Appeal by Ngarluma and Yindjibarndi – Full Court

Moses v Western Australia [2007] FCAFC 78

Moore, North, Mansfield JJ, 7 June 2007

Issue

The main issue in this case was whether the Full Court of the Federal Court should uphold the primary judge's findings in relation to:

- whether native title was wholly extinguished by the grant of certain pastoral leases;
- the application of ss. 47A and 47B of the *Native Title Act 1993* (Cwlth) (NTA);
- the existence of native title in part of the determination area called the Karratha area;
- the description of the native title holders in the determination; and
- whether more than one prescribed body corporate could be nominated for the determination area.

The Commonwealth filed a notice of contention in the appeal proceedings to support the judgment.

Background

The primary judge, Justice Nicholson, handed down the main reasons for judgment relevant to this appeal in *Daniel v Western Australia* [2003] FCA 666, (summarised in *Native Title Hot Spots* Issue 6). Other outstanding issues, including the terms of the final determination of native title pursuant to s. 225 of the NTA, were dealt with in judgments delivered between December 2003 and March 2006. The Ngarluma and Yindjibarndi peoples were partly successful in their claim to hold native title to the areas they claimed. Three overlapping claim groups were found not hold native title, although it was accepted that some members of one of those groups (the Wong-Goo-TT-OO) may be either Ngarluma or Yindjibarndi and, in that capacity, hold native title rights and interests—at [35], [40], [46] and [48] to [50].

Respondents claiming native title

The Full Court (Justices Moore, North and Mansfield) took the unusual step of commenting on an issue that was not raised on appeal. In relation to the decision at first instance in relation to an 'overlapping group', it was said that:

> In circumstances where the Kariyarra participated as respondents only and made no attempt to satisfy the learned primary judge that all of the requirements of the NTA had been met in respect of their overlap claim, it would not have been appropriate to nevertheless make a determination of native title [in their favour] ... . Of course, the obverse position, namely a decision that the Kariyarra people did not have native title ... in those overlapping areas was able to be made, because competing evidence ... was adduced. Such a conclusion did not have to address issues arising under s. 251B [which deals with authorisation of claimant applications]—at [18] and see [49] to [50].

On this point, see also *Kokatha People v South Australia* [2007] FCA 1057, summarised in *Native Title Hot Spots* Issue 25.

The issues on the appeal

The Ngarluma and Yindjibarndi peoples appealed against certain aspects of the reasons and orders at first instance. The State of Western Australia filed a notice of contention. The Commonwealth filed a cross-appeal. The issues raised were whether:

- native title was wholly extinguished by the grant of certain pastoral leases;
- subsection 47A(2) applied to the area covered by a pastoral lease and several freehold grants;
- section 47B applied to areas subject to temporary reserves made under s. 276 of the *Mining Act 1904* (WA);
- internal geographical limitations on the exercise of the native title rights and interests should have been imposed;
- native title should have been found to exist in an area located around the town of Karratha and extending to the western boundary of the claim area and northwards to the commencement of the Burrup Peninsula (the Karratha area);
- determining that the holders of the native title were the 'Ngarluma People' and the 'Yindjibarndi People', without further defining those expressions, was sufficient;
- subsections 56(2) and 57(2) allowed for more than one prescribed body corporate to be nominated in respect of the determination area—at [88] to [90].

Reasons for not making 'interim' consent orders

As the parties to the appeal were agreed that the Ngarluma and Yindjibarndi peoples should succeed on the first four issues noted above, orders were sought to that effect by the Ngarluma and Yindjibarndi peoples. However, the court refused to make those orders because:

- it appeared that, in exercising the powers conferred by the *Federal Court of Australia Act 1976* (Cwlth) in relation to its appellate jurisdiction, the court did not have power to partially dispose of an appeal;
- neither ss. 87(1)(c) or 68 of the NTA provide an additional source of power i.e. the court's power is not enlivened unless the court is satisfied the orders sought are otherwise within power—at [91] and [104] to [114].

