Native Title Hot Spots

No.17, February 2006

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Proposed determination of native title and party status – Bardi Jawi

Sampi v Western Australia (No 2) [2005] FCA 1567

French J, 4 November 2005

Issues

This decision deals with matters arising from the Federal Court's reasons in *Sampi v Western Australia* [2005] FCA 777 (Sampi No. 1), namely:

- an application for joinder by the Jawi Aboriginal Corporation or, alternatively, certain individuals under s. 84(2) of the *Native Title Act 1993* (Cwlth) (NTA); and
- whether a determination of native title should be made in relation to what the court identified as traditional Jawi territory.

Background

The original application in this matter was lodged in 1995 on behalf of the Bardi and Jawi People. For further background to this case, see the summary of his Honour Justice French's reasons for judgement in Sampi No. 1, summarised in *Native Title Hotspots* Issue 15.

In those reasons, French J foreshadowed the form the determination of might take. The applicant was subsequently ordered to file and serve a draft determination and to inform the court as to whether native title was to be held in trust and, if so, to nominate a prescribed body corporate (PBC) to be the trustee of native title: see ss. 55, 56 and 57 of the NTA. However:

- the applicant filed submissions seeking a further determination in response to French J's statement that: 'Absent further argument or agreement, I am not prepared to make a separate determination in favour of the surviving Jawi people in relation to… the traditional territory of the Jawi—Sampi No 1 at [1047]; and
- on 19 September 2005, the Jawi Aboriginal Corporation (the corporation) and 24 individuals (20 of whom were members of the corporation) made joinder applications.

Joinder application

The court may join any person under s. 84(2) of the NTA if satisfied that 'the person's interest may be affected by a determination in the proceedings.'

The corporation's rules identified its members as all the traditional owners of Sunday Island, which is within the area identified by French J as traditional territory of the Jawi. The chairperson of the corporation swore an affidavit identifying the corporation's activities as directed to assisting persons who hold native title rights to Sunday Island in support of a submission that this gave the corporation a special interest in the proceedings. The corporation had an aquaculture licence on the south side of Sunday Island and it wanted to build infrastructure, including living quarters, accommodation for tourists and an airstrip on the island. However, the relevant land was a crown reserve subject to a 99 year

lease to the Bardi Community Inc. (now Ardyaloon Inc.) and Ardyaloon Inc. had not responded to the corporation's requests for 'land tenure' on Sunday Island—at [8] to [13].

The evidence was that, following the reasons for judgment, the corporation held a meeting (the Lombadina meeting) where it was resolved to withdraw its instructions to the Kimberley Land Council, (the KLC) the representative body acting for the claimants, in relation to the native title claim. A new legal representative was appointed, the corporation resolved to withdraw any authorisation given to the applicant in the claimant application and instructed its new legal representative that:

> [T]he Jawi people saw the determination of native title as separate to the determination made in favour of the Bardi and Jawi people in respect of Jawi country, including Sunday Island.

A further resolution stated that the persons at the meeting were Jawi people with authority under the traditional laws and customs to speak on behalf of those who had rights and interests in Sunday Island.

Four affidavits were filed on 25 August 2005 by members of the native title claim group stating they had not withdrawn instructions from the KLC and that they had not withdrawn authorisation from the current applicant. Two of the deponents were present at the Lombadina meeting and deposed that the minutes were not a true and accurate record of what had happened—at [17].

The submissions filed by the corporation were that the following issues were yet to be determined in the proceedings:

- whether it was open to the court to make a separate determination of native title in favour of Jawi people in relation to the area said to have comprised the traditional territory of the Jawi;
- in the event that such a determination was made:
  - the relationship between any native title rights and interests and the non-native title rights in respect of Sunday Island, including the lease held by Ardyaloon Inc;
  - whether that native title is to be held on trust and, in any case, the identity of the prescribed body corporate—at [19].

Findings on joinder applications

In finding that no case for joinder of the corporation had been made out, French J noted that:

- on the evidence, in did not appear that the absence of a native title determination would impact adversely upon the corporation's plans;
- the corporation's arguments for joinder should have been advanced a long time ago and it was now far too late for joiner as this would delay the final resolution of the claim with little apparent effect—at [20].

