NATIVE TITLE HOT SPOTS

NATIONAL NATIVE TITLE TRIBUNAL LEGAL NEWSLETTER JUNE 2010, ISSUE 32

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National Native Title Tribunal

Appeal succeeds – society question & native title to the sea

Sampi on behalf of the Bardi and Jawi People v Western Australia [2010] FCAFC 26

North & Mansfield JJ, 18 March 2010

Issue

The main issue in these appeal proceedings was whether the Bardi and Jawi people constituted one society at sovereignty or two. The appeal court found the primary judge should have inferred there was one society at sovereignty and so upheld the appeal on this ground. The extent of native title rights and interests recognised in the intertidal zone and offshore was also in issue. Most of these grounds of appeal were also successful.

Background

In 1995, the Bardi and Jawi people made a claimant application over part of the Dampier Peninsula, islands in the Buccaneer Archipelago and some of the surrounding offshore areas in northern Western Australia. They claimed that, although they were distinct peoples, they had always formed one society for the purpose of holding native title. Justice French did not accept this. The Bardi and Jawi people appealed from French J's determination in *Sampi v Western Australia (No 3)* [2005] FCA 1716, which was made in accordance with the reasons given in *Sampi v Western Australia* [2005] FCA 777 (*Sampi No 1*). The State of Western Australia and the Western Australian Fishing Industry Council (WAFIC) cross appealed.

As the critical issue was whether there was one society or two at sovereignty, the Full Court addressed that issue first. However, before doing do, Justices North and Mansfield considered their role as the appeal court in the circumstances of this case.

Appeal court's role in such 'unusual circumstances'

The unusual aspect of this case was that French J did not hear all of the evidence himself. Justice Beaumont conducted the trial over 24 days but became ill and so the case was transferred to French J's docket. The parties agreed that his Honour could determine the case based on the transcript and a small amount of additional evidence taken over three days (mostly from the same Aboriginal witnesses who had given evidence in the first trial). The additional evidence addressed developments in the law, such as the decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*).

In determining whether the primary judge 'erred in drawing inferences from the evidence', North and Mansfield JJ were guided by the following principles:

- in circumstances where the trial judge's conclusions were 'largely drawn by inference from the facts found by him', an appeal court 'will give respect and weight to the conclusion of the trial judge' but, once its reached its own conclusion, 'will not shrink from giving effect to it';

- to give weight and respect to the conclusion of the trial judge means not finding error merely because the appeal court prefers a different outcome to that reached by the trial judge where both are equally available or the matter is finely balanced;
- the appeal court must come to the view that the primary judge was wrong in order to interfere and 'a sufficiently clear difference of opinion may necessitate that conclusion';
- the appeal court must 'bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect', i.e. usually, the trial judge has had the advantage of seeing and hearing the witnesses directly'—at [6] to [8], referring to various authorities.

However, in the 'unusual circumstances' of this case, French J 'did not have a significant advantage' over the appeal court because both he and the appeal court relied 'principally' on the transcript of evidence—at [9].

It was also noted that delivery of judgment on the appeal was delayed at the parties' request to allow for negotiation toward a settlement and that, during that time, one of the members of the Full Court retired. The parties consented to North and Mansfield JJ constituting the Full Court—at [10].

Framing the question

Subsection 223(1) of the *Native Title Act 1993* (Cwlth) (NTA) was 'central' to the primary judge's consideration of the legal framework surrounding the critical issue i.e. the 'one society or two' question. French J explained the proper construction of that section before noting that:

> It must be shown that the society under whose laws and customs the native title rights and interests are said to be possessed has continued to exist from sovereignty to the present date '... as a body united by its acknowledgment and observance of the laws and customs'—at [963] in *Sampi No 1*.

Primary judge's conclusion

The central issue in this case was whether the Bardi and Jawi people comprise a society in whose favour a determination of native title could be made. French J was of the view that determining that issue required making two enquiries:

- whether there is a society of the requisite kind in existence today; and
- whether that society can be said to have existed since sovereignty—*Sampi No 1* at [968].

As North and Mansfield JJ put it:

> [T]he primary judge concluded that there was a present day Bardi society which, at sovereignty, was able under its laws and customs to receive into membership, at least by intermarriage, people from the Jawi community. The present society could therefore be broadly described as a Bardi and Jawi society. However, only the land and waters in which the Bardi people held rights and interests at sovereignty could be the subject of a native title determination. The primary judge therefore made the determination in favour of the Bardi and Jawi applicants but only in relation to the lands and waters of the Bardi people. In so doing, the primary judge rejected the contention of the Bardi and Jawi people that an inference could be drawn from the evidence that they constituted one society at sovereignty—at [28].

It was the reasoning leading to this conclusion that was examined on appeal.

Reasoning of primary judge

The reasoning of the primary judge, found in *Sampi No 1* at [1043] to [1046], was brief and concluded with a finding that:

> The evidence does not allow me to infer that one society of Bardi and Jawi people occupied the claim area at sovereignty and were united by a single set of traditional laws and customs acknowledged and observed by that society today. Nor am I able to conclude that there was one such society which, in effect, communally held the land and waters of the claim area under such a body of law and custom, which was, in effect, the applicants' case.

The factors French J said showed the similarities of the Bardi and Jawi people were:

- a pattern of intermarriage which dated back to sovereignty;
- common creation and otherwise similar cosmologies;
- similar laws and customs defining the rights and responsibilities of clans and families with respect to particular burus or estate areas;
- similar patterns of exploitation of marine resources; and
- common ceremonies in relation to initiations.

The factors said to highlight the distinctiveness of each were:

- the members of each group identified themselves as either Bardi or Jawi;
- they spoke different languages; and
- they occupied separate territories.

Primary judge should have inferred one society at sovereignty

The court found that French J was wrong in 'failing to draw the inference from the evidence that the Bardi and Jawi people formed a single society at sovereignty' for the reasons summarised below—at [50] and [54].

Their Honours first noted that:

- whether the group concerned acknowledged the same body of laws and customs relating to rights and interests in land and waters is central to the consideration of whether a group of people constitute a society in the *Yorta Yorta* sense;
- the primary judge held that the Bardi people as a group acknowledged the same body of laws and customs relating to rights in land and waters but was not able to infer from the evidence that the Jawi people also acknowledged those laws and customs—at [51].

According to their Honours, there was 'a wealth of detail of a highly complex system of land holding and social interaction [before the primary judge] which was explained by the Aboriginal witnesses and, at length, by [anthropologist] Mr Bagshaw', with the latter's evidence going to 'the depth and detail of the legal code involved'. This included evidence that:

- Bardi and Jawi primarily inherit country and associated rights in country by way of patrifiliation;
- each individual becomes a member of an exogamic kin-aggregate or patrifilial group which is identified with, and responsible for, a specific mythologically inscribed estate or buru and its associated religious resources;
- individual estate-affiliates are 'gamelid' (a person who, together with his or her father, is from a particular country), which 'conveys the sense of an individual who is known to

the country itself' and that country is 'conceived of as an active physical and metaphysical entity';
- nimalj rights refer to limited rights which estate-affiliates can grant in respect of their own buru to unrelated or distantly related persons, e.g. nimalj to fish at a certain spot, exploit particular resources or reside in a particular locality within a buru;
- other derivative rights arise in relation to maternal estates (ningarlm) and spousal estates (gurirriny) but the holders of these are expected to defer to estate-affiliates, support them on estate related issues and speak for, and act on behalf of, the physical and spiritual welfare of the estate;
- continuing responsibility exercised in respect of deceased or vacant burus supported the view that the estate rights fell within an overarching system of traditional law and custom defining the connection of the people to their land and waters—at [54].

Their Honours found that 'the inherently communal nature of Bardi and Jawi territorial ownership' was underscored by the proposition advanced in Mr Bagshaw's report that 'it may reasonably be said that all persons with a recognised kin-base connection to an estate have at least some form of ownership interest in it'—at [53].

The court did not agree with French J that Mr Bagshaw's description of the system was based on the premise that the Bardi and Jawi people constituted a single society. Rather, their Honours read Mr Bagshaw's evidence as being 'descriptive of a system which, *as a matter of fact, rather than assumption*, both the Bardi and Jawi people shared' (emphasis added). Accepting this view, that system 'was equally the system of the Jawi people as it was of the Bardi people'—at [55] to [56].