Extinguishment by grant of pastoral leases

At first instance, it was found that the act of granting five pastoral leases had wholly extinguished native title, whereas other pastoral leases granted under the same provisions of the relevant Western Australian legislation were found to only partially extinguish native title rights and interests.

Pastoral leases of the kind considered at first instance are, generally speaking, what the NTA defines as 'non-exclusive pastoral leases' and, therefore, 'previous non-exclusive possession acts' which, as such, do not wholly extinguish native title—see *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward* , summarised in *Native Title Hot Spots* Issue 1) at [187] to [190], [192] and [194].

However, the five leases concerned were granted after the commencement of the *Racial Discrimination Act 1975* (Cwlth) (RDA), which sometimes gives rise to issues in relation to the application of the past act provisions of the NTA—see ss. 15(1)(a), 23G(3), 228 and 229 and *Ward* at [418] and [422].

From the reasons given at first instance, it was not apparent to their Honours why the primary judge considered that the five pastoral leases had wholly extinguished native title. It was noted that:

> The parties are agreed that the leases did not in fact have any further extinguishing effect than any [of the] pre-existing [non-exclusive] pastoral leases, and that, contrary to his Honour's findings, the grants of each of the leases were [sic] not past acts nor [sic] previous exclusive possession acts. In accordance with the principle established in *Ward* ... , we consider that the parties' position in that regard is appropriate. Nothing has been identified to us which might indicate that those five pastoral leases should have any greater extinguishing affect than the other pastoral leases which affected parts of the claim area—at [113].

The court allowed the appeal in relation to the five pastoral leases and held that the determination should be altered accordingly—at [114].

Application of s. 47A

The Ngarluma and Yindjibarndi peoples contended that s. 47A applied to the Mt Welcome pastoral lease and several areas covered by freehold grants, referred to collectively as the 'Mt Welcome freehold titles'. They said that the first limb of s. 47A(1)(b)(ii) was satisfied i.e. that 'the area is held expressly for the benefit of ... Aboriginal peoples or Torres Strait Islanders'.

If s. 47A applies, then all extinguishment brought about by the creation of a 'prior interest' must be disregarded for all purposes under the NTA and the non-extinguishment principle found in s. 238 applies (except in relation to public works). On the latter point, see *Erubam Le (Darnley Islanders)(No 1) v Queensland* (2003) 134 FCR 155; [2003] FCAFC 227 ,summarised in *Native Title Hot Spots* Issue 7.

The argument put on appeal in relation to s. 47A was not raised at first instance, where reliance was placed on s. 47 instead. On appeal, leave was granted to raise the new argument based on s. 47A—at [121].

The areas in question

The relevant areas (the Mt Welcome pastoral lease and the Mt Welcome freehold titles) were held by the Mt Welcome Pastoral Co Pty Ltd, a company incorporated under general legislation i.e. the *Companies Act 1961* (WA).

All of the shares in the company, except for one held by a Ngarluma man, were held at the time of the trial by the Ieramugadu Group, a body incorporated under the *Associations Incorporation Act 1895-1969* (WA), also legislation of general application.

The members of the Ieramugadu Group are 'those aboriginals [sic] from time to time resident in and around the Roebourne district in Western Australia who are of the Jindjibandi, Ngaluma and Bandjima tribal groups together with such other aboriginals as have an established residential connection with the district'.

According to the court, there was no obligation on individual shareholders to either hold those shares or exercise the voting rights with respect to them 'for the benefit of' Aboriginal peoples, as distinct from their own personal interests—at [152]. .

Construction of s. 47A

Their Honours considered two lines of authority in relation to the meaning of 'held expressly for the benefit of ... Aboriginal peoples' in the first limb of s. 47A(1)(b)(ii).

