

# Compensation application in Jango – no determination of native title

## *Jango v Northern Territory (No 6)* [2006] FCA 465

Sackville J, 3 May 2006

### Issues

The issues raised in this case were:

- whether there should be an order as to costs in relation to *Jango v Northern Territory* [2006] FCA 318 (the principal judgment), summarised in *Native Title Hot Spots Issue 19*; and
- whether the Federal Court was required to make a ‘current determination of native title’ pursuant to s. 13(2) of the *Native Title Act 1993* (Cwlth) (NTA) in relation to the application area dealt with in the principal judgment.

On 31 March 2006, in the principal judgment, Justice Sackville dismissed a compensation application and set a timetable for written submissions on costs and any other further orders (if any) that should be made.

### No order as to costs

Neither the Northern Territory nor the Commonwealth sought an order for costs. Since s. 85A(1) of the NTA provides that, unless the court orders otherwise, each party to a proceeding must bear their own costs, the court determined it was appropriate that there be no order as to costs—at [2] to [3].

### Was a ‘current determination of native title’ required?

The question raised here related to s. 13(2) of the NTA, which provides (in paraphrase) that, if the court is making a determination of compensation in accordance with Division 5 of the NTA, and there has been no previous ‘approved determination of native title’ (as defined in ss. 13(1), (3) to (7) and 253) in relation to the area concerned, then it must also make a ‘current determination of native title’, i.e. a determination of native title ‘as at the time the determination of compensation is being made’.

The Commonwealth, with the support of the territory, submitted that:

- having finally determined the compensation application in principal judgment, the court was now required to make a ‘current determination of native title’ in relation to the application area pursuant to s. 13(2);
- no ‘approved determination’ of native title had previously been made in relation to any part of the application area;
- the court was ‘making a determination of compensation’ when it made a final determination in the principal judgment and so s. 13(2) applied;
- this was so even where, as in the principal judgment, the court dismissed the application for a determination of compensation—at [4] to [5].

The applicant's response was that:

- the court had not made 'a determination of compensation in accordance with Division 5' within the meaning of s. 13(2);
- the Commonwealth's interpretation of s. 13(2) strained the statutory language and sought to rewrite that provision by suggesting the words 'is making a determination of compensation' should be taken to mean 'is making a determination of liability or quantum with respect to compensation';
- such a construction was untenable—at [8].

After summarising the statutory scheme in relation to compensation, Sackville J noted (among other things) that:

- the 'key' expression found in s. 13(2) relevant to this case was 'making a determination of compensation in accordance with Division 5';
- unlike s. 225, which defined 'determination of native title' as a determination of whether or not native title exists in relation to a particular area, the NTA did not define the expression 'making a determination of compensation in accordance with Division 5';
- the expression 'determination of native title' appears in s. 13(1), which provides for an application to be made for a determination of native title in relation to an area for which there is no approved determination;
- this potentially raised the issue of whether the statutory definition of 'determination of native title' should be applied *mutatis mutandis* (i.e. with any necessary changes made) to the expression 'determination of compensation';
- subsection 13(2) refers not merely to 'a determination of compensation' but to 'a determination of compensation in accordance with Division 5';
- the entitlement to compensation was not created by Div 5 but by other provisions in Part 2 of the NTA;
- Division 5 was concerned with determining the quantum of compensation payable to persons entitled to compensation under those other provisions—at [18] to [20].

It seemed to his Honour that:

[T]he intent of the statutory language is clear enough. The Court is 'making a determination of compensation in accordance with Division 5' when it is determining the quantum of compensation payable to particular applicants. It is **not** making such a determination when it decides that the applicants are not entitled to any compensation—at [22], emphasis in original.

In the court's view, had Parliament wished to adopt the meaning urged by the Commonwealth and the territory:

[I]t might have been expected to define the expression 'making a determination of compensation' so as to include a determination that no compensation is payable. After all, Parliament took that course when it defined a 'determination of native title' to include a determination that native title does not exist in relation to a particular area: see s 225. However, it has not done so—at [23].

According to Sackville J, this construction of s 13(2):

[N]ot only accords with the ordinary meaning of the statutory language but is ... readily understandable as a matter of policy. The Court can make an award of compensation under the NT Act only where native title over land has been extinguished. If a compensation award is made, the Court will have before it the evidence necessary to conclude that native title does not exist over the land. [Note that there may also be a determination of compensation where native title is only partially extinguished.] Accordingly, there will be no difficulty in the Court making a determination to that effect.

However, an application for compensation under the NT Act may fail for many reasons. The evidence adduced on an unsuccessful compensation application may be insufficient to enable a current determination to be made as to whether or not native title exists over the land. In these circumstances, it may simply be impossible for the Court to comply with a statutory requirement that it make a determination as to whether or not native title exists in relation to the land. This is presumably one reason why Parliament did not define 'determination of compensation' to include a decision to dismiss an application for compensation. It follows that I disagree with the Commonwealth's submission that there can be no rational reason for distinguishing between a case where compensation is payable and a case where the Court decides that there is no entitlement to compensation.

The Commonwealth contended that a 'broader' interpretation of s 13(2) of the NT Act would promote the statutory objects of providing certainty as to the status of land and reducing the potential for multiple litigation concerning the same area. It is by no means clear that this is necessarily the case. For example, a declaration that native title does not exist over particular land, made in the context of an unsuccessful application for compensation under the NT Act, may not prevent a subsequent application by other claimants seeking compensation. In any event, for the reasons I have given, the 'broader' interpretation may prove to be unworkable in a given case. Moreover, as I have explained, had Parliament intended to promote the objects of certainty and finality in the way suggested by the Commonwealth, it would have been easy for it to incorporate in the legislation a definition that achieved the desired result—at [24] to [26].

## **Decision**

It was found that:

- s. 13(2) of the NTA did not require the court, in the circumstances of this case, to make a current determination of native title; and
- the respondents did not point to any other source of power which would support the making of a determination of native title—at [27].