Aboriginal witnesses' evidence

The court agreed with French J that the testimony of the Aboriginal witnesses was 'of the highest importance in a determination of the evidence of native title'. According to North and Mansfield JJ, that evidence established that 'the Bardi and Jawi people shared one system of law at least as far back as the latter part of the 19th century'. Therefore:

> On the basis of this ... evidence the primary judge should have found that the Bardi and Jawi people acknowledged the same laws and observed the same customs concerning rights and interests held in land and waters at least from the present back until the time of these witnesses' 'old people' or grandparents, namely, the latter part of the 19th century—at [63].

Further, it could be inferred that this was also the case from the latter part of the 19th century back to sovereignty because: "[T]he constitutional status and elaborate nature of the rules in question make it improbable that the system arose in the relatively short period between sovereignty and the time of the ... 'old people'"—at [65], referring to *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50.

The court concluded that French J should have inferred that the Bardi and Jawi people are, and have been since the time of sovereignty, 'united by their acknowledgement of a common set of laws and their observance of a common set of customs'—at [66].

Indicators of separateness

It was found that the linguistic evidence, the evidence of distinct territories and the existence of self-referents was 'not sufficient to displace the inference from the wealth of other evidence that the Bardi and Jawi people were a single society at sovereignty'—at [66] and [75].

The difference in language was at the level of dialect. As was noted,

> The difference in dialect, in the overall picture ... , does not tend to lead to the view that the traditional laws acknowledged and traditional customs observed by the Bardi and Jawi were not acknowledged and observed by them as one society or that they were not inextricably linked by those normative rules which existed at sovereignty—at [68].

Similarly, the use of the self-referents 'is paralleled in many unified societies'. Their Honours referred to the fact that Australians call themselves Victorians or Queenslanders or Western Australians because they 'have a residential linkage in those States' while at the same time being 'united in adherence to the law of Australia' and forming 'part of the Australian society'. In this case, the territorial delineation provided 'further evidence of a common set of laws and customs with respect to land' in that Bardi and Jawi possession of particular territory was (according to Mr Bagshaw) the result of a 'supernaturally-authored territorial demarcation' that pointed to 'an overarching set of laws and customs derived from a common cosmology'—at [69] to [70].

After pointing out that each native title case turned on its facts, the court noted decisions from which 'certain lines have emerged between the characteristics of those groups which fall within the requirements laid down in *Yorta Yorta* and those which do not'. It was, they thought, noteworthy that there had been cases where a native title claim group that adhered to 'an overarching set of fundamental beliefs' was found to constitute a society 'notwithstanding that the group was composed of people from different language groups or groups linked to specific areas within the larger territory which was the subject of the application'—at [71] to [4], referring to *Neowarra v Western Australia* [2003] FCA 1402, *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* [2004] FCA 472, *Northern Territory v Alyawarr, Kaytetye, Warumunga, Wakaya Native Title Claim* (2005) 145 FCR 442; [2005] FCAFC 135 and *King v Northern Territory* (2007) 162 FCR 89; [2007] FCA 944.

Conclusion – one society, determination should include Jawi territory

North and Mansfield JJ concluded that:

> [T]he primary judge should have inferred from the evidence that the Bardi and Jawi people constituted a single society from sovereignty until the present. The primary judge should not have excluded the country of the Jawi people from the determination. The determination should, subject to resolution of the remaining arguments, include the territory of both the Bardi and Jawi people. As a result of these findings, the cross-appeal by the State must fail—at [79].

Islands north of Dampier Peninsula

French J excluded islands to the immediate north of the Dampier Peninsula from the determination because, in his opinion, those islands were not part of Bardi country. Since their Honours had found there was one Bardi and Jawi society at sovereignty, it was

'necessary to revisit that conclusion'. North and Mansfield JJ were satisfied that this was an area over which native title rights and interests exist and there was:

> [A]mple evidence to support the tentative view of the primary judge that the land and waters north and east of the Dampier Peninsula mainland to Hadley Passage were part of the Bardi and Jawi peoples' land (the step of finding the one society at sovereignty having been taken—at [83].

Therefore, the determination of native title rights and interests will be amended to include this area.

Tidal movements and the existence of native title

French J had found that non-exclusive native title rights and interests could be recognised in the intertidal zone and in relation to reefs within and adjacent to that zone and offshore reefs otherwise exposed and traditionally used by the Bardi/Jawi people, together with the waters in their immediate vicinity. As the parties could not reach agreement as to how this should be reflected in the determination, it was determined in *Sampi v Western Australia* [2005] FCA 1567 that there should be '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 to low tide only when that reef is exposed or covered by water to a depth not more than' two metres. On appeal, the Bardi and Jawi people characterised this as a temporal limitation either on the existence or the exercise of the very limited native title rights and interests recognised in those areas and argued that the proviso was in a form not contemplated by the NTA.

The court agreed with the submission that ss. 223 and 225 of the NTA 'do not contemplate the type of limitation which is contained in the proviso'. Since no party had proposed any alternative limitation, it was decided that the determination should be amended to omit the proviso—at [95].

Seaward extent of recognition extended to three nautical miles

The application area generally extended to the three nautical mile limit. French J recognised the following rights in relation to waters, shoals and reefs seaward of the high water mark:

- the right to access, move about in and on and use and enjoy the sea;
- the right to hunt and gather in and on the sea, including for dugong and turtle;
- the right to access, use and take any of the resources of the sea (including the water of the intertidal zone) and to manufacture any object or other thing from these resources.

However, recognition was limited to the area between the high water mark and the mean low water mark and reefs when exposed or covered by water to a depth of not more than two metres between the mean low water mark and the two metre bathometric contour at the lowest astronomical tide of the mainland coast of the Dampier Peninsular. Beyond the two metre bathometric contour at the lowest astronomical tide, French J found that the evidence as to use of the open sea beyond the intertidal zone was limited and did not establish definable rights under traditional law and custom in relation to that use. The three reasons given for rejecting the 'sea' claim were:

- the claimants had not established that the use of the sea area was made under traditional law and custom;
- the evidence of use of the sea on the western side of the mainland was insufficient to establish any claimed right;

- while there was more extensive use of the sea to the north of the mainland in the region of the islands by Bardi people, that area was not in Bardi country and so their use of the sea in that territory could not give rise to rights or interests in the Bardi society.

Obviously, the third reason depended on French J's findings that the relevant rights and interests were held by the Bardi society. As a result:

> [T]he question he asked in respect of the sea areas was whether the evidence established native title rights and interests in the Bardi people. As we have explained earlier in these reasons, the relevant society which held any rights or interests established by the evidence was the Bardi and Jawi society. Thus, the proper enquiry was whether the Bardi and Jawi people had established native title rights or interests in the sea claim area. As the primary judge approached the issue on a different basis, this Court must determine for itself whether the evidence established that the Bardi and Jawi people have native title rights or interests in the sea claim area on the basis of the evidence led in the first and second trials—at [102].

The court canvassed the evidence of the Aboriginal witnesses concerning the rights in the sea area. North and Mansfield JJ were satisfied that the evidence as a whole established that:

> [I]t is, and has been since sovereignty, customary for the Bardi and Jawi people to use the sea around the coast of the mainland of the Dampier Peninsula and among the islands for hunting, fishing and travelling. That evidence supports customary rights to access, move about in and on, and use and enjoy those areas, to hunt and gather including for dugong and turtle, and to access, use and take any of the resources of the sea for food and trapping fish. There was also evidence that resources from the ocean such as trochus shell were used for religious, spiritual, ceremonial and communal purposes. This evidence taken as part of the evidence as a whole supports a right to access, use and take the resources of the sea for those purposes as claimed by the Bardi and Jawi people—at [111].

Therefore, it was found that French J was wrong to find that 'the evidence did not establish these defined rights under the traditional law and custom of the Bardi and Jawi people' and, since none of the respondents contended otherwise, the three nautical mile limit was determined to be an appropriate outer boundary line to mark the extent of the native title rights and interests in the sea. The determination of native title will be amended to reflect that boundary.

Right to protect offshore areas – no need for unnecessary precision

The Bardi and Jawi people claimed a right to care for, maintain and protect the land or sea respectively, including their places of spiritual or cultural significance. French J did not recognise this right in relation to offshore areas. On appeal, the Bardi and Jawi people argued that rights in similar terms had been recognised in other cases and that the evidence supported the existence of the claimed right. North and Mansfield JJ found that the Bardi and Jawi people had not established the evidentiary basis for success on this ground. Therefore, it was found that French J correctly excluded the claimed 'right to protect' in the offshore areas generally—at [126].