As for the alternative (joinder of 24 individuals), the court noted their submission that:

- they wished to put an alternative proposition to that put by the applicant, which was for a determination of native title similar to that made by the Full Court in *De Rose v South Australia (No 2)* [2005] FCFCA 110 *(De Rose)*, summarised in *Native Title Hot Spots* Issue 15;
- the evidence before the court was sufficient to establish they had group rights comprising native title in relation to Sunday Island that were possessed under traditional laws acknowledged and traditional customs observed by a larger traditional block which comprised the relevant society.

The state opposed joinder, pointing out that the persons seeking joinder included 12 individuals who jointly comprised the applicant bringing the claimant application and that to change the composition of the applicant, the provisions of the NTA must be followed or the application must be amended: see *Johnson v Minister for Land and Water Conservation (NSW)* [2003] FCA 981 per Stone J at [8], summarised in *Native Title Hot Spots* Issue 7.

Another of the respondents, in opposing the joinder application, submitted that it amounted to an attempt to recall the decision in Sampi No. 1. The applicant in the Bardi Jawi claimant application did not support the joinder application.

French J found there was no separate interest established by the material relied upon nor any evidence that made out a credible case to support joinder. Again, in exercise of the discretion available under s. 84(5), the court held it was, in any event, far too late to 'reopen and restructure these proceedings with a view…to securing an outcome different from that…already reached.' Sampi No. 1—at [28].

Should a further determination be made?

His Honour referring to his conclusions in Sampi No. 1 at [1046] to [1047] and [1082] stated that, absent further argument or agreement:

- the court was prepared to make a determination in favour of the native title claim group as defined in the application, which would include those Jawi people found to form part of the contemporary Bardi society;

- however, the area covered by that determination could not extend beyond the traditional territory of the Bardi since there were no rules of succession identified that would allow consideration of the incorporation of Jawi traditional territories into Bardi territory;

- the court did not consider that the case and evidence led to the identification of a distinct Jawi society presently in existence which acknowledges traditional laws and customs under which native title rights and interests are possessed;

- none of the islands forming part of the traditional Jawi territory would be the subject of the determination—at 28] to [31].

The applicant made submissions in support of a further determination in relation to traditional Jawi territory in which De Rose at [38] was relied upon, where it was said that:

> If it is necessary for the purposes of proceedings under the NTA to distinguish between a claim to communal native title and a claim to group or individual native title rights and interests, the critical point appears to be that communal native title presupposes that the claim is made on behalf of a recognisable community of people, whose traditional laws and customs constitute the normative system under which rights and interests are created and acknowledged. That is, the traditional laws and customs are those of the very community which claims native title rights and interests—at [33].

Reference was also made to *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (Alyawarr), summarised in *Native Title Hot Spots* Issue 16, where the Full Court upheld a communal or claim group level claim by a community which did not include all individuals affiliated with the four language groups with which the seven landholding groups and their countries had affiliation.

The applicants submitted, among other things, that:

- whether the entire native title claim group involves and, at sovereignty involved, two societies or one may not matter in the context of this case because the closeness of the normative systems in this case 'indicated an inherent capacity for cross-recognition';

- jurisprudentially, this allowed the claim group to comprise an overlap of two 'societies' or, in the alternative, for two native title claim groups to substantially overlap in respect of a claim area;

- applying the *Alyawarr* 'principle', it did not matter if 'one and a half' societies or one were involved, so long as it collectively included those who possessed rights and interests in the collective parts of the claim area under laws and customs the origins of which could be traced to a normative system at sovereignty—at [34] to [36].

French J found there was no basis upon which a further determination could be made in respect of the islands:

> The evidence supported a finding that there is one and only one extant traditional society. That is the Bardi society. Its traditional country was found not to include the islands to the north and north-east of the Peninsula. There was no basis for a finding of a Jawi society 'overlapping' the Bardi society and retaining the requisite connection to the claimed islands—at [37].