The Ngarluma and Yindjibarndi peoples relied upon the first line of authority, found in *Neowarra v Western Australia* [2003] FCA 1402 (summarised in *Native Title Hot Spots* Issue 9) and *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 summarised in *Native Title Hot Spots* Issue 19). The state relied upon the second line of authority found in *Hayes v Northern Territory* (1999) 97 FCR 32 and *Risk v Northern Territory of Australia* [2006] FCA 404 (summarised in *Native Title Hot Spots* Issue 19).

Their Honours said:

> The point of difference between the two approaches ... appears to be the perspective from which one considers whether land is "held expressly for the benefit of" Aboriginal peoples. *Neowarra* and *Rubibi (No 7)* appear to permit consideration of that question from the perspective of the entity holding the beneficial interest in the land set in the legislative context in which the entity was established. In *Hayes* and *Risk*, on the other hand, consideration of the issue is restricted to the perspective of the legislative or executive structure under which the grant or transfer itself was made, or to the perspective of the instrument which grants the relevant interest—at [138].

The court noted that:

- some support for the approach taken in *Risk* and *Hayes* could be drawn from the Senate's Supplementary Explanatory Memorandum to the *Native Title Amendment Bill (No 2) 1997* (Cwlth), which emphasised that grants which were not expressly for the benefit of Aboriginal peoples, but rather made in the 'normal way' to a specific person who happened to be an Aboriginal person, were not covered by paragraph 47A(1)(b);
- the practical effect of the provisions of s. 47A may further indicate that Parliament did not intend it to apply other than according to the expressed intention of the Crown—at [141] to [142].

The court went on to explore what the 'practical effect' of accepting Ngarluma and Yindjibarndi submission might be, including that:

- a lessee of an ordinary lease from the Crown could defeat the Crown's reversion by their own act, such as by subleasing the area expressly for the benefit of Aboriginal people;

- if the native title rights and interests in question extended to an exclusive right to use and enjoy the area, the Crown could not extend the lease or grant a fresh pastoral lease without confronting the future act regime under the NTA;
- if native title continued to exist in the Mt Welcome freehold titles (subject to the non-extinguishment principle), and the company chose to transfer those titles to a member of the public, the transferee would hold them subject to the non-extinguishment principle, with the unintended consequence that any attempt by the transferee to, say, sub-divide the land, may also be subject to the future act regime;
- even a change in the shareholding of the company so as to permit non-Indigenous persons to acquire shares, might constitute a future act—at [142] to [144].

Their Honours decided that: '[T]hose considerations lend support to the approach to the construction of s 47A(1)(b)(ii) adopted in *Risk* and *Hayes'*—at [145].

Context matters

The court noted that, even if the approach in *Risk* and *Hayes* was followed, 'each set of circumstances must be addressed separately, including in the particular legislative context in which those circumstances emerge'—at [145].

For example, the court accepted that, in *Neowarra*, the legislation under which the lessee (e.g. the Indigenous Land Corporation) was established may have supported a finding that s. 47A(1)(b)(ii) applied. That was:

> [A] matter of construction of the relevant legislation. It is not necessary to reconsider that decision in that respect. It clearly addresses different facts to those presently before the Court—at [149].

Section 47A did not apply in this case

It was found that:

- the expression 'Aboriginal peoples' in s. 47A(1)(b)(ii) 'contemplates some communal or collective benefit rather than individual personal benefit';
- the absence of any legislative or executive indication that the company was to hold the area subject to the Mt Welcome pastoral lease or the area subject to the Mt Welcome freehold titles for the benefit of Aboriginal peoples was sufficient to conclude that s. 47A(1)(b)(ii) was not enlivened;
- had the Ieramugadi Group, as the majority shareholder, procured a change to the company's memorandum and articles of association to require that the company's business and activities be conducted for the benefit of Aboriginal peoples, there may then have been some similarity to the circumstances addressed in Neowarra and adopted in *Rubibi* (No 7) but this was not the case;
- the view expressed in *Risk and Hayes* as to the reach of s. 47A(1)(b)(ii) was to be preferred;
- in this case, the connection between the potential provision of the benefit to Aboriginal peoples and the holding of the area in question was too remote to enliven the application of s. 47A(1)(b)(ii)—at [152] and [154].