However, their Honours indicated that, if there had been evidence to support it, they would not have rejected the claim to such a right on the ground that it lacked sufficient precision (as French J apparently did). They went on to point to the evidence that might have been used to indicate what the claimed right encapsulated. According to the court:

> To require a greater precision than is expressed in the formulation of the rights or interests under the laws or customs of the Aboriginal people is to fail to recognise the rights or interests which arise under that law. Once the statutory requirements for the recognition of native title are established, there is no warrant for limiting the rights and interests by adding a gloss to the statutory requirements in the form of a stipulation for a particular level of precision in the articulation of the rights or interests—at [120].

It was also noted that similar rights and interests were accepted in *Attorney-General (NT) v Ward* (2003) 134 FCR 16, *Neowarra v Western Australia* [2004] FCA 1092, *Alyawarr, Daniel v Western Australia* [2005] FCA 536, *De Rose v State of South Australia (No. 2)* (2005) 145 FCR 290—at [121] to [125].

Right to protect recognised in relation to Alarm Shoals and Lalariny

Particular arguments were put in relation to the recognition of a right to protect Alarm Shoals and Lalariny.

Alarm Shoals is an area of shallow water north of Cape Leveque largely within the three nautical mile limit. The right to access, move about in and on, and use and enjoy the area for spiritual purposes and the right to care for, maintain and protect the area as a place of spiritual significance were claimed. French J recognised that the area was of great significance but held there were no native title rights or interests in Alarm Shoals because, essentially, what was asserted involved a right to exclude which the common law does not recognise as a native title right in offshore areas. Evidence about how significant Alarm Shoals is to the Bardi and Jawi People was given by Paul Sampi, 'an elderly senior law man with a very wide and deep knowledge of the culture of his people'. According to Mr Sampi, it was a dangerous spiritual place and, under Bardi and Jawi Law, 'nobody is allowed to go there'—at [130].

While their Honours agreed that the claim for a right to access, move about in and on, and use and enjoy Alarm Shoals for spiritual purposes was not made out because the Law required that Bardi and Jawi people keep away from it, they found (contrary to French J) that the evidence supported the right to care for, maintain and protect Alarm Shoals as a place of spiritual significance. It was not 'restricted to a responsibility to exclude from Alarm Shoals'. Although the evidence was brief:

> Recognition of rights or interests must take into account not only current circumstances which call for the exercise of rights or interests but circumstances which may call for their exercise in the future. Thus, for example, Bardi and Jawi law men would be bound under Bardi and Jawi law to speak out against, say, a proposal to construct a natural gas platform at Alarm Shoals. ... . The right to care for, maintain and protect Alarm Shoals as a place of spiritual significance should have been included in the determination. Expressed in those terms, such a right would not be one which the common law would not recognise—at [133].

Lalariny is a rock feature on the west coast of the Dampier Peninsula. French J did not include Lalariny in the area where native title was recognised because Mr Sampi's gender restricted evidence was to the effect that traditional law and custom required it to be avoided, which French J found was inconsistent with the rights claimed over the area. On the appeal, the Bardi and Jawi people contended it should have been treated in the same way as the surrounding offshore and intertidal areas. The public statement of the restricted evidence

indicated it was an area that 'holds a particular cultural significance to the Bardi and Jawi people resulting from its close association with a particular spiritual being' and that nobody should go there.

Their Honours agreed with French J that the evidence did not support the existence of a right to move about in and on, and use and enjoy the area, the right to hunt and gather including for dugong and turtle and the right to access, use and take any of the resources thereof for food, trapping fish, religious, spiritual, ceremonial and communal purposes because they 'could not exist in an area which traditional law required that people avoid'. However, as with Alarm Shoals, there was some specific evidence about the cultural significance of Lalariny and the responsibility of Law men to protect the area and the fact that the evidence was given in restricted session indicated the cultural importance of the area. It was held that the evidence was sufficient to justify recognition of the right to protect in relation to Lalariny—at [139] to [140].

Exclusive possession to islets

The determination recognised a native title right to exclusive possession above the high water mark of the mainland coast. Lesser 'non-exclusive' native title rights were recognised in offshore areas between the high water mark and the two metre bathometric contour at the lowest astronomical tide of the mainland coast. There are a number of islets, including Manynyingnurr (Nannygoat Island) and Anbarrngani (Leveque Islet), which include land above the high water mark. French J thought the Bardi and Jawi people had conceded that the native title was non-exclusive in those areas. On appeal, the Bardi and Jawi people contended no such concession was made and that the land above the high water mark in the offshore area should be treated in the same way as the land on the Dampier Peninsula, i.e. exclusive possession should be recognised. The court was satisfied there was no concession. The evidence in relation to the islets was quite limited.

North and Mansfield JJ found that

- it was not necessary for the Bardi and Jawi people to identify every offshore site and lead evidence of the claim for exclusive possession specific to each site;
- the evidence in relation to two of the islets showed how close these areas are to the mainland and how they are 'capable of being accessed at times as if they were part of the mainland';
- there was nothing significant in the evidence that demonstrated that the land above the high water mark in the offshore area should be treated differently from such areas on the mainland;
- the determination should have recognised the same exclusive rights in respect of the islets as were recognised in respect of the mainland area —at [146].

Exclusivity and 'use and enjoyment'

The Bardi and Jawi people claimed the right to 'possession, occupation, use and enjoyment' in relation to the land above mean high water mark. French J refused to include the phrase 'use and enjoyment' because he thought it was 'too widely stated and could pick up a variety of rights not contemplated by traditional law and custom'. On appeal, the Bardi and Jawi people contended the determination should have included reference to use and enjoyment because the formula 'possession, occupation, use and enjoyment'. They pointed to 11 cases in which such a right had been recognised. The court agreed that the cases established that was

'a usual practice' to use the composite expression 'possession, occupation, use and enjoyment' to express 'the nature of the native title rights flowing from a finding that Aboriginal people are entitled to exclusivity in relation to land'. Their Honours were of the view that French J's departure from the 'usual usage' was not satisfactorily explained and found that 'use and enjoyment' should be included—at [153].

WAFIC cross appeal

WAFIC, supported by the Commonwealth, argued that the right to fish recognised in the determination should be limited to non-commercial purposes because no claim was made for commercial fishing rights. The determination included the right to 'access, use and take any of the resources thereof (including water and ochre) for food, trapping fish, religious, spiritual, ceremonial and communal purposes'. On the appeal, WAFIC:

- referred to six cases where the court had expressly stated in the determination that the native title rights recognised were non-commercial;
- argued that there was value in adopting a consistent approach;
- properly drew attention to three cases in which non-commercial rights had been recognised in determinations but those rights had not been expressly designated as non-commercial.

As there was 'no settled practice', North and Mansfield could not conclude that the primary judge was wrong. WAFIC's argument that including reference to the non-commercial nature of the rights and interests would give greater clarity to the determination was rejected—at [160].

Decision

The court decided to allow the Bardi and Jawi people's appeal on the issues of the one society or two, exclusivity and 'use and enjoyment', the islands south-west of Hadley Passage, tidal movements and the existence of native title, islets and the seaward extent of native title. The appeal was allowed in part on the issue the right to protect Alarm Shoals and Lalariny but otherwise dismissed. The cross appeals by the State and WAFIC were dismissed.

The determination made by French J will be set aside 'in due course'. The parties, as directed, have filed an agreed form of orders. Submissions have been made about some aspects of the form of the determination.

Kurnai claim dismissed

Rose on behalf of the Kurnai Clans v Victoria [2010] FCA 460

North J, 14 May 2010

Issue

The issue in this case was whether the Kurnai Clans should be recognised as holding native title in relation to Gippsland region of south-east Victoria. Their claimant application covered the same area as that covered by a claimant application made on behalf of the Gunai/Kurnai. It was decided that the Kurnai had not proven they held native title to the

claimed area and so their application for a determination of native title 'must be refused'—at [208].

Background

The Kurnai Clans' application was filed in 2005. Regina Rose, Dot Mullett, Pauline Mullett, Flo Hood-Finn and Frank Hood comprised the applicant. It was brought on behalf of the descendants of Larry Johnson and Kitty Perry Johnson, a couple who were born and lived in Gippsland in the second half of the 19th century. As Justice North noted, the application was made 'as a result of a long running controversy' between the Kurnai Clans and a larger group of Aboriginal people from the Gippsland area referred to as the Gunai/Kurnai about the appropriate group of people in whose favour a determination of native title in the Gippsland area should be made. This was referred to as the 'group composition' issue—at [5].

