications would be made.

### Removal of pastoralists as parties

The applicant had submitted that the only interests the pastoralists had cited that may be affected by a determination in these proceedings were their leases—see s. 84. His

Honour was not persuaded that the pastoralists did not have an interest sufficient to entitle them to remain parties: 'No doubt the four pastoralists were not anticipating the particular confluence of circumstances that is present today'. Therefore, Allsop J gave them 28 days to file documents to show why they were entitled to remain as parties—at [14].

### Costs

The question was whether the applicant should pay the pastoralists' costs of the proceedings to date. His Honour noted that:

- the pastoralists were largely funded by the Commonwealth;
- while the court had a broad discretion as to costs, it must be exercised judicially and is informed by s. 85A of the NTA, which provides that, unless the court orders otherwise, each party to a proceeding must bear their own costs. One of the grounds upon which the court can depart from this is where it is satisfied that any unreasonable act or omission by one party has caused another party to incur costs;
- public policy in seeing this matter move forward either to an agreed or (if necessary) a litigated outcome, was a relevant consideration;
- if the applicant was ordered to pay costs, it might affect the progress of the matter.

His Honour concluded that:

> Were this not a piece of litigation of a very different character than the usual piece of litigation I would order costs. However, in the light of s 85A, in light of the explanation of the conduct of the applicant, in the light of the fact that to a significant if not a complete degree the litigation is publicly funded, I do not propose to order that the applicant pay the four pastoralists' costs—at [18].

The applicant's undertaking to pay the pastoralists' costs if an application was made in the future on behalf of the Eastern Ku-Ku Yalanji People over the leases was noted. The question of costs was reserved and liberty to apply granted to the pastoralist and the Commonwealth to argue the question of costs should any further claim be made in the future.

## Strike-out

### *Branfield v Wharton* [2004] FCAFC 138

Ryan, Finn and North JJ, 21 May 2004

### Issue

The applicants sought (among other things) leave to appeal against His Honour Justice Emmett's decision to dismiss their application to strike out a claimant application—see *Wharton v Queensland* [2003] FCA 1398, summarised in *Native Title Hot Spots* Issue 8.

### Background

At first instance, Emmett J found that:

- item 21 of Schedule 5 of the *Native Title Amendment Act 1998* (Cwlth) (the transitional provisions) provided that, if an application was made under the old Act, then references in s. 84C of the new Act to ss. 61 or 62 are references to ss. 61 or 62 of the old Act;
- an amendment to the main application does not give rise to a new application;
- the scheme of the Act recognises that applications may be amended; and
- there is nothing to suggest that, when an application is amended, it should thereupon be treated as a new application so as to lose the protection afforded by item 21.

*Quall v Risk* [2001] FCA 378 ) (*Quall*) was relied upon by the appellants, where it was said that if a claimant application made under the old Act is amended by changing the composition of the claimants, then s. 61 of the new Act applies to the consideration of a strike out application made under s. 84C of the new Act (the *Quall* principle).

The Full Court distinguished *Quall* on the basis that, while the amendment to the description of the native title claim group in this case described the group with greater particularity and considerably more certainty, it did not change the persons or group on behalf of whom the application was bought, as was the case in *Quall*.

### Decision

After noting that one of the important matters to be considered by the court in deciding whether or not to grant leave to appeal is the chance of success on the appeal, the Full Court found that the applicants were 'bound to fail on appeal'. This was because, even if the principle said to have been established in *Quall* was assumed, the applicants had not established any error made by the primary judge in the application of that principle—at [12].

Therefore, the application for leave to appeal was dismissed.

### The Quall principle questioned

On these facts, the court was prepared to assume the existence of the *Quall* principle. That said, the court acknowledged that 'there is scope for questioning the correctness of the principle' but felt that this should await a case in which its determination was required by the facts of the case—at [13] to [14].

In relation to arguments by the appellant in relation to *Landers v South Australia* [2003] FCA 264 (*Landers*); *Dieri People v South Australia* [2003] FCA 187 (*Dieri*), *Bodney v Western Australia* [2003] FCA 890 (*Bodney*) and *Colbung v Western Australia* [2003] FCA 774 (*Colbung*) which followed *Quall*, the court also observed 'in passing' that:

> [I]n Landers, Dieri and Bodney there was no argument addressed to the effect of an amendment to the application of a determination of native title. In both Landers and Bodney the parties agreed that the approach in Quall should be taken. In Colbung, although Dieri was approved, the Quall reasoning was unnecessary for the determination of the application before the Court because the application for a determination of native title was found to comply with the new s61 in any event—at [14].