Competing draft determinations

French J considered various points of difference in regard to the proposed draft determination, including:

- the demarcation of the landward side of the intertidal zone (which divided exclusive from non-exclusive native title rights and interests), with 'mean high water mark' being preferred by the court;
- whether 'use and enjoyment' should be included as part of the description of a right to 'exclusive possession', with his Honour reaffirming his view that it should not;
- whether a native title right to 'live on waters, 'whatever that means', should be recognised, with French J concluding there was no factual basis to support it;
- whether the determination should expressly state that certain areas were excluded from the determination area because native title was extinguished, with the court holding it was unnecessary to do so;
- whether a 'fluid', rather than fixed, description of the seaward boundary should be used, with the court preferring to include 'a proviso to the effect that non-exclusive native title rights and interests are exercisable seaward of the mean low water mark on any reef exposed at low tide only when that reef is exposed or covered by water to a depth not more than two metres';
- whether to add 'non-commercial' to the qualifier that the native title rights and interests recognised were exercisable 'for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes', with the court deciding this was unnecessary;
- whether 'the right of any person to use…any road in the Determination Area over which…the public has a right of way according to the common law' should be recognised in the determination, with the court holding it should not unless there was at least a precise identification of the 'roads' in question which, in this case, there was not;
- whether a new paragraph recognising the public right to use any road in the determination area, with French J accepting the applicant's submission that it should not, given the potentially significant impact of such a clause on native title rights and interests—at [45] to [113].

Conclusion

His Honour decided that a determination of native title in accordance with his reasons would be made on country but allowed a short time for the making of further submissions on technical or drafting issues, with his Honour noting that this was not 'an invitation to canvass these reasons'—at [116].

The determination itself, made in *Sampi v Western Australia (No3)* [2005] FCA 1617, is summarised below.

Determination of native title – Bardi Jawi

Sampi v Western Australia (No 3) [2005] FCA 1716

French J, 30 November 2005.

Issue

This decision deals with the making of a determination of native title under the *Native Title Act 1993* (Cwlth) (NTA) recognising the existence of native title over part of the West Kimberley region in Western Australia.

Background

For the background to this determination, see *Sampi v Western Australia* [2005] FCA 777 (Sampi No. 1), summarised in *Native Title Hot Spots* Issue 15, and *Sampi v Western Australia (No 2)* [2005] FCA 1567 (Sampi No. 2), summarised in this issue of *Native Title Hot Spots*. It was formally handed down on country at One Arm Point on the Dampier Peninsula, north of Broome.

Vacation of dismissal of Brue Reef application

On 10 June 2005, the court dismissed a second application made by Bardi Jawi over Brue Reef. However, as a result of the findings made in Sampi No. 1 that native title did not exist in the area covered by that application, it was pointed out to the court that a s. 225 determination in those terms should be made in relation to the area it covered. Therefore, on 21 November 2005, his Honour Justice French vacated the order to dismiss the application so that a determination reflecting the finding could be made over Brue Reef.

Application adjourned in on 47A issue

On 25 November 2005, a problem arose about the potential application of s. 47A to certain small areas that was not raised at trial and could not be resolved prior to the on-country determination. French J ordered that the application should be adjourned in relation to those areas—at [4].

Determination

Before handing down the determination, the court noted that:

- the Bardi and Jawi People of the Dampier Peninsula had struggled long and hard for the recognition of their native title and should be congratulated for achieving it;
- they had established the existence of native title rights and interests held by Bardi Jawi people as a group that had observed one set of traditional laws and customs under which their native title rights and interests arise;
- their existence as a society of Aboriginal people and their traditional laws and customs 'may be traced back to before the time at which Western Australia was colonised'—at [5] to [8].

His Honour acknowledged that some claimants would be disappointed that the native title determination did not extend to traditional Jawi territory but noted that:

> The proof of native title rights and interests is not an easy matter and the Court is only empowered to make determinations on the evidence before it. The absence of any determination on the islands does not, of course, prevent Bardi and Jawi People from continuing their association with them or even from making arrangements with government about the use of some or all of them—at [8].