The Gunai/Kurnai application was made much earlier, in 1997. At the time of the hearing, it identified the group of people in whose favour a determination of native title should be made as the descendants of a 25 sets of apical ancestors, including Larry and Kitty Johnson, the Kurnai ancestors. The Kurnai did not accept that this was the correct native title claim group, arguing that only the descendants of Larry and Kitty Johnson held native title to the claimed area.

Events leading to trial

Many attempts were made to resolve the issue, including mediation by the National Native Title Tribunal, the production by a court-appointed expert of a report on the laws and customs of the Gippsland Aboriginal society at sovereignty and the identification of the ancestors of the people who constituted that society by that expert. The report and further mediation did not resolve the issue. In a 'final process' to 'attempt to bring the Gunai/Kurnai and the Kurnai together', early and preservation evidence were taken in two separate hearings. While it did not resolve the matter, it did allow some assessment of the evidence by the State of Victoria, which led to the state indicating it was willing to enter into negotiations with the Gunai/Kurnai.

In July 2008, the court acceded to the Kurnai's request that their application be set down for trial. According to his Honour:

> The Kurnai case, at least implicitly, accepted that there were Aboriginal people in Gippsland at sovereignty who, at that time, formed a society of which Larry Johnson and Kitty Perry Johnson were part. The Gunai/Kurnai case is that the members of that society are the descendants of the 25 ancestral sets. The Kurnai case is that none of the descendants of those Aboriginal people, apart from the descendants of Larry Johnson and Kitty Perry Johnson, remain today as part of the continuing society. The Kurnai thus took on the burden of establishing that, apart from the descendants of Larry Johnson and Kitty Perry Johnson, none of the descendants of the 25 ancestral sets are part of the alleged Kurnai society existing today and dating back to sovereignty. If the Kurnai are wrong in relation to the descendants of any of the 25 ancestral sets, save for the descendants of Larry Johnson and Kitty Perry Johnson, their application for a determination of native title must fail because it would omit relevant ancestors. Thus, in the end, there was a particular focus in the evidence on the validity of the ancestral sets—at [15].

In December 2008, the Gunai/Kurnai and the state started negotiations directed to resolving the Gunai/Kurnai application. As those negotiations were proceeding positively, the parties did not wish the court to program a hearing of the Gunai/Kurnai application.

The historical context was relevant to the dispute that has arisen in this case and so his Honour summarised the major events from first contact in 1797 to the handover of the former Lake Tyers mission lands to the Lake Tyers Aboriginal Trust in 1971—at [32] to [47].

The relevant law

North J set out s. 223(1) of the *Native Title Act 1993* (Cwlth), noting it required the applicant to establish that:

- The claimed rights and interests are held under a system of rules which has a normative content;
- the claimants constitute a group bound together by adherence to that system of rules;
- the system of rules and the society which adheres to it existed at the time of acquisition of sovereignty and has had a continuous existence and vitality since that time;
- the claim group have had a connection with the land and/or waters through those laws and customs—at [29], referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58.

Further, it 'follows from these requirements' that the court must determine who are the parties holding the rights and interests and the nature and extent of those rights and interests when making a determination of native title—at [30], referring to s. 225.

The Kurnai evidence

The early and preservation evidence hearing for the Kurnai application was held at Lake Tyers in December 2007. Pauline Mullett was the first witness. It was noted that: 'She has at all times been the main spokesperson for the Kurnai'. Ms Mullett gave evidence over a period of about 5 days. While she did speak of other matters, the primary focus of Ms Mullett's evidence was the rules relating to membership of the Kurnai. According to Ms Mullett:

> To be a member of the Kurnai you have to have a blood inheritance on one of the five tribes. Everybody else that – that is not a blood inheritance from one of those five tribes are called strangers, people who are not of our nation. So we identify by – we identify it through our mother who has told us that we're Kurnai, and therefore our elders then recognise that we're Kurnai. We do not recognise any other group outside our nation. ... It's a blood inheritance from Kitty and Larry being one of the – one connected to one of the five tribes. Like I said, Kitty is Brabralung and Larry is Tatungalung. They are the pairing of the – pairing – the pairing of the Kurnai.

It was evident to the court that Ms Mullett has 'a passionate conviction that the only proper people for the Gippsland area are those who have a blood linkage to Larry ... and Kitty ... Johnson'. It was found that she had an impressive knowledge of the history of most of the hundreds of people recorded in the 25 ancestral sets put forward by the Gunai/Kurnai. However, her evidence demonstrated that 'she was not open to any rational persuasion against her view about who was a Kurnai'. Initially, Ms Mullett said that the elders had decided that only she would give evidence on behalf of the Kurnai at the early and preservation evidence hearing. However, after the court indicated it would be useful to hear

from other claimants, Ms Mullett's sister (Cheryl Drayton) and aunt (Regina Rose) gave evidence—at [55] to [56].

Cheryl Drayton's evidence was 'markedly different'. She believed people could be Kurnai without being in the Larry Johnson and Kitty Perry Johnson bloodline and the exclusionary rules she knew were 'different and less stringent than those outlined by Ms Mullett'—at [57].

Regina Rose, the sister of Ms Mullett's mother Euphemia, was recognised as an elder of the Kurnai. According to the court:

> Although she did not have much knowledge of Kurnai laws, she thought that a person would not lose Kurnai status by leaving Kurnai country for the purpose of obtaining work, or by calling oneself Gunai. And significantly, for an argument to be addressed later, she recalled being told by her mother that her great grandmother, Kitty Perry Johnson, had a brother called Billy The Bull—at [58].

At the trial in October 2009, Ms Mullett conducted the case for the Kurnai Clans. She called Marion Flo Hood-Finn and Lynette Hayes. She also gave further evidence herself.

Ms Hood-Finn said that a Kurnai person lost membership of the group if they went off country but not if they went off to another place in Victoria. She said two people who have a bloodline linkage to Larry Johnson and Kitty Perry Johnson lost their Kurnai membership because they identified as Gunai by supporting the Gunai/Kurnai claim. She was 'blindly supportive' of Ms Mullett's approach and gave the court the impression that 'her evidence was given solely to back up the case of the Kurnai as conceived by Ms Mullett'—at [60].

Lynette Hayes (aka Grace) is the daughter of Regina Rose. She regards Ms Mullett as a sister and collaborated with her in preparing the Kurnai case. On the 'basic rule of membership of the Kurnai people', she 'adhered adamantly to the requirement of bloodline connection to Larry Johnson and Kitty Perry Johnson as advocated by Ms Mullett'. Ms Hayes accepted there were other Aboriginal people in Gippsland at the time of Larry Johnson and Kitty Perry Johnson but 'had no coherent explanation why their descendants were not Kurnai'. She said that, if people identified as Gunai, they were no longer part of the Kurnai. While some of her evidence of other rules of exclusion was consistent with Ms Mullett's, at other times it was inconsistent—at [61].

Ms Mullett's further evidence was then given and she was further cross examined.

The state's case

The state called historian Dr Sue Wesson, an expert in archival information on the Aboriginal occupation of eastern Victoria. In her Doctorate of Philosophy, she examined the impact of European land use on traditional patterns of movement of South-East Australian Aborigines and, as part of her research, developed a genealogical database of information concerning the historical movement and key ancestors of Aboriginal people in south-eastern Australia. Her report first gave her assessment of the historical source material on which the 25 Gunai/Kurnai ancestral sets were based. Then she addressed specific questions relating to the ancestral sets which called for expertise in historical research.

In Dr Wesson's opinion, the records kept by John Bulmer, who was the reserve manager at Lake Tyers and spent 46 years living amongst the Gippsland Aboriginal people, were 'as good as could be achieved in the historical and social context'. Later mission managers' records were not accorded the same status.

Among the many other sources she drew on were two works co-authored by Phillip Pepper. He was an Aboriginal man born in Gippsland in 1907 who wanted to record his family history and the stories and legends passed down to him so his descendents would know how his ancestors had lived. The first work was both a personal history of the Pepper family and an account of rural life in Gippsland for Aboriginal people from 1842 to the mid 20th century. The second work had 41 chapters covering consecutive periods of the history of the Kurnai people from pre-contact times (before the 1840s) to 1958. Dr Wesson said:

> I find Pepper['s] ... books to be invaluable on a number of counts. They are well written and engaging, the supporting public documents are relevant and appropriately referenced. And the text is complemented and supported by photographs from both private and public collections. The books provide not only the first in depth expositions of Gippsland Aboriginal history but also the first Victorian Aboriginal histories from an Aboriginal perspective supported by the public record. ... In my opinion *The Kurnai of Gippsland* is an exceptionally valuable work and can be generally relied upon to provide the perspective of a well informed local Aboriginal man and his oral tradition, a fresh analysis of Victorian Aboriginal affairs and supporting factual information from private and public records.