## Compulsory acquisition

### *South Australia v Honourable Peter Slipper MP* [2004] FCAFC 164

Branson, Finn and Finkelstein JJ, 24 June 2004

### Issue

This decision concerns the validity of:

- the issue of a certificate by the Commonwealth Minister for Finance and Administration under s. 24 *Lands Acquisition Act 1989* (Cwlth) (LAA); and
- the subsequent compulsory acquisition of land under s. 41(1) of the LAA for a national repository for disposal of low level radioactive waste by the Commonwealth of Australia.

The Full Court unanimously found that the compulsory acquisition should be set aside on grounds related to the proper interpretation of the LAA.

This summary relates only to the interpretation of s. 26(1) of the NTA, which deals with compulsory acquisitions affecting native title (i.e. that are future acts) and whether or not the right to negotiate is attracted to particular acquisitions. Of particular interest is the meaning given to 'infrastructure facility' as used in s. 26(1)(c)(iii)(B). It may mean that some future acts previously thought to be excluded from the right to negotiate regime (Subdivision P of Division 3 of the NTA) must now be seen to be acts that attract the right to negotiate.

### Background

This decision deals with appeals made by the State of South Australia and Mr McKenzie, the applicant in a native title claim made on behalf of the Kuyani People, against a decision of his Honour Justice Selway in *South Australia v*

*Honourable Peter Slipper MP* [2003] FCA 1414 and *McKenzie v Honourable Peter Slipper MP* [2003] FCA 1416, both summarised in *Native Title Hot Spots* Issue 8. The Honourable Peter Slipper MP was the first respondent to these appeals in his capacity as Parliamentary Secretary to the Commonwealth Minister for Finance and Administration.

The proceedings relate to the purported compulsory acquisition by the Commonwealth of a radioactive waste repository site and access corridor near Woomera in South Australia (the site) under the LAA. At first instance, Selway J dismissed applications brought by the state and Mr McKenzie challenging the validity of the certificate given under s. 24 of the LAA for the compulsory acquisition of all the interests in the site, on the basis of 'urgent necessity for the acquisition'. It was accepted that the right to negotiate process under Subdivision P of Division 3 of Part 2 of the NTA had not been complied with.

### Making of the statement — s. 26(1)(c)(iii)(A)

Section 26(1)(c)(iii)(A) of the NTA has the effect of excluding from the operation of Subdivision P (the right to negitiate regime) a compulsory acquisition of native title rights and interests in circumstances where the purpose of the acquisition is to *confer rights and interests* in relation to the land on the *'government party'*, defined in in s. 26(1)(b) to be the Commonwealth, a state or a territory), and the government party '*makes a statement* in writing to that effect *before* the acquisition takes place'. Note that in such cases, the procedural rights available to native title parties are found under s. 24MD(6A).

The Commonwealth contended that s. 26(1)(c)(iii)(A) applied to exclude the right to negotiate because:

- the relevant statements were incorporated in both the certificate given under s. 24 and the declaration of acquisition under s. 41 of the LAA; and
- the purpose of the acquisition was to confer rights on the Commonwealth.

Mr McKenzie argued that the statements were not made within the meaning of s. 26(1)(c)(iii)(A) because they were not communicated to him until after the compulsory acquisition had been effected.

The Full Court unanimously found that:

- Selway J had rightly concluded that the word 'statement' in s. 26(1)(c)(iii)(A) meant 'something stated' and did not imply communication 'in a compendious sense'; and
- the meaning Mr McKenzie contended for would result in a delay before a compulsory acquisition could be effected anomalous with the existence of an urgent necessity to acquire—at [74] to [76] and [137].

Therefore, the right to negotiate did not apply to the acquisition in question because s. 26(1)(c)(iii)(A) applied.

### Infrastructure facility

Although nothing turned on it in this case, the court went on to consider the Commonwealth's alternative contention that the primary judge should have found that the purpose of the acquisition of the site was to provide an 'infrastructure facility' within the meaning of s. 26(1)(c)(iii)(B) of the NTA, which excludes from the operation of Subdivision P the compulsory acquisition of native title rights and interests where the purpose of the acquisition is to provide an 'infrastructure facility'.