Existence of native title

Native title was recognised in relation to parts of the determination area, which can be generally described as the northern part of the Dampier Peninsula and certain intertidal areas and adjacent reefs and islets, together with the waters in the immediate vicinity. Over the remainder of the determination area, a determination was made that native title did not exist: see ss. 94A and 225.

Common law holders

Where native title was recognised to exist, the native title holders were determined to be the Bardi and Jawi people, described as the descendants of certain named ancestors and persons adopted by those descendants in accordance with the traditional laws and customs of the native title holders.

Nature and extent of native title rights and interests recognised

Over what can be very generally described as that part of the determination area landward of mean high water mark on the mainland, native title was recognised as being the right to possession and occupation as against the whole world, including rights to:

- live on the land;
- access, move about on and use the land and waters;
- hunt and gather on the land and waters;
- engage in spiritual and cultural activities on the land and waters;
- access, use and take any of the resources of the land and waters (including ochre) for food, shelter, medicine, fishing and trapping fish, weapons for hunting, cultural, religious, spiritual, ceremonial, artistic and communal purposes;
- refuse, regulate and control the use and enjoyment by others of the land and its resources;
- access to and use the water of the land for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes.

Over the other parts of the determination area where native title rights and interests were recognised (generally described as certain intertidal areas, adjacent and offshore reefs and islets and the waters in the immediate vicinity), they consist of non-exclusive rights to:

- access, move about in and on and use and enjoy those areas;
- hunt and gather, including for dugong and turtle;
- access, use and take any of the resources thereof (including water and ochre) for food, trapping fish, religious, spiritual, ceremonial and communal purposes.

In areas seaward of the mean low water mark, the preceding native title rights and interests are limited to reefs and islets within that area when they are exposed or covered by not more than two metres of water.

The native title rights and interests are exercisable in accordance with, and subject to, the:

- traditional laws and customs of the native title holders; and
- laws of the State of Western Australia and the Commonwealth, including the common law.

Limits on rights to waters

The court determined that notwithstanding anything in the determination, there are no exclusive native title rights or interests in:

- flowing waters;
- any natural collection of water that a river, creek, stream or brook flows through;
- any underground water source.

Relationship between native title and non-native title rights and interests

The relationship between native title and non-native title rights and interests is that:

- to the extent of any inconsistency, the native title rights and interests continue to exist but, to that extent, have no effect on the non-native title rights and interests;
- recognition of native title does not prevent the doing of any activity required or permitted to be done by or under non-native title rights and interests and those rights and interests, and any activity required or permitted by them, prevail over native title rights and interests and any exercise thereof but do not extinguish them.

Determination of native title – Wotjobaluk People in Western Victoria

Clarke v Victoria [2005] FCA 1795

Merkel J, 13 December 2005

Issue

The issue before the Federal Court was whether to make orders as agreed by the parties pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA) over an area of land and waters in Western Victoria. The significance of this was that that, if made, the

orders would constitute the first determination, whether by consent or otherwise, made recognising the existence of native title in Victoria.

Background

The orders sought in this case would finalise three claimant applications, the first of which was made in 1995. The orders sought included:

- a determination recognising the existence of native title over part of the area covered by one of the applications; and
- a determination that native title did not exist over the remainder of the area covered by the applications.

Court's power to make orders – s. 87

Pursuant to s. 87, if the parties reach agreement on the terms of an order, the court may make the order without holding a hearing. In this case, the pre-conditions to the making an order under s. 87 were satisfied in that:

- the terms of the agreement were in writing, signed by or on behalf of the parties and filed in the court;
- an order in the terms agreed upon was within the court's power – it had jurisdiction and there was nothing in the terms of the orders, which reflected s. 225, to suggest it did not have power;
- it was 'appropriate' to make the orders because 'the terms of the orders were clear and unambiguous and…freely agreed upon after the parties…had access to competent and independent legal advice' and the court was satisfied in relation to the 'substantive aspects' of the orders as a result of the written submissions filed by the applicant and the State of Victoria—at [4] to [10].