The Gunai/Kurnai's case

The Gunai/Kurnai called Belinda Burbidge, an anthropologist employed by Native Title Services Victoria, and Dr John Morton, the court-appointed expert.

Ms Burbidge filed an affidavit exhibiting the 25 ancestral sets relied upon by the Gunai/Kurnai and another that recorded some amendments to those sets as a result of further research. She explained that the ancestral sets were compiled from the genealogical database held by Native Title Services Victoria. She also explained the process of checking and cross-checking the ancestral sets against the sources, indicating it was unlikely there were any additional sources that would result in significant changes to the genealogies. In cross-examination, she said (among other things) that:

- the process of compiling the ancestral sets had occurred over a period of ten years and oral histories of some Gippsland Aboriginal people had been taken into account in compiling them;
- the ancestral sets had been refined to the point that she thought that she could not improve upon them;
- the ancestral sets were 'truncated at the lower levels, going only as far as to show the older living descendants of apical ancestors' because extending them to all living descendants would be 'unwieldy and unnecessary for the purposes of showing that there were people alive today descended from the apical ancestors'—at [83].

Dr Morton had filed two anthropological reports. One was provided to the court in 2006 as part of the process of mediation. It was directed to answering specific questions delineated in the contract between the court and Dr Morton. One of those questions concerned the name of the Aboriginal society in Gippsland at sovereignty. The Kurnai contended that it was Kurnai and that 'Gunai' referred to Aboriginal people generally and so those who identified as

Gunai were not claiming to be descendants of the Aboriginal society of Gippsland at sovereignty.

After researching the question, Dr Morton concluded that:

- the name of the group at sovereignty was Ganai, although there were many different spellings of that name in the literature;
- 'Gunai' and 'Kurnai' are variants of the same word, that is to say, they stem from the word Ganai, a word that meant 'man' in the ethnocentric sense of 'us familiars' as distinct from 'those strangers';
- over time with the influx of white people and other Aboriginal people, Ganai was transformed into Gunai and Kurnai; and
- Gunai took up the meaning of 'all Aboriginal people' as opposed to 'all white people'—at [86].

Dr Morton was also asked to identify the laws and customs concerning group membership at sovereignty of the Gippsland Aboriginal society. At the time the report was written, the Kurnai had not given evidence of the exclusionary rules. The section on group membership in the report explained that:

- the Ganai at sovereignty was a group united by a common language, albeit with dialectical differences;
- they occupied the five geographical divisions of the region and different dialects were spoken in each division;
- land ownership was at the regional level but there was a degree of local governance;
- while there was a unity at the regional level there were different degrees of rights and duties attributable to each of the smaller units down to the level of family networks—at [87].

Dr Morton also addressed the identification of the people who are the ancestors of the Aborigines of the Gippsland region. After considering the source material, Dr Morton said (among other things) that:

- the ancestral sets were unchallengeable and accurate as a record of the objective historical ancestry of the Gippsland Aborigines;
- the ancestral sets establish the biological descent which might demonstrate the continuity of a society which is required by the concept of native title but do not demonstrate the requirements of cultural and social anthropology which begins by an understanding of the categories by which people define themselves – the 'emic view'
- genealogical charts are not emic accounts, although they may fairly be used in reconstructing a past social or cultural situation out of which another has grown—at [88].

His second report was provided to Native Title Services Victoria in June 2009. Again, it answered specific questions. After clarifying his previous explanations of the system of local organisation, Dr Moreton elaborated on the issue of governance of the society, outlining a detailed and extensive model of governance of Ganai society at the time of sovereignty. He then considered in detail the evidence given by Ms Mullett in the early and preservation evidence about certain exclusionary rules.

According to North J:

> In view of his opinion that the original people of Gippsland were called Ganai, there was no basis for Ms Mullett's conclusion that people who identify as Gunai did not identify as descendants of the original Gippsland Aborigines. Dr Morton also disputed Ms Mullett's evidence that a Kurnai person, using Charles Hammond as an example, lost their status as a Kurnai by living off country, for instance, on his wife's country. Then, Dr Morton contested Ms Mullett's evidence concerning that non-Kurnai adopted children had no rights in Ganai society—at [90].

The constitution of the GunaiKurnai Land and Waters Aboriginal Corporation was also in evidence. One of its objectives is that it be the peak body representing the Gunaikurnai people's interests, including in any native title negotiations. The Gunai/Kurnai said that the fact that many members of the Kurnai claim group are also members of the corporation was significant.

Potential native title holding group

As noted earlier, to succeed on their application, the Kurnai Clan had to show that the only people constituting the native title holding group are the descendants of Larry Johnson and Kitty Perry Johnson. This in turn meant showing that none of the living descendants of the other 24 ancestral sets formed part of the potential native title holding group. His Honour conducted a detailed analysis of two of the 24 ancestral sets. This was all that was required to show:

> [T]he significant body of evidence drawn upon by the Gunai/Kurnai in establishing the ancestral sets, the lack of expert evidence in favour of the Kurnai propositions and the inconsistent and generally illogical nature of that evidence which the Kurnai did provide—at [95].

Ancestral Set 2

Ancestral Set 2 showed the lines of descent from Jemmy Bull and Mary. The Kurnai contended they were not Kurnai. His Honour found on the evidence that:

- 'the sources relied upon to construct AS2 are reliable';
- AS2 reflected 'the historical descent from Mary and Jemmy Bull'—at [146].

Therefore, the Kurnai's basis for rejecting the living descendants represented in AS2 as Kurnai was not made out—at [146].

Ancestral Set Six (AS6)

AS6 illustrated the descendants of the apical ancestor Bungil Tay-a-bung. A number of them are living today and they all form part of the Gunai/Kurnai native title claim group. The Kurnai accepted that Bungil Tay-a-bung was Kurnai. The disagreement regarding AS6 related to the second line of descent, through Bealmaring. The Kurnai did not accept that Harry Stephens was a Kurnai and, therefore, did not accept that those people represented on AS6 were Kurnai. After a lengthy consideration of the evidence, North J found that the submission that Harry Stephens was not Kurnai could not reasonably be sustained:

> Whilst some of the Kurnai submissions had a basis in certain inconsistencies in the public records, when those records are examined as a whole there is no real doubt that Harry Stephens' father was a Kurnai—at [183].

This meant that the living descendants (Albert Mullett, Edward Foster and Margaret Donnelly) could not be excluded from the native title holding group 'if one accepts the laws and customs asserted by the Kurnai'. According to his Honour:

> The fact that the Kurnai application does exclude these ancestors means that, for that reason alone, the application by the Kurnai for a determination on the basis sought cannot succeed—at [183].

Further considerations

While the conclusions reached on AS2 or AS6 were 'sufficient to determine the application', North J thought it desirable to record briefly some other reasons why the Kurnai application must be dismissed, which included that:

- the evidence that links to Kurnai ancestors were broken by operation of certain exclusionary traditional rules was 'in such disarray that it cannot be relied upon' and so the attempt by the Kurnai to exclude certain ancestors by operation of these alleged rules failed;
- the difference between the words 'Gunai' and 'Kurnai' stemmed from the same root and later usages did not provide a basis to exclude the Gunai/Kurnai as the proper people for Gippsland;
- all of the Kurnai witnesses claimed that they were linked by a common bloodline 'identifier' that was concerned their family affiliation' but this 'was not the level at which the relevant native title holding group is ascertained';
- family identification was akin to the local governance units referred to by Dr Morton in his evidence about the traditional structure of the society of Gippsland Aborigines;
- indeed, Dr Morton said conflict between groups within that society was a characteristic of its history and that the present day disharmony between the Kurnai and the Gunai/Kurnai is a reflection of that same characteristic of the particular society—at [184] to [189].

North J accepted in Dr Morton's opinion that 'the traditional land holding group was at the level of the conglomeration of the types of local group typified by the Kurnai people', based as it was 'on a considerable body of public records and respected anthropological, ethnographical and historical writings'—at [188].