As a result, s. 47A did not apply to the Mt Welcome pastoral lease or the Mt Welcome freehold titles and the appeal on this ground failed—at [155].

Application of s. 47B

This ground of appeal concerned whether s. 47B applied to the areas subject to temporary reserves made under the *Mining Act 1904* (WA) and continuing in force under the *Mining Act 1978* (WA)—at [157].

Section 47B provides that extinguishment of native title in relation to areas of vacant Crown land (or unallocated State land) must be disregarded, provided that (among other things) the area is not:

> [C]overed by a reservation ... made or conferred by the Crown in any capacity ... under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose—see s. 47B(1)(b)(ii).

The primary judge found that a temporary reserve of this kind was a 'reservation' for the purposes of s. 47B(1)(b)(ii) and, therefore, s. 47B did not apply.

On appeal, the Ngarluma and Yindjibarndi people accepted that these were 'reservations' but contended that, as these reserves were not areas 'to be used for public purposes or for a particular purpose', s. 47B did apply—at [159] and [164].

Their Honours said:

> Since the primary judge published his reasons at first instance, s. 47B has been the subject of consideration by the Full Court of this Court in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 ... . The issue in *Alyawarr* ... was whether the proclamation of a townsite fell within the terms of s 47B(1)(b)(ii). Contrary to the observation of the primary judge ... , the Court in *Alyawarr* ... clearly did not consider that the exclusionary provision in s 47B(1)(b)(ii) should be applied 'as widely as possible'—at [165].

Following the reasoning in *Alyawarr*, their Honours said the issue must be determined solely by reference to the provisions of the Mining Act, and the instruments creating the temporary reserves, and the nature of the purposes for which the area subject to the temporary reservations were to be used—at [167] and [171].

Therefore, it was held (having regard to its beneficial purpose of s. 47B) that any limitation found in s. 47B(1)(b)(ii) should not be construed more widely than is necessary to achieve its purpose:

> The relevant use, whether for public purposes or for a particular purpose, must emerge from the reservation itself. It is "under" the reservation that the area is to be used for public purposes or for a particular purpose, as the word "which" is the relative pronoun for the reservation or other instrument made or conferred by the Crown. If the use of the word "under" was not intended to convey that the public purposes or the particular purpose could emerge in respect of the reserved area independently of the reservation itself, the words "under which" would not have been used and instead a simple conjunctive "and" would have been used. Consequently, although particular land may

> ultimately be used for a public purpose such as an airport site or a salt mine, such use cannot be regarded as occurring "under" a reservation authorised by s 276 of the Mining Act unless that section or the reservation made pursuant to that section and in its legislative context provide the necessary purposive character to the reservation—at [170].

After examining the legislation, their Honours concluded that:

> A reservation under s 276 of the Mining Act may lawfully be made without the area of the reservation being required for public purposes or for a particular purpose, and there is no requirement in s 276 ... that under a reservation the area is to be used for public purposes or for a particular purpose ... . In our judgment, the reservations under s. 276 of the Mining Act do not fall within the exclusionary provision in s 47B(1)(b)(ii)—at [175].

In case it was permissible to consider evidence as to the purpose for which the reserve was created (rather than confining the inquiry to the legislation), the court examined the evidence given but found it also showed that the reserves did not come within the exception provided by s. 47B(1)(b)(ii)—at [176] to [188].

Therefore, their Honours found the primary judge was wrong in concluding that s. 47B did not apply in respect of the areas the subject of reserves made under s. 276 of the Mining Act—at [189].

Were the disputed areas 'occupied' by the Ngarluma and Yindjibarndi peoples?
As a result of the finding in relation to s. 47B, a further contention, raised by the state, became relevant. After some refinements as to the precise areas in dispute, the court addressed the question of whether the requirement that, at the time of the making of the claimant application, the area of each reserve was 'occupied' by one or member of the claim group, was met—at [196] and [205].