The main distinction between ss. 26(1)(c)(iii)(A) and (B) is that subparagraph (B) covers situations were the purpose of the compulsory acquisition is to confer rights on someone *other than* a 'government party' but only if the purpose of the acquisition is to provide an 'infrastructure facitity', a phrase which is found in s. 253 of the NTA.

Branson J noted that section 253 contains a number of 'definitions' as that term is ordinarily

understood, i.e. unless a contrary intention appears, it provides that certain words or phrases have the meaning set out in s. 253 or other identified provisions—at [78].

However, sometimes rather than *defining* a word or phrase, s. 253 provides that the word or phrase *includes* specified things i.e. it includes those specified things in addition to whatever the ordinary meaning of that word or phrase might be—see [78].

This is the case with 'infrastructure facility'. Section 253 states that the term 'infrastructure facility includes any of the following' specific categories of things. The last category of things is: 'any other thing that is similar to any or all of the things mentioned in' the preceeding eight paragraphs, provided that the Commonwealth minister has determined in writing that the 'thing' in question is an infrastructure facility for the purposes of the definition found in s. 253.

After considering the 'ordinary meaning' of the word 'infrastructure' as defined in the Oxford English Dictionary and the Macquarie Dictionary, and noting that the issue was not 'free from doubt', Branson J (with Finn at [88] and Finkelstein JJ at [148] agreeing) concluded that the better view was that the definition of 'infrastructure facility' found in s. 253 had been drafted on the basis of the ordinary meaning and the term 'infrastructure facility' was relatively narrow.

Branson J found that:

> It is…in accordance with [that relatively narrrow] ordinary usage for 'infrastructure facility' to be used to describe a subordinate part of a particular undertaking or a facility intended to serve or support a particular undertaking. If this view is the correct view, a national radioactive waste repository not designed as a subordinate part of any particular undertaking or facility would not be an 'infrastructure facility'.
>
> I would reject the [Commonwealth's] contention that the primary judge should have found that the purpose of the acquisition was to provide an infrastructure facility within the meaning of s. 26 of the Native Title Act—at [84] to [85].

In so finding, the court:

- presumed the purpose behind s. 26(1)(c)(iii)(B) to be to exclude the right to negotiate where the acquisition is to provide a facility for the economic benefit of the nation or a region of the nation; and

- noted that the ordinary meaning of the term 'infrastructure facility' was too narrow to achieve that purpose, which may explain why the specific non-exhaustive list of things it was to include was inserted into s. 253.

Therefore, according to the Full Court, had s. 26(1)(c)(iii)(A) not applied, the right to negotiate would have applied to the acquistion, since the nuclear waste repository did not constitue an 'infrastructure facility' as required by s. 26(1)(c)(iii)(B) and so would not have been excluded from Subdivision P. Nothing turns on it in this case, because the mattter was decided on the basis of the Full Court's reading of the LAA and s. 26(1)(c)(iii)(A) of the NTA.

### Decision

Their Honours allowed the appeal and ordered:

- the orders of Justice Selway be replaced with orders in the nature of certiorari quashing the relevant certificates and declarations under the LAA; and

- the Commonwealth pay both the state's and Mr McKenzie's costs at first instance and on appeal.

## *Minister for Lands, Planning and Environment (NT) v Griffiths* [2004] NTCA 5

Martin (BR) CJ, Mildren and Riley JJ, 10 May 2004

### Issue

This was an appeal against a decision that certain notices of compulsory acquisition issued by Minister for Lands, Planning and Environment of the Northern Territory were invalid. See *Griffiths v Lands & Mining Tribunal* [2003] NTSC 86, summarised in *Native Title Hot Spots* Issue 6.

### Background

A number of notices of proposed acquisition of unalienated Crown land, unaffected by any interest or tenure derived from the Crown, in Timber Creek in the Northern Territory, including acquisition of any native title interests, were issued under the *Lands Acquisition Act 1978* (NT) (LAA). The purposes for which the land was being acquired identified in the notices were, essentially, in order to grant term leases for pastoral, agricultural or commercial purposes, some of which could later be surrendered in exchange for a freehold grant.

Native title claims were filed (and subsequently registered), together with notices of objection to the acquisitions lodged under the LAA. This decision deals with an appeal by the minister to the Court of Appeal of the Northern Territory against the findings of the primary judge in relation to the validity of those notices.

