# Amendment reducing area covered late in proceedings and costs — Yalanji

## *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 *Native Title Act 1993* (Cwlth) (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.

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 substantially allocated 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 and, while the court refused to do this, the parties were informed 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 *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, they were given 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.