The court said that:

- whether or not an area was 'occupied' for the purposes of s. 47B(1)(c) was a factual inquiry that must be considered in the context of each individual case;
- in this case, the primary judge did not make any findings regarding 'occupation' of the areas in dispute on appeal at the relevant time;
- the evidence considered at first instance for the purposes of 'connection' under s. 223(1) could also be relied upon to establish whether or not 'occupation' under s. 47B(1)(c) was satisfied—see [207], [210], [211] and [218], referring to *Hayes* at [162], *Western Australia v Ward* (2000) 99 FCR 316 at [449] and *Alyawarr* at [193] to [195].

It was found that most of the disputed areas were 'occupied' in the sense required and so s. 47B applied to those areas—at [235].

'Occupation' of areas within a town or a road not shown
In relation to evidence of occupation 'in the vicinity' of the township of Karratha, their Honours said that, while it may be inferred in the case of 'open' country that use of one part of that country involves the assertion being established over a wider general geographical area, the same inference could not readily be drawn in the case of a township: 'To live in a town does not itself suggest that the surrounding areas,

or some of them, are also 'occupied' by the residents of the town or some of them'—at [231].

In relation to a narrow strip of land adjoining a road, their Honours found that mere travel along a road available to the public is not sufficient to establish occupation of an area adjacent to that road for the purposes of s. 47B(1)(c)—at [234], referring to Sundberg J in *Neowarra* at [750], [752], [758] and [760].

Internal geographical limitations

The primary judge's determination limited the geographical area in which certain native title rights and interests might be exercised e.g. in the 'proximity' of river courses. The parties to the appeal agreed this finding should be overturned on appeal because recognition of native title rights and interests should not be limited only to those places where the evidence showed they were currently exercised.

Their Honours accepted that:

- current activity was, no doubt, a reflection of the more physically amenable places for those rights to be exercised
- it was not definitive of the places within the claim area where they have been, or may be, exercised;
- there may be cases where there is a real issue as to whether the determination of the particular native title right or interest should confine the area in which it may still be exercised—at [237] to [239].

However, their Honours did not think that this case was in that category and the appeal on this ground was allowed—at [240].

The existence of native title in the Karratha area

This issue went to the heart of the primary judge's reasoning as to connection and, as a result, the court set out in some length the approach taken at first instance—at [241] to [300].

Late in the appeal proceedings, the state decided to rely primarily upon oral submissions made on its behalf on the hearing of the appeal, rather than its 'extensive written submissions'. This approach was criticised because it 'embarrassed' the Ngarluma and Yindjibarndi people, necessitated the filing of further submissions after the hearing concluded and 'limited the value of the engagement' between the court and counsel for the state—at [302].

That said, and with some difficulty, the court extracted two major propositions from the state's oral submissions:

- there was no continuity in the connection of the Ngarluma people by their laws and customs with the Karratha area because there was no evidence that the Ngarluma people occupied, or were present in, that area continuously from the acquisition of European sovereignty;
- the connection required by s. 223(1) is a connection by traditional laws acknowledged and traditional customs observed. The laws or customs relating to

land at the acquisition of European sovereignty specified that rights and interests in the Karratha area were held by estate groups. The primary judge should have examined whether rights and interests were continuously held in accordance with that law and custom or some modification of it—at [301] to [303].

As noted earlier, in order to understand the arguments of the state (and the Commonwealth) on this issue, it was necessary to trace the reasoning of the primary judge. The technique used at first instance was to record the claims and findings in the body of the reasons for judgment and then refer to the evidence on which the findings were based in appendices to the reasons. The primary judge then laid out the applicable legal principles and went on to consider the historical, archaeological, linguistic and anthropological evidence—at [241], [247] and [248] to [300].