The primary judge found that:

- if the minister intended to acquire the native title interests in land, the notices had to be drawn so as to compulsorily acquire those interests and not the Crown's interest as well; and
- the notices had been ineffective to acquire interests in unalienated Crown land.

### Decision

The appeal was allowed unanimously. Riley J agreed with the reasoning of His Honour Justice Mildren, as did Martin CJ, subject to one qualification which the Chief Justice set out in separate reasons for decision. That qualification is briefly set out below. Otherwise, what follows is a summary of Mildren J's reasons.

Mildren J disagreed with the primary judge and found that:

- on a true construction of the notices, the minister only intended to acquire all interests, including the native title interests, other than the interests which the Crown itself already had; and
- the notices were not rendered invalid simply because they purported to acquire that which the Crown already had—at [55].

### Does the LAA apply where the fee simple interest is not acquired?

His Honour held that the argument put by the native title party that the LAA does not apply in circumstances where the interest to be acquired is not the land itself could not be sustained because:

- the LAA specifically envisages the acquisition of any interest in land including, in particular, native title interests; and
- therefore the Parliament intended that the minister had the power to acquire an interest in land under the LAA without, at the same, time acquiring the fee simple title to the land—at [60] to [71].

### Does the NTA preclude an acquisition where only native title interests acquired?

One of the arguments put forward by the native title party rested upon the interpretation of s. 24MD(2) of the NTA. It provides that a compulsory acquisition will have the effect of extinguishing native title rights and interests if:

- the act is a compulsory acquisition of the whole or part of any native title rights and

interests under a law of the Commonwealth, a state or a territory that permits the compulsory acquisition of both native title and non-native title rights and interests; and

- the whole, or the equivalent part of, of all non-native title rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily acquired relate, is also acquired (whether compulsorily or otherwise) in connection with the compulsory acquisition of the native title rights and interests; and

- the practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired.

The matter before the court turned on the second requirement i.e. s. 24MD(2)(b).

The native title party's argument was that:

- where there are no non-native title rights in the land in question (as in this case), any notice of acquisition will *not* have the effect of extinguishing the whole or part of the native title rights and interests attempted to be acquired; and

- therefore, the notices of acquisition given under the LAA in this case were ineffective—at [72] and [73].

This was primarily because, under s. 46(1) of the LAA, upon publication in the Gazette of a notice of acquisition:

> [T]he land described in the notice vests in the Territory freed and discharged from all interests, trusts, restrictions, dedications, reservations, obligations, encumbrances, contracts, licences, charges and rates of any kind…and any interest that a person had in the acquired land is divested, modified or affected to the extent necessary to give effect to this subsection.

Mildren J found that:

- if s. 24MD(2)(b) applies only where there is an acquisition of all interests other than the Crown's interests in land, and cannot apply where the only interest in land other than the Crown's interest is a native title interest (as in this case), that does not invalidate the notice of acquisition; and

- in those circumstances the non-extinguishment principle would apply—see s. 24MD(3) and s. 238 NTA.

According to his Honour, this meant that:

- the procedural rights available to native title parties as a result of s. 24MD(6A) of the NTA would still apply; and so

- the LAA would apply, since s. 5(1)(a) provides that the LAA applies in relation to an acquisition of native title rights and interests that is an act to which the consequences in section 24MD(6A) or (6B) of the NTA apply. [Note that the consequences of s. 24MD(6B) would also seem to apply in this case, since the purposes of the acquisitions in question was to confer rights on persons other than the Territory]—at [74].

Mildren J concluded that the effect of these provisions was to suppress the native title rights until such time as the acquisition or it effects were later wholly or partly removed, or wholly or partly cease to operate—at [74], referring to s. 238 of the NTA.

According to his Honour, there was nothing in any provision of the LAA, apart from s. 46(1), which suggested that an acquisition to which the non-extinguishment principle applied was not contemplated by the LAA. Therefore, his Honour found that:

- subsection 46(1) of the LAA should be read down to the extent that it was in conflict with the NTA;

- therefore, the notices were valid; and

- where the only interest acquired was a native title interest (because, as in this case,

there were no other interests in the land in question), it was not necessary to decide whether or not the compulsory acquisition would extinguish the native title rights in terms of ss. 24MD(2)(b) and (c) of the NTA—at [75].