As his Honour saw it, this case was largely focused on 'upholding the separate identity' of Ms Mullett's family (the Hood family). As a result:

> The elements which need to be established in an application for a determination of native title were left largely unaddressed. There was thus no cohesive body of evidence which sought to establish a society existing at sovereignty or to establish a present day society with the necessary continuity. There was almost no evidence about laws and customs which linked people with the land and waters. Whilst this application was not the vehicle for the Gunai/Kurnai to prove their entitlement to a determination of native title in favour of the wider Aboriginal society of Gippsland, the evidence, particularly from the voluminous historical and anthropological sources gave a clear indication of a strong basis for such an entitlement—at [189].

Decision

It was found that, because the Kurnai had not established an entitlement to a determination of native title, their application should be dismissed—at [208].

Intent of s. 67

The state and the Gunai/Kurnai drew the court's attention to s. 67(1), which provides that:

> If 2 or more proceedings before the Federal Court relate to native title determination applications that cover (in whole or in part) the same area, 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* (emphasis added).

They contended that, in order to comply with s. 67(1), the court should:

- consolidate the Kurnai application with the Gunai/Kurnai application under O 29 r 5(a) of the Federal Court Rules (FCR);
- dismiss so much of the consolidated application as represented the issues determined in the Kurnai application, relying on O 29 r 2 of the FCR.

North J thought there were 'difficulties with this proposed course' because:

- it was 'not appropriate to consolidate two proceedings where they are at completely different stages of progress';
- there was no separate question raised for determination in this case and so O 29 r 2 did not apply;
- it seemed directed to 'providing an appearance of having the two applications dealt with in the same proceeding when in substance they have been treated independently'—at [198].

His Honour felt he had 'good reason for treating the applications independently', including:

- that is what the parties wanted, i.e. the Kurnai, a litigated outcome and the Gunai/Kurnai, a negotiated outcome, with the latter not wanting to 'advance their application' while negotiations were on foot;
- there was 'reason to think that the Kurnai application was unlikely to succeed, because, it seemed to run counter to the extensive literature which recognised a Gippsland wide Aboriginal society rather than a limited Kurnai society';
- the state, in exercise of its role as 'guardian' of the rights and interests of the people of the state, had indicated a willingness to commence negotiations with the Gunai/Kurnai based on investigations into the proper people for Gippsland;
- the Gunai/Kurnai and Kurnai had access to the report of Dr Morton, which lent support to the Gunai/Kurnai case—at [199].

In these circumstances, North J thought it 'necessary' to 'provide different management programs for each application'—at [199].

His Honour thought this approach was supported by *Kokatha Native Title Claim v South* Australia [2006] FCA 838 where, at [5], Finn J said the policy informing s. 67(1) was 'plain enough' and that: 'Fully informed decision-making and finality in respect of determinations relating to the same area are central to it. ... The policy informing s 67(1) ... seems clearly to be tied to facilitating the orderly and efficient administration of justice where claims overlap'. In North J's view, the 'orderly and efficient administration of justice was served in the case of these two applications by allowing them to proceed in different ways' and s. 67(1) did not require the court to ensure that two or more applications are dealt with in the same proceeding 'if to do so would be inefficient or would not advance the proper administration of justice'—at [201].

According to his Honour:

> The intent of ... [s. 67] is to require the Court to determine whether it is in the interests of justice that the applications be dealt with in one proceeding and, if the Court so determines, then to require the Court to make appropriate orders to achieve that purpose. The section was not brought into operation in the present circumstances because it was not in the interests of the administration of justice for the two applications to be dealt with in the same proceeding—at [201].

The result of dismissing the Kurnai application, as proposed, would be that only one application remained on foot and so the policy reflected in s. 67(1) 'will be effectuated'—at [202].

Comment on approach to s. 67

With respect, it is not at all clear that the 'obvious purpose' of s. 67 is as his Honour describes it. Nor is it clear that the court is able to effectively ignore the process mandated by the NTA for dealing with overlapping applications in the way his Honour suggests.

According to the Explanatory Memorandum to the Native Title Amendment Bill 1998, what became s. 67 was inserted because:

> The Federal Court may be required to deal with applications for a determination of native title which cover part or all of the same area. *It is intended that consideration by the Federal Court of an application for a determination of native title should involve consideration of all issues of native title in relation to that area.* The Federal Court *is required* to make such orders as it considers appropriate so that, *to the extent of the overlap, applications with overlapping areas are dealt with in the same proceeding ...* . In some cases, these orders may require that an *application be dealt with in the same proceeding as another application to the extent that those applications cover the same area*; and/or may require that an application *be split* so that *different parts of the application are dealt with in separate proceedings*—at [25.63]. emphasis added.

Extinguishment - mineral lease

Brown (on behalf of the Ngarla People) v Western Australia (No 2) [2010] FCA 498

Bennett J, 21 May 2010

Issue

The questions before the Federal Court were, essentially, whether mineral leases granted pursuant to an agreement ratified by statute conferred a right of exclusive possession and, if not, the extent (if any) to which those leases extinguished non-exclusive native title rights and interests. It was found that the leases did not confer a right of exclusive possession. However, native title was found to be wholly extinguished over the mined areas and areas where infrastructure and a town had been constructed.

Background

The area subject to the mineral leases (the Mt Goldsworthy leases) is covered by a claimant application made under the *Native Title Act 1993* (Cwlth) (NTA). The Mt Goldsworthy leases were granted pursuant to an agreement ratified by the *Iron Ore (Mount Goldsworthy)*

Agreement Act 1964 (WA). The leases are associated with the Mt Goldsworthy iron ore project in the Pilbara region of Western Australia and permit a far greater range of activities than an ordinary mining lease. The first (Lease 235) was granted on 17 February 1966 and commenced on 5 August 1965. The second (Lease 249) was granted on 21 August 1973 and commenced on 8 May 1974. Both leases remain on foot and, following a further renewal, will expire in August 2028. There was no dispute as to the validity of the Mt Goldsworthy leases.

The parties agreed that, unless they had been extinguished, non-exclusive native title existed over the leased area, consisting of rights to:

- access, and to camp on, the land and waters;
- take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land and waters;
- engage in ritual and ceremony; and
- care for, maintain and protect from physical harm particular sites and areas of significance to the common law holders (the non-exclusive native title rights).

By consent, the court ordered pursuant to O 29 r 2 of the Federal Court Rules that the separate questions, essentially concerning extinguishment, be decided. There was a statement of agreed relevant facts. In summary:

- BHP Billiton Minerals Pty Ltd, Itochu Minerals & Energy of Australia Pty Ltd and Mitsui Iron Ore Corporation Pty Ltd (the current 'joint venturers' under the Agreement) currently hold the Mt Goldsworthy leases;
- in February 1962, the State of Western Australia and the original joint venturers executed an agreement for the mining, transport and shipment of the iron deposits at Goldsworthy;
- under the agreement, the state was required (among other things) to grant to the original joint venturers a temporary reserve under the *Mining Act 1904* (WA) in respect of an identified 'mining area' and to grant mineral leases over the mining area in terms of the lease scheduled to the agreement;
- in 1964, a new agreement was executed (the Agreement) and ratified by the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) (the State Agreement Act) that repealed earlier Acts ratifying or varying the earlier agreement;
- the 1964 agreement was varied three times and each variation was ratified by statute;
- the Mt Goldsworthy leases were granted pursuant to obligations under the Agreement;
- as required under the Agreement, various proposals concerning mining, services, townships, railway, ore handling and a harbour were submitted to the state by the joint venturers and, following negotiation and amendment, approved in September 1971;
- the joint venturers then fully funded construction of the relevant facilities in accordance with the approved proposals.

Nature of the project

Construction began in 1965. The infrastructure included a railway, roads and a power station. The town of Goldsworthy, at its peak, included over 200 houses and associated facilities. The maximum population was 1400 in 1977. In 1991, when it was decided to start closing the town, work began to remove houses. The town was officially closed in July 1992. The mine at Goldsworthy closed in December 1982. The total area of the Goldsworthy mine and township was about one-third of the area subject to Lease 235. There was no evidence of any significant construction on the remainder of the leased area.

When open pit mining started in 1965, Mt Goldsworthy was 132 metres above sea level. When it ended in 1982, the pit was approximately 135 metres below sea level. From late 1974, the mine operated 24 hours a day, 7 days a week and access was controlled. After mining operations ceased in 1982, the Goldsworthy power station continued to operate and provided power to operations at Shay Gap. In 1989 a power line was constructed that connected Goldsworthy with a Pilbara power grid, following which the Goldsworthy power station closed.