The primary judge referred to the work of Professor Radcliffe-Brown, who (in 1911) reported that tribes were essentially a collection of local groups each with its own defined territory. Professor Radcliffe-Brown considered the norm in the region was ownership of specific tracts of country by groups of patrikin. The case of the state rested on these concepts. Their Honours said that the way in which the primary judge dealt with the concepts was central to the issues raised in this part of the appeal—at [272].

Another issue of importance was 'the degree of connection', meaning whether or not evidence must be led in native title cases showing that all areas under claim had been used in accordance with traditional laws and customs. The issue arose because the state contended that the Ngarluma people had not led any, or any sufficient, evidence of connection in respect of certain areas, including the Karratha area. The primary judge concluded that authorities such as *Ward* indicated that physical occupation of the land was not a necessary condition for proof of continued connection and that it was not necessary to have a presence on every part of the land or to actively use every part of the land at all times—at [293] and [294].

Continuity in the connection with the Karratha area

Regarding the state's first proposition, as identified by the court, their Honours said that:

- while it may be accepted that the presence of Ngarluma people in the Karratha area was limited as contended for by the state, it was quite another thing to conclude that there was no evidence of the necessary connection of the Ngarluma people with the Karratha area;
- whether the Ngarluma people had established the necessary degree of connection was a matter of judgment involving an assessment of a wide array of evidence;
- the trial involved 81 hearing days, including 35 days 'on country' at 76 sites, hearing from 76 indigenous witnesses, six pastoralists and 11 expert witnesses (on matters of archaeology, history, linguistics and anthropology), so any assessment by the primary judge would be a 'complex process of assimilation of a large and diverse body of material';
- the approach taken by the trial judge, as set out in their Honour's reasons, illustrated 'the scope of the exercise and the interlocking nature of many of the

issues so that findings on the evidence relating to one issue are often applied to other issues as well';
- a primary judge enjoys advantages that an appellate court does not, such as the opportunity to consider, and reflect upon, the entirety of the evidence as it is received at trial and to draw conclusions from the evidence, viewed as a whole—at [304] to [310], referring to *CSR v Della Maddalena* [2006] HCA 1 at [17].

Their Honours dismissed the state's assertions that the Karratha area formed a relatively large part of the Ngarluma claim area because, even if it did, this alone did not demonstrate error on the part of the trial judge and, in any case, it was 'an insubstantial basis for asserting that the whole process of assimilation of the evidence on the subject has miscarried'—at [311].

Karratha area on the periphery

The state contended that Karratha area was on the periphery of the claim area. The court was of the opinion that this was not, in itself, significant unless it could be shown that this peripheral geographical position reflected a lack of connection to the Karratha area. The state failed to show this, which was sufficient to dispose of this contention. Their Honours noted that, in any case, '[m]any places figure in the historical, archaeological, and anthropological evidence which are fairly close to the Karratha area'—at [312].

Estate group argument rejected

As to the state's second proposition (i.e. that connection must be found by the traditional laws and customs concerning estate groups), their Honours found it necessary to 'disentangle' a number of separate arguments—at [314].

The state contended the primary judge wrongly reasoned backwards from the present exercise of native title rights and interests. Their Honours said this contention mistook the process undertaken by the trial judge who had:

- first set out the requirements of continuity derived from *Yorta Yorta*;
- held that the native title rights and interests presently observed were exercised within an existing normative system;
- considered the question of the traditionality of laws and customs;
- identified the necessity of considering whether current rights and interests have been exercised continuously from the acquisition of European sovereignty and whether they were derived from a normative system;
- reviewed the findings from the historical, anthropological, genealogical and lay evidence—at [315] and [324] to [328].

In rejecting this contention, their Honours observed:

> One curiosity about this argument is that, whilst the state raised it in relation to the Karratha area, if it is a good argument, it would apply to the whole of the claim area because his Honour adopted the same process of reasoning in relation to the entire claim area—at [331].