### Validity of notices — improper purpose

Subparagraph 43(1)(b) of the LAA provides that 'subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever'. It was argued by the native title party that:

- the words 'any purpose' should be limited to purposes which are the purposes of the Territory or public purposes; and
- accordingly, the acquisition of native title interests for the purpose of issuing a Crown lease to a third party fell outside the acquisition power contained in s. 43 of the LAA—at [76] and [77].

Mildren J considered various cases regarding compulsory acquisitions and decided that, in the circumstances of this case, the acquisition was for a legitimate Territory purpose in that it was:

> [V]ery much the business of government to promote industry in or around towns by providing land for the use of industry, whether the industry be manufacturing, tourist businesses or goat farming—at [85].

It was noted that the LAA contains a mechanism to ensure that the minister's power to acquire land was not abused because:

- the LAA provides for objection and review by an independent tribunal and that tribunal's decision is subject to appeal;
- the minister's decision is subject to a statutory right of judicial review; and
- in the case of the compulsory acquisition of native title rights and interests, where the independent tribunal recommends those rights and interests must not be compulsorily acquired, the minister is obliged to comply with the recommendation unless certain conditions are satisfied—at [86] and ss. 45 and 45A of the LAA.

### Racial Discrimination Act

His Honour noted that s. 24MD(6B)(a) of the NTA specifically contemplated:

> [T]he compulsory acquisition of native title rights and interests for the purposes of conferring rights and interests in relation to the land or waters concerned on persons other than the Commonwealth, the State or the Territory to which the act is attributable.

Therefore, it was held that: 'As what is in contemplation by the Minister is specifically authorised by the NTA, there is no breach of the Racial Discrimination Act'—at [89].

### Martin (BR) CJ

His Honour Chief Justice Martin agreed with Mildren J subject to some qualifications about the interpretation of s. 43 of the LAA, which (as noted above) provides that: 'Subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever.'

After reviewing the legislative history of s. 43 and the relevant authorities, the Chief Justice found that:

- the executive power conferred by that provision was restricted to compulsory acquisitions for a purpose related to the need for, or proposed use of, the land; and
- it did not extend to a compulsory acquisition merely for the purpose of giving the land of one citizen to another for a purpose totally unrelated to a need for, or proposed use of, the land—at [36].

Nonetheless, Martin CJ found that the purposes for which the land was acquired in this case (commercial, agricultural and tourism development) were purposes related to the need for, or proposed use of, the land and therefore agreed that the appeal should be allowed—at [41].

# Right to negotiate applications

The determinations made by the Tribunal 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 Tribunal's *Guide to future act decisions made under the Commonwealth right to negotiate scheme.*

## Objection to the application of the expedited procedure

### *Sharpe/Ashburton Minerals Ltd/ Western Australia* [2004] NNTTA 31

Member O'Dea, 7 May 2004

#### Issue

Is the expedited procedure attracted to the grant of exploration licences in a 'site rich' area in circumstances where the grantee party had not indicated either its willingness to comply with the Western Australia Government's *Guidelines for Aboriginal Consultation by Mineral and Petroleum Explorers* (the Guidelines) or its intentions in relation to exploration of the tenement area?

#### Background

The government party proposed to grant two exploration licences. In the relevant s. 29 notices, it was stated that the expedited procedure applied to the grant of those tenements. The native title party objected to the application of that procedure on the grounds that the requirements of s. 237 of the NTA, which defines acts attracting the expedited procedure as those that satisfy the requirements of s. 237(a) to (c), were not fulfilled in this case. If the act in question does not fall within the class of future acts defined in s. 237, then the right to negotiate would apply.

#### Meaning of 'site rich'

'Site rich' is a shorthand term used by the Tribunal to describe an area where the number and nature of sites is, in itself, a 'manifestation of the overall spiritual importance of the land and waters in the relevant locality'. If an area is 'site rich', then the Tribunal is on notice that, even applying the presumption of regularity, there is 'often a real chance or risk that the act in question will interfere with the spiritual fabric of the locality': *Ward v Northern Territory* (2002) 169 FLR 303 at [82]. In 'site rich' areas, evidence as to the grantee party's intentions is important: see *Gilla/Western Australia/ Blackjack Resources Pty Ltd,* WO01/174, 27 March 2002, at [20].

#### Subsection 237(a) — no likelihood of interference with community and social activities

The Tribunal was satisfied by the affidavit evidence that the native title party currently utilised the area covered by one of the proposed licences to a significant degree for the purposes of hunting, fishing, camping, collecting bush tucker, conducting ceremonies and as a communal meeting place. However, there were no specific references in the evidence to community or social activities in relation to the second tenement—at [30].