His Honour Justice Merkel 'strongly commended' the parties for resolving issues by mediation and consensus, rather than by an adversarial process involving 'great expense and conflict'. The National Native Title Tribunal was also commended for its role in resolving the dispute between the parties—at [10].

Submissions to the court

His Honour noted the applicant and the state's written submissions relied upon certain affidavits and anthropological material, including material from one of the claimants, the late William John Kennedy (known as Uncle Jack Kennedy), who was born on the banks of Wimmera River in 1919 and was the senior Wotjobaluk elder. Uncle Jack Kennedy outlined the traditional laws and customs acknowledged and observed by the Wotjobaluk people, including teachings about *Bunjil*, the creator spirit.

The anthropological material referred to in submissions included:

- a description of the boundaries of the Wotjobaluk people's country and some of their customs and traditions, including their belief in *Bunjil*, from 1904;
- recognition that, in 1965, the Wotjobaluk peoples had a strong attachment to tradition and their language had been preserved;
- contemporary reports that explained why the native title claim group:
  - was a recognisable body of persons united in and by traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests are being claimed;
  - possessed communal native title rights and interests under the traditional laws and customs that have been acknowledged and observed by the applicants;
  - had, by those laws and customs, a connection with some of the land and waters covered by the claimant applications: see s. 223(1)(a) and (b)—at [8] to [10].

Tradition and the 'tide of history'

Merkel J was of the view that the orders were:

> [O]f special significance as they constitute the first recognition and protection of native title resulting in the ongoing enjoyment of native title

> in…Victoria…These are areas in which the Aboriginal peoples suffered severe and extensive dispossession, degradation and devastation as a consequence of the establishment of British sovereignty over their lands and waters during the 19th century—at [2].

Merkel J went on to note that:

> The outcome of the present claim is testimony to the fact that the 'tide of history' has not 'washed away' any real acknowledgement of traditional laws and any real observance of traditional customs by the applicants and has not, as a consequence, resulted in the foundation of their native title disappearing…Indeed, the evidence in, and the outcome of, the present case is a living example of the principle that is now recognised in native title jurisprudence that *traditional* laws and customs…evolve over time in response to new or changing social and economic exigencies to which all societies adapt as their social and historical contexts change…In some cases…that adaptation may result in some of the evolving laws and customs no longer being characterised as *traditional*, and therefore no longer capable of founding a claim to native title...However…it is important to recognise that that is simply the criterion established under Australian law for the recognition and protection of native title. It does not follow that the tide of history has also washed away the evolving laws and customs that are acknowledged and observed by Aboriginal peoples. Although in some cases those laws may not found native title…they nonetheless remain fundamental to the identity of those persons as individuals belonging to a particular indigenous people or community—at [11], emphasis in original.

That said, Merkel J was careful to note that 'the continued existence, and the nature and extent, of that native title can only be resolved on a case by case basis'—at [12].

Determination

The court determined that:

- non-exclusive native title rights and interests exist in what was designated Determination Area A, subject to the exceptions and qualifications noted below;
- native title does not exist in the area designated Determination Area B.

Determination Area A covers Crown reserves totalling 269km^2 along the banks of the Wimmera River. While native title was not be recognised over Determination Area B, under a number of agreements, the claimants will have other rights and receive certain benefits in relation to those areas.

Who holds native title?

The Wotjobaluk People are the native title holders, defined as those Wotjobaluk, Jaadwa, Jadwadjali, Wergaeia and Jupagalk Aboriginal persons who:

- are accepted in accordance with their traditional laws and customs as descended from one of seven named ancestors; and
- acknowledge and observe Wotjobaluk traditional laws and customs.

Native title rights and interests recognised

The native title rights and interests recognised over Determination Area A are non-exclusive rights to hunt, fish, gather and camp for personal, domestic and non-commercial communal needs. They are held in trust by the Barengi Gadjin Land Council Aboriginal Corporation (BGLCAC) on behalf of the Wotjobaluk People as the common law holders.

As required by ss. 94A and 225(e), it is specifically stated that the native title rights and interests do not confer possession, occupation, use and enjoyment to the exclusion of all others. The determination also states that native title rights and interests do not exist in:

- any waters, with it being noted this does not include the bed or subsoil under, or airspace over, those waters; and
- any lands on which validly created public works are situated.