NTA extinguishment provisions not relevant

As her Honour noted, s. 228 of the NTA relevantly defines a 'past act' as an act that took place before 1 January 1994 which is *invalid* by reason of the operation of the *Racial Discrimination Act 1975* (Cwlth) (RDA). In this case, the Mt Goldsworthy leases were granted before the RDA commenced on 31 October 1975 and no party disputed the validly of the grants. Therefore, the past act provisions of the NTA had no application. Nor did Pt 2 Div 2B, which deals with (among other things) extinguishment by a 'previous exclusive possession act', because the Mt Goldsworthy leases were 'mining leases' as defined in s. 245 and so (unless dissected, discussed below) were excluded from the definition of 'previous exclusive possession act'. Further, a mining lease cannot be a 'previous non-exclusive possession act' for the purposes of Pt 2 Div 2B. However, as was noted, an act that does not fall within any of these provisions 'may still extinguish native title' because the NTA 'does not constitute a comprehensive code of extinguishment'. All parties agreed that the question of extinguishment in this case was to be addressed by reference to the common law—at [59] to [62] and [66].

Treatment of mining leases under the NTA not relevant

Putting to one side the question of the dissection of a mining lease, the NTA 'does not evince any intention that mining leases extinguish native title'. In fact, such leases are generally 'specifically excluded from having such an effect'. The applicant submitted this should be taken into account. However, her Honour found that the principle that common law rules could be affected by statute did not apply in this case because (among other things) the definition of 'native title' in the NTA incorporates the concept of common law extinguishment. In other words, to be native title rights for the purposes of the NTA, the rights must be recognised by the common law of Australia and recognition 'may cease if those rights have been extinguished under the common law'—at [65].

As was noted at [64], s. 245(3) of the NTA permits a mining lease to be 'dissected into separate leases in relation to those parts' and then, pursuant to s. 23B(2)(c)(vii), part of the area so dissected is a 'previous exclusive possession act' that extinguishes native title. However, none of the parties submitted these provisions applied.

Common law extinguishment

Her Honour referred to Chief Justice Brennan in *Wik Peoples v Queensland* (1996) 187 CLR 1 (*Wik*) at 84 to 85 for the proposition that, under the common law of Australia, native title may be extinguished in three ways:

- by laws or executive acts which simply extinguish native title;
- by laws or acts which create rights in third parties which are inconsistent with the continued right to enjoy native title; and

- by laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title—at [68].

According to Brennan CJ in *Wik* at 85 to 86:
- no rights inconsistent with native title are created by the first kind of law or act but it must have the clear intention, objectively ascertained, of extinguishing native title;
- the second kind creates rights that are inconsistent with the continued enjoyment of native title, irrespective of whether or not there was an actual intention to extinguish native title and whether or not there was any reference to the existence of native title;
- the third occurs as a result of the acquisition of native title under statutory authority or where the Crown, without statutory authority, acquires beneficial ownership by appropriating land in which no interest has been alienated by the Crown.

Bennett J went on to identify the principles emerging from 'the key authorities on common law extinguishment', which were:
- *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*);
- *Yanner v Eaton* (1999) 201 CLR 351 (*Yanner v Eaton*);
- *Fejo v Northern Territory* (1998) 195 CLR 96;
- *De Rose v South Australia (No 2)* (2005) 145 FCR 290 (*De Rose*);
- *Daniel v Western Australia* [2003] FCA 666;
- *Daniel v Western of Australia* [2003] FCA 1425;
- *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 (*Alyawarr*); and
- *King v Northern Territory* (2007) 162 FCR 89.

Her Honour's analysis of these cases is not summarised here. Readers are directed to the reasons for judgment at [74] to [110].

Inconsistency
On this issue, it was noted (among other things) that at common law:
- the relevant test for extinguishment is an 'inconsistency of incidents' between the relevant legislation or grant and the asserted native title rights and this involves comparing the legal nature and incidents of the existing native title right and the statutory right;
- two rights are either inconsistent or they are not;
- where inconsistency is established between 'the particular rights created by the statutory grant and the particular native title rights or interests, the latter will have been extinguished by the grant of the former';
- the basic inquiry is about the inconsistency of rights, not inconsistency of use, but actual use or the area concerned may suggest or demonstrate the nature of those rights;
- once native title is extinguished, it cannot be revived;
- a grant that confers a right to exclusive possession wholly extinguishes native title—at [112] and [114] to [115], [117] and [165].

In this case, the comparison to be made was 'between the rights granted under the Mt Goldsworthy Leases' pursuant to the Agreement and the non-exclusive native title rights and interests. It was noted that, at common law, if the grant of the Mt Goldsworthy leases did extinguish native title over a particular area, the fact that the tenement holders were no

longer exercising their rights over that area, or that it had been returned to its natural state as a result of post-mining rehabilitation, did not revive the native title rights—at [113] and [165].

Nature of the rights granted

The operative mining legislation at the date of the State Agreement Act, and at the date of the grant of the Mt Goldsworthy leases, was the *Mining Act 1904*. By the transitional and saving provisions of the *Mining Act 1978*, nothing in that Act affected the provisions of the State Agreement Act. The Agreement was brought into force as the operative schedule to the State Agreement Act and was a 'government agreement' for the purposes of the *Government Agreements Act 1979* (WA) (GA Act). A 'government agreement' operates, and takes effect, from inception according to its terms notwithstanding any other Act or law. The whole of the area relevant to this case is 'subject land' for the purposes of the GA Act. A person who remains on 'subject land' without lawful authority, having been warned to leave, or who prevents, obstructs or hinders any activity carried on pursuant to a government agreement commits an offence.

Under the Agreement (among other things):

- the state was (subject to certain pre-conditions being met) obliged to 'cause to be granted' to the joint venturers and to them alone 'rights of occupancy for the purposes of this Agreement (including the sole right to search and prospect for iron ore)' and to 'cause to be granted' successive renewals of such rights 'as may be necessary';
- 'as soon as convenient' after the commencement date, the joint venturers 'may apply' and the state 'shall cause to be granted a mineral lease of any part or parts of the relevant area to the joint venturers 'in form of the Schedule hereto' for 21 years subject to rental payment and performance and observance by the obligations under the mineral lease, with the right to successive renewals of 21 years.

Bennett J noted that the rights exercisable under the Mt Goldsworthy leases allowed the joint venturers 'to do what was needed under the Agreement' and that what was done pursuant to the leases and the Agreement was extensive: 'The scale of the work at Mt Goldsworthy was ... to transform a mountain into a deep gorge by extracting tens of millions of tonnes of material from an area'—at [150].

Further, as was noted in *Western Australia v Ward* (2002) 213 CLR 1 at [147], the State Agreement Act was 'bespoke legislation' that gave statutory force to the Agreement and 'specifically modified a range of general legislation so as to vest the land and mineral interests necessary for the particular project'. For example, the Goldsworthy town site was built pursuant to Lease 235, i.e. no special lease or other separate provision was required.

No conferral of a right of exclusive possession

It was found that the right to occupy granted by the Agreement for the purposes of the Agreement did not amount to a right of exclusive possession. Further, it was found that the Mt Goldsworthy leases did not confer such a right because:

- while a mining lease 'of its nature' granted a right to exclude other miners from exercising mining rights, it did not 'necessarily entail a right to exclude all others';

- even if there were a right to prevent persons without lawful authority remaining on the land, that could not 'apply to people exercising native title rights and interests' if those rights had not been extinguished;
- it could not have been the intention that the tenement holders would exert their rights over the whole of the leased area, which was borne out by the fact a significant part of the leased area had not been subject to the exercise of those rights;
- it could not have been intended (and it was not 'feasible') to 'assume a grant ... of exclusive possession of the whole of the leased area'—at [182] and [184] to [185] and [187].

Her Honour drew support for the last point from the Agreement, which provided for 'third party rights of access which do not interfere with the operations' of the joint venturers. This 'recognition' that these operations would not 'encompass the whole of the leased area' was, according to Bennett J:

> [C]onsistent with the recognition that those parts of the leased area that are not part of the mining operations and associated development are accessible to third parties ... . There is no good reason ... to presuppose that it was intended that the Joint Venturers had the right to exclude access by native title holders ... over those parts of the leased area that were left untouched by the Joint Venturers—at [187].