It was determined that the grant of the first tenement in this case was likely to interfere with the carrying on of community or social activities of the native title holders, contrary to the requirements of s. 237(a), with the Tribunal noting that the grantee party would be entitled to use the exploration licence to its full extent if it were granted and had not given any indication as to its plans—at [31].

### Subsection 237(b) — no likelihood of interference with areas or sites of particular significance

The native title party said that:

- the area was site rich;
- the *Aboriginal Heritage Act 1972* (WA) (AHA) did not provide for consultation with the native title party; and
- the grantee party had not indicated its willingness to comply with the Guidelines or give any indication of its intentions—at [33].

After summarising the 'detailed depositions' provided by three witnesses on behalf of the native title party, Member O'Dea was satisfied that:

- the area covered by the proposed tenements was 'site rich although not all of those sites have been shown to be of particular significance', as required under s. 237(b); and
- there were sites or areas of 'particular' (i.e. special or more than ordinary) significance in accordance with the traditions of the native title holders in the area covered by both proposed tenements—at [32] to [43].

With regard to the presumption of regularity and the provisions of the AHA, the Tribunal noted that:

> The Grantee party has provided no evidence of his intentions regarding protection of sites of significance and while I accept their undoubted intention to adhere to the provisions of the law there is a real risk of inadvertent interference unless consultation with the Native Title party takes place—at [44].

Therefore, the proposed grant of the tenements was determined to be likely to interfere with areas or sites of particular significance and, therefore, s. 237(b) was not satisfied.

### Subsection 237(c) — no likelihood of causing or creating rights causing major disturbance

As nothing in the evidence addressed the issue of the likelihood of major disturbance with the requisite degree of specificity, the Tribunal was unable to find that the requirements of s. 237(c) were not fulfilled—at [49].

### Determination

Member O'Dea determined that the grant of the exploration licences in question were not acts that attracted the expedited procedure under the NTA because s. 237(a), with regard to the first tenement, was not satisfied and s. 237(b), with regard to both, was not satisfied. Therefore, the right to negotiate will apply to the grant of these tenements.

## Meaning of 'major disturbance' in s. 237(c)

### *Little/Oriole Resources Ltd/Western Australia* [2004] NNTTA 37

Deputy President Franklyn, 3 June 2004

### Issue

What evidence is required to make out the likelihood of a 'major disturbance' for the purposes of s. 237(c) in an objection to the application of the expedited procedure?

### Background

The government party proposed to grant a miscellaneous licence for mine site accommodation (the proposed licence) under the *Mining Act 1978* (WA) (the Mining Act). In the relevant s. 29 notice, it was stated that the expedited procedure applied to the grant of the licence.

Deputy President Franklyn noted that:

- information provided by the government party revealed 'a considerable history of exploration and mining in and around the area of the proposed licence'; and

- there was no evidence of an Aboriginal community in the vicinity and no sites registered under the *Aboriginal Heritage Act 1972* (WA) (AHA)—at [16] to [18]

**Native title party**

The native title party objected to the application of the expedited procedure on the grounds that there was no compliance with s. 237(c), i.e. the act of granting the proposed licence was 'likely to involve major disturbance to any land or waters concerned or to create rights whose [sic] exercise is likely to involve major disturbance to any land or waters concerned'.

The native title party contended that:

- the grant of the proposed licence would permit the grantee to construct mine site accommodation and associated facilities over the whole of the area of the licence (some 120ha); and

- as such facilities can occupy an extensive area and involve the erection of buildings likely to remain in place for the duration of the mine, the likelihood of major disturbance was an inevitable consequence.

The native title party referred to two earlier Tribunal decisions: *Wonyabong v Western Australia* [1996] 134 FLR 462 and *Nyungah People v Western Australia* [1996] 132 FLR 54. Deputy President Franklyn reviewed both those determinations and the relevant Federal Court authorities—at [19] to [20].

The Tribunal noted the absence of evidence from the native title party of:

- the views or concerns of the Aboriginal community; and

- the effects of any previous tenements or any traditional use of or customs relating to the land the subject of the proposed licence—at [26].