Relationship between native title and non-native title rights and interests

The nature and extent of other rights and interests were also set out in the determination, as required by ss. 94A and 225(c) and (d), with the relationship between native title rights and interests and other non-native title rights and interests being that the other rights and interests, and any activity done in exercise of a right conferred or held under the other rights or interests, prevail over the native title rights and interests and any exercise of those native title rights and interests, but do not extinguish them.

The native title rights and interests are subject to and exercisable in accordance with:

- the traditional laws acknowledged and the traditional customs observed by the Wotjobaluk People;
- the laws of the state or Commonwealth; and
- the terms and conditions of the proposed access agreement noted below.

Subsequent agreements

His Honour also noted that following the making of the determination:

- the state and the BGLCAC would enter into agreements to provide financial and other benefits to the Wotjobaluk People;
- the state, BGLCAC and certain other respondents would enter into an access agreement over Determination Area A regarding the co-existence of:

the Wotjobaluk native title holders' non-exclusive native title rights to hunt, fish, gather and camp;

- the rights of the state;
- the rights of the other respondents.

Further information about the settlement is available at http://www.nntt.gov.au/publications/WJJWJ_Determination.html

Splitting proceedings under s. 67

Turrbal People v State of Queensland [2005] FCA 1796

Spender J, 9 December 2005

Issue

The State of Queensland sought orders separating the Turrbal People's claimant application into two separate proceedings. It was proposed that the proceeding in relation to Turrbal Part A would deal with that part of the area covered by the application where there was no overlapping claimant application. That would be set down for trial. The proceeding dealing with Turrbal Part B, the balance of the area where there were overlapping claimant applications, would be adjourned to a later date. Most of the other respondents and the applicants in the overlapping claims supported the state's submissions and none of the respondents opposed them. The Turrbal people opposed the making of the orders.

Background

The Turrbal People's application covered an area of approximately 1,485 square kilometres comprised of 330 specific parcels of unallocated state land, state forests and parklands in and around Brisbane i.e. it was 'lot specific'. The area the state proposed as Turrbal Part A comprised 96 lots covering 522 kilometres. Both the Jinibara People's claim and Jagera People's No. 2 claim, neither of which was programmed to trial and both which were 'country claims' (i.e. not lot specific), overlapped parts of the area covered by the Turrabal People's claim.

After 'significant unsuccessful attempts' to resolve the Turrbal and Jinibara overlap via mediation, the court ordered that mediation cease – see s. 86C of the *Native Title Act 1993* Cwlth (the NTA). Subsequently, programming orders were made and the Turrbal People made significant preparations for trial, including identifying points of claim and delivering the

majority of their evidence to the state. The state's objections to the applicant's expert reports, the evidence it wanted led orally and its objections to the tender of documents or parts thereof had also been provided.

The state's submissions

In support of its application to have the two areas covered by the Turrbal People's application dealt with in separate proceedings, the state argued (among other things) that:

- the main steps for trial remaining to be taken by the respondents could be done expeditiously if the area covered by the hearing was confined to Turrbal Part A;
- a trial of Turrbal Part A would be relatively short and inexpensive e.g. only three Turrbal People apparently had a relevant connection with the claim area and it appeared the applicant proposed to call no more than four witnesses;
- apart from cross-examination, the time spent by the respondents at trial would be short, as their evidence was likely to be in documentary form;
- as Turrbal Part A covered only unallocated state land, state forests and parks, it was likely that fewer parties would be involved than would be the case if the whole of the Turrbal application area went to trial and the tenure research required for the extinguishment issues would be limited;
- if the whole of the Turrbal People's claim was heard at once, the involvement of overlapping claims would result in further delay and expense, primarily because of the nature and extent of the overlaps and the requirements of s. 67;
- the applicants in the overlapping claims had neither particularised their claims nor carried out the steps necessary to proceed to a trial; and
- because the overlapping applications were not lot specific, the state would have to carry out extensive tenure research and analysis—at [15] to [20].