The state also contended the primary judge should have made a finding that, under the laws or customs applicable at the acquisition of European sovereignty, land was held by estate groups of patrikin.

The primary judge had taken steps in his reasoning:

- identifying the views of the expert anthropologists, and found there was a controversy about whether the estate group construct was a full reflection of the laws or customs relevant to the enquiry into the issue of connection required by s. 223(1)(b);
- concluding that the controversy did not need to be resolved because an anthropological opinion could not determine the matter and so it was necessary for the court to have regard to the evidence as a whole—at [316] and [335].

Their Honours concluded that:

- the trial judge had analysed the entirety of the evidence relating to the groups which held the native title rights and interests and rejected that they were held at the estate group level;
- that approach was consistent with the authorities referred to and there was no error in his approach—at [344].

Findings on society as defined in *Yorta Yorta*

The state contended the primary judge failed to make findings, or correct findings, as to the society which was said to have acknowledged and observed the laws or customs continuously. Their Honours found the trial judge identified the Ngarluma people and Yindjibarndi people as groups united in their acknowledgement and observance of laws and customs continuously since the acquisition of European sovereignty. There was, therefore, no error in the trial judge's approach to the identification of society as defined in *Yorta Yorta*—at [317] and [349].

Commonwealth's position—misapplication of Yorta Yorta

The Commonwealth contended that the primary judge relied upon a different approach to continuity and change (i.e. as explained by Gaudron and Kirby JJ in the minority) to that found in the majority judgment in *Yorta Yorta*. Their Honours:

- rejected the contention that there was such a difference in *Yorta Yorta* on that point;
- found that the trial judge did not assume that the acknowledgement and observance of laws and customs had been continuous but, rather, arrived at this conclusion by an assessment of all the evidence—at [352], [359] and [361].

Description of native title holders

After considering both a proposed description of the native title holders proffered by the state and the description of native title holders adopted in other cases, the primary judge arrived at the following descriptions of 'Ngarluma People' and 'Yindjibarndi People' in the determination:

> 'Ngarluma People' are Aboriginal persons who recognise themselves as, and are recognised by other Ngarluma People as, members of the Ngarluma language group.

> 'Yindjibarndi People' are Aboriginal persons who recognised themselves as, and are recognised by other Yindjibarndi People as, members of the Yindjibarndi language group.

On appeal, the state's argument (adopted by the Commonwealth) was that s. 225(a) required a more precise description of the native title holders and must be read with s. 61(4). Their Honours:

- rejected the contention that s. 225(a) required that the description of the native title holders must stipulate a method by which individual group members could be ascertained;
- found no argument on the facts to persuade the court that the description failed to comply with that section—at [373] and [375].

Prescribed bodies corporate

The primary judge made one determination of native title which set out the separate rights and interests of each of the Ngarluma and Yindjibarndi groups of native title holders over separate areas, apart from a small area of overlap in the vicinity of the Chichester Ranges . Orders were then made that one prescribed body corporate (PBC) would hold the native title rights and interests of the Yindjibarndi people in trust for the Yindjibarndi people and a second PBC would hold the rights and interests of the Ngarluma people in trust for the Ngarluma people. On appeal, the Commonwealth contended that the scheme of the NTA demonstrated that Parliament intended there would be only one PBC for each determination area.

In their Honours' view, the Commonwealth's contentions did not suggest that the plain meaning of the sections in the context in which they appear should not apply and so this ground failed—at [381] to [386].

Decision

Most of the grounds of the appeal raised by the Ngarluma and Yindjibarndi peoples were upheld (i.e. with the exception of the ground in relation to s. 47A). The court was willing to make orders in the terms proposed by the parties on what were called the 'Extinguishment by Grant of Pastoral Leases' and 'Internal Geographical Limitations' issues and allowed the parties 28 days (or an extension with leave) to submit the final form of orders which give effect to their Honours' reasons. No order was made as to costs.—at [388], [390] and [392].