**The grantee party**

The grantee party submitted that:

- it was intended that the proposed licence would be used to support existing infrastructure associated with existing mining campsites, including a possible power line easement and access tracks for construction of protective fire breaks and rubbish disposal, as required by various state laws;

- as there was no proposed construction of any further substantive infrastructure or other works within the boundaries of the licence, other than those referred to above, it was not possible to generalise regarding the extent of likely disturbance at a particular mine, as each project is unique; and

- the decision of the native title party not to submit anthropological, archaeological or ethnographic evidence in support of the objection application represented a fundamental flaw in the construction of their contentions and rendered the arguments advanced purely academic—at [22]

**Major disturbance**

The Tribunal noted that the question of whether there was a likelihood of major disturbance is to be determined from the viewpoint of the general community but taking into account the views and concerns of the local community as disclosed by the evidence—at [25], referring to *Dann v Western Australia* (1997) 144 ALR 1.

The native title party contended that the grant of the proposed licence would:

> [C]reate rights whose exercise is likely to involve a major disturbance to the land and will give rise to activities which will constitute a major disturbance by the standards of the whole Australian community and in the eyes of the Aboriginal community as a whole.

The Deputy President was of the view that:

> [R]eference to a major disturbance giving rise to a major disturbance adds nothing and is unhelpful. If it is intended to refer to authorised activities which are not likely to cause major disturbance to the land or waters but which may cause disturbance to

people by way of perception, in my opinion it is not the subject of s 237(c)—at [25].

### Determination

It was noted that the grant of the proposed licence would:

- increase 'very considerably' the areas available for mine site accommodation and associated facilities i.e. from the present limit of 8.75ha to 120ha; and

- permit the grantee to do such things as were specified in the licence over that enlarged area.

Therefore, it was accepted that the grant would create rights, the exercise of which may involve major disturbance. However, the Deputy President was of the view that:

> [The assertions made by the native title party]…in the absence of supporting evidence, do not establish the matters asserted. It is of some significance that there is no evidence to suggest that the construction and use of the existing mining camp, accommodation and associated facilities…or any thing else done under its authority, are considered by the Aboriginal people to be a "major disturbance" or that they have any concerns whatever about the same. The evidence produced by the State reveals the proposed Licence to be within an area where there has been, and is, considerable mining and exploration activity…
>
> On the available evidence I am satisfied that the Australian community as a whole, in the absence of any evidence of the concerns (if any) and views of the Aboriginal people in the locality, would consider the grant of the Licence and the exercise of the rights created thereby to be no more than another aspect of the conduct of the Mining and Exploration Industry in an area, presently and over many years the subject of considerable mining and exploration activity and that whilst the exercise of such rights will result in or involve disturbance to the land, in all of the circumstances it is not likely to involve "major" disturbance or to create rights whose exercise is likely to involve major disturbance in the ordinary meaning of that expression—at [26] to [27].

Therefore, Deputy President Franklyn determined that the grant of the proposed licence was an act attracting the expedited procedure i.e. the right to negotiate did not apply—at [28].

### Appeal

The native title party has filed an appeal in the Federal Court against the Tribunal's decision in this matter—see s. 169.

## Use of summons by Tribunal

### *Victoria Diamond Exploration/ Western Australia/Councillor & Ors* [2004] NNTTA 38

Deputy President Franklyn, 10 June 2004

### Issue

The point of interest in this determination is the consideration of the use of a summons by the Tribunal to obtain information for the purposes of a consent determination when not all those constituting the registered native title claimant were able to sign a proposed consent determination.

### Background

A proposed consent determination was reached in regard to a petroleum exploration permit after a s. 35 application was filed with the Tribunal. Difficulties in signing the requisite documents arose because two of the people named as the group constituting the registered native title claimant had died and a third was incapacitated with dementia—at [6] and see s. 61(2) and s. 253.

Affidavit evidence from the native title parties' legal representatives confirmed the two deaths and indicated that there was no power of attorney for the allegedly incapacitated person to allow for the release of medical records.

Deputy President Franklyn issued a summons, following a request from the grantee party, requiring the relevant medical officer to give evidence and produce relevant medical records relating to the capacity of the person concerned to the Tribunal. A letter accompanying the summons advised that, if the medical records sought were lodged with the Tribunal, then the medical officer would not be required to appear in person. Subsequently, medical records were lodged that satisfied both the Tribunal and the parties that the person in question was legally incompetent—at [10] to [15].

The Deputy President noted that the issue of summons to give evidence and produce documents in regard to a claimant's medical state would be used sparingly—at [17].

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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