The Turrbal People's submissions

The Turrbal People opposed the state's application, arguing that:

- subsection 67(1) required that the Jinibara, Jagera and Turrbal applications be dealt with in the same proceeding;
- dealing with their application in two separate proceeding was unjust because they had built their case for trial over the whole of the area and unreasonable because they would incur additional costs; and
- the notion of separating their traditional homelands into Part A and Part B was at odds with the principles of the Turrbal laws and customs—at [34] to [37].

Court's power to make the orders

His Honour Justice Spender noted that s. 67(1) required that, where there are two or more proceedings before the court relating to native title determination applications that have overlapping areas, the court 'must make such order as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding'. The court noted that, 'importantly', s. 67(2) (headed 'Splitting of application area') provides that, without limiting s. 67(1), the order of the court 'may provide that different parts of the area covered by an application are to be dealt with in separate proceedings'—at [18].

Further, s. 68 provides that, if there is an approved determination of native title in relation to a particular area, the court must not conduct any proceeding relating to an application for another determination of native title or make any other determination of native title in relation to that area or to an area wholly within that area, except in the case of an application to revoke or vary the first determination (see s. 13) or a review or appeal of the first determination—at [19].

In the court's opinion:

- the effect of ss. 67(1) and 68 was that, in relation to the overlapping area, the court could not hear and determine the Turrbal People's claim separately from the overlapping claims;
- it was unlikely the overlapping claims would be ready to be heard for some years;
- subsection 67(1) required overlapping applications to be dealt with in the same proceedings only to the extent that the applications covered the same area;
- it is possible to avoid the need to have the overlapping applications heard in the same proceeding by making an order that different parts of the area covered by the Turrbal People's application be dealt with in separate proceedings;
- by virtue of s. 67(2) and O 78 r 5(3) and O 29 r 2(a) of the Federal Court Rules, the court had power to split the area covered by the Turrbal People's application into two proceedings, with the unoverlapped portion dealt with in one proceeding and the overlapped portion dealt with in separate, further proceedings;
- those further proceedings could only be heard and determined in the same proceeding as the hearing and determination of the claims in respect of the overlap area;
- the orders sought were consistent with s. 67(2), notwithstanding a submission by the state that the orders involved only an 'administrative' separation;
- the orders would effectively split the Turrbal's People's claim into two proceedings i.e. into two parts, one part in respect of the area contained in Turrbal Part A, heard and determined separately from, and ahead of, the Turrbal People's claim in respect of the area contained in Turrbal Part B—at [25] to [26] and [33] to [34].

Conclusion

Spender J found:

- the court was empowered to make the orders the state sought and, on the evidence, it was just and convenient to do so, referring to similar orders made in other matters e.g *Wik Peoples v Queensland* [2004] FCA 1306, *Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229; and
- there were 'overwhelming reasons' why the court should make the orders sought, particularly since hearing the whole of the Turrbal People's claim, together with the overlapping claims, faced very considerable delay—at [28] to [32] and [40].

Comment

There have been unsuccessful attempts in the past to split a claimant application for the purposes of limiting the parties whose consent must be obtained for the purposes of s. 87 or to allow for parts of the area covered by overlapping claimant applications to be combined with parts of the area covered by other claimant applications: see Munn and *Champion v Western Australia* [1999] FCA 581. It should be noted that this case does not affect what was found in those cases. Subsection 67(2) only applies to overlapping applications and only provides for a splitting of the *proceedings*, not the *application*. So, in this case, there will be two proceedings that deal with one claimant application i.e. the Turrbal People's claimant application. And it is arguable that s. 87 will then only require to agreement of the parties to those *proceedings* (see s. 84 which makes it clear that persons are parties to proceedings rather than parties to the application). However, if amendment becomes necessary, then the application is still treated as a whole, as it is for the purposes of the application of the registration test under s. 190A(1). Indeed, there are no provisions in the NTA to deal with the registration of 'split applications' and if it were attempted it may produce a disjunction between the split applications in the Federal Court and the application as entered on the Register of Native Title Claims.