

# ILUA—application to set aside decision to register

## *Kemp v Registrar, Native Title Tribunal* [2006] FCA 568

Emmett J, 5 May 2006

### Issue

The applicant in this case, Keith Kemp, sought:

- an order setting aside the decision to register an indigenous land use agreement (the ILUA) in the Khappinghat Nature Reserve and Saltwater National Park in New South Wales (the main application); and
- interlocutory relief prohibiting the doing of certain works that were covered by the ILUA.

This decision deals with the interlocutory proceedings.

### Background

Mr Kemp claimed to have a native title interest in the ILUA area and that the Saltwater People (one of the parties to the ILUA) were not authorised to enter into the agreement. Mr Kemp also alleged that the decision to register the ILUA involved both an error of law and a breach of the rules of natural justice and should be set aside. The Native Title Registrar's decision under s. 24CL of the *Native Title Act 1993* (Cwlth) (NTA) to register the ILUA was made on 12 December 2005.

The ILUA stated that various Ministers of the Crown in right of New South Wales, and Patricia Hurst, the Saltwater Tribal Council and Greater Taree City Council entered into the agreement for the purpose of:

- recognising that the Saltwater People held native title in the area;
- regulating the exercise of those rights;
- providing a role for the Saltwater Tribal Council (an Aboriginal Corporation incorporated under the *Aboriginal Councils and Associations Act 1976* (Cwlth) for the purpose of holding native title in trust for the Saltwater People) in the management of the area;
- providing for the withdrawal of the native title determination applications made by Ms Hurst on behalf of the Saltwater People; and
- settling other matters—at [5].

Among other things, the parties to the ILUA consented to the doing of certain future acts (what Mr Kemp called capital works), including:

- the amendment, repeal or the re-making of the National Parks and Wildlife Act;
- the making of a plan of management and any subsequent amendments;
- construction of a camping ground area and associated amenities, facilities and signage;

- erection of a plaque recording the use of the land by the ‘Indigenous People of the Manning River Valley ‘ — at [7].

Mr Kemp sought an interlocutory order prohibiting the doing of any further of the works. As the court noted, Mr Kemp became aware at the time of the hearing that the majority of the works contemplated by the agreement had been completed and accepted that completion of works necessary for health and safety purposes should not be hindered — at [14] and [16].

Mr Kemp was concerned that other works might be done that would be inconsistent with the native title rights that he sought to establish in relation to the area but was ‘unable to be specific about that matter and acknowledged the difficulty that a citizen has in knowing what the executive government has in mind’ — at [17].

Justice Emmett was of the view that:

Be that as it may, in the absence of evidence of some threat, I am not persuaded that there is any appreciable or relevant risk that work might be done that is inconsistent with the native title claims that Mr Kemp seeks to assert prior to the time when the matter is fixed for final hearing. Even if there were, I have considerable difficulty in seeing what equity there is vested in Mr Kemp to restrain the work — at [18].

It was found that there was no evidence before the court of the basis upon which Mr Kemp asserted such rights and:

More fundamentally, the only relief ... sought ... is the setting aside under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of the decision to register the agreement. Mr Kemp has not demonstrated any basis for the proposition that the registration of the agreement has any relevant effect on Mr Kemp’s entitlement to restrain works of the nature in question — at [19].

## **Decision**

For the reasons summarised above, Emmett J was not persuaded that Mr Kemp was entitled to any interlocutory relief of the nature sought — at [21].