Her Honour rejected the tenement holders' submission that renewal of the leases in 2007 wholly extinguished native title pursuant to s. 24IB of the NTA, essentially because:
- as the state submitted, s. 24IB did not apply to the renewal of grants of exclusive possession leases because the NTA assumed such grants had already extinguished native title and, therefore, that the renewal of such a lease would not affect native title and so was not a future act;
- in any case, based on the finding that the grant of the Mt Goldsworthy leases did not confer a right of exclusive possession, the renewal of those leases would 'likewise not have conferred a right of exclusive possession' for the purposes of s. 24ID of the NTA.

Native title wholly extinguished over 'developed areas'

The state and the tenement holders submitted (among other things) that all of the granted rights pursuant to the leases and the Agreement were inconsistent with the determined native title rights and so extinguished all of those rights and interests (with this being illustrated via evidence of what had actually happened in relation to the leased area). The applicant submitted (among other things) that:
- no clear and plain intention to extinguish existed in the relevant legislation, i.e. the State Agreement Act and the *Mining Act 1904* (WA);
- it was important to distinguish between inconsistency that extinguishes native title from the inconsistent operation of co-existing rights, whereby the non-native title rights prevail but native title is not extinguished;
- the latter is not a case of 'legal inconsistency' but a matter of the rights of the tenure holder having priority over those of the native title holder when it comes to 'incompatible exercise';
- there was scope for the non-exclusive native title rights to be exercised at a distance from the mining works and also over the mining footprint area before mining commenced and after it ceased;

- *De Rose* was distinguishable because mining leases are intended to provide for the mining of a finite resource and so were temporary in nature, which militated against finding extinguishment.

Her Honour found that:

> [T]he granted rights to construct the mine and the town site, together with the associated infrastructure, and to work and utilise those entities and the land on which they stand, were inconsistent with the continued existence of any of determined native title rights within the areas on which the mines, town sites and associated infrastructure have been constructed (the developed areas)—at [202].

According to Bennett J, the rights exercised within the developed areas were 'analogous to rights of exclusive possession', which was illustrated by the fact that there was no need for a special lease to construct the town of Goldsworthy on the leased area—at [202].

Her Honour drew a distinction between the leases in this case and non-exclusive pastoral leases:

> It is not a question of possible co-existence as may be the case with a pastoral lease when comparing the right to hunt and the right to graze cattle, or the right to camp and the right to construct yards to contain stock, or the right to drive down a road. The work carried out on the Leases, ... , assists in demonstrating the extent of those granted rights. It is, for example, inconceivable how the ... rights to excavate an open pit mine which has so dramatically changed the landscape, and to control access to the mining area, are consistent with the native holders having a right to camp, take flora and fauna, or engage in ritual and ceremony on the mining area—at [203].

The finite nature of the mine and the fact that the developed areas were returned to their natural state was not relevant:

> In the developed areas ... , it is their [the tenement holders] **rights** which cannot co-exist with the determined native title rights. Once such inconsistency occurs so as to extinguish the native title rights, it is not relevant that the resources being mined are finite or that the mine and the town are later abandoned—at [207], emphasis in original.

Native title survived over undeveloped areas

Her Honour, relying on *De Rose*, found that the rights granted by the Mt Goldsworthy leases were not inconsistent with the continued existence of the non-exclusive native title rights and interests in that part of the leased area that was not developed:

> [T]he fact that the Joint Venturers have a choice about where on the leased area to exercise their rights does not mean that such rights are necessarily inconsistent with the existence of the ... [non-exclusive] native title rights over the whole of the leased area. As in *De Rose*, the grant of the rights under the Mt Goldsworthy Leases became operative to extinguish native title rights on particular parts of the leased area when the granted rights were exercised, because it was only then that the precise areas of land affected by the right could be identified—at [209].

Future developments

It was found that the tenement holders continue to have the rights (arising from the Agreement) to 'explore and ascertain appropriate sites for new mines and infrastructure' on

the leased area. According to Bennett J: 'If such development occurs, native title will have been extinguished once the land on which that development occurs is identified'—at [210].

There was also evidence that the tenement holders have identified potential sites for future mining and development on the leased area via the exercise of the right to explore. It was found that the work done to identify possible future mine sites did not extinguish the non-exclusive native title rights. However:

> If the decision is made to proceed with those new mines and is permitted under the terms of the Agreement, ... [t]o the extent that infrastructure similar to that described in relation to the Goldsworthy project is constructed, the ... [non-exclusive] native title rights would be extinguished—at [210].

Later, her Honour rejected a submission by the state that a fresh determination of native title would be required each time the right to develop new mines and infrastructure was exercised. However, it was noted that there might be rights exercised by the tenement holders over a previously undeveloped part of the leases that could co-exist with some or all of the non-exclusive native title rights. According to her Honour: 'If that question arises and a fresh determination must be made, it is a consequence of the reasoning in *Ward* and *De Rose*'—at [217].

Comment on future developments

If and when there is an 'approved determination of native title' in this case and if a fresh determination is later required, s. 68 will prevent the court from conducting 'any proceedings relating to an application for another determination of native title' or making 'any other determination of native title' in relation to the determination area unless those proceedings involve a review or appeal of the determination or an application to revoke or vary it. In this case, review or appeal proceedings would not appear to be appropriate. As to a variation or revocation, s. 61(1) will not allow the tenement holders to bring such an application. It would have to be brought by the relevant State or Commonwealth minister, the registered native title body corporate or the Tribunal's Native Title Registrar.

It should also be noted that s. 11(1) provides that 'native title is not able to be extinguished contrary to' the NTA. It may be that, since the extinguishment occurs at common law, the NTA has no application and so that extinguishment is not 'contrary to' the NTA. On the other hand, s. 226(f), 227 and 233, which define 'act', 'act affecting native title' and 'future act' respectively, may mean that the exercise of the extinguishing 'right to develop' is a future act. Questions may then arise as to which of the provisions of the future act regime apply, what is the effect of the act on native title (i.e. does the non-extinguishment principle in s. 238 apply) and what, if any, procedural rights do the native title holders have in relation to that act? In this context, note that s. 23G(1)(c) apparently avoids this issue in relation to most pastoral improvements because the extinguishment is deemed to have occurred when the non-exclusive pastoral lease was granted, i.e. it seems from *De Rose* at [157] that the 'act' is the grant of the lease, not the exercise of the right to improve. There is no equivalent provision for mining leases.

Area where native title wholly extinguished

The applicant submitted extinguishment should be confined to improvements intended to be significant, permanent or at least longstanding and should not extend to improvements

capable of being used by native title holders once the tenement ceased. These submissions were rejected:

> As I consider that the granted rights are inconsistent with and therefore extinguished the determined native title rights over the developed areas, it is not relevant whether the constructions were permanent or that they could be used by the native title holders after the mining tenements cease—at [226].

Instead, it was found that:

> [N]ative title has been extinguished over the whole of the area of mines and any area on which infrastructure and town sites have been constructed, together with any buffer zones over which exclusive use is necessary for or incidental to the operation or enjoyment of the improvements—at [227].

Conclusion

The answers to the questions were:

- the Mt Goldsworthy Leases did not confer a right of exclusive possession;
- the rights granted pursuant to the leases and the Agreement are inconsistent with the continued existence of any of the non-exclusive native title rights in the developed areas;
- all of the non-exclusive native title rights are wholly extinguished in respect of the developed areas;
- native title is wholly extinguished to part of the area of the leases through the rights as exercised under the leases and the Agreement;
- native title been wholly extinguished in the areas of the mine, the town sites and associated infrastructure known as the Goldsworthy Area of Interest.

Comment – revisiting *De Rose*

It is acknowledged that her Honour was bound by *De Rose* to the extent it was relevant. It is also clear from her comments in rejecting the applicant's submissions on inconsistency v 'prevailing over but not inconsistent' that she agreed with the Full Court's approach:

> It is important to note that the fundamental question is whether the granted rights and the native title rights are inconsistent and not whether one can prevail over another. A reverse analysis may result in every possibility of inconsistency between two sets of rights being answered by the fact that the granted rights can merely prevail over the native title rights—at [206].

However, with respect, it might also be said the converse is true. Following *De Rose*, 'every possibility' of any conflict in exercise between any right found in either of the 'bundles' (i.e. third party rights v native title rights) appears to lead inevitably to a finding of inconsistency, rather than co-existence, with all the serious consequences that has for native title holders.

In addressing the issue of the exercise of rights under a mining lease, the plurality in *Ward* said at [308] that:

> The holder of a mining lease having the right to exclude for the specified purposes, may exercise that right in a way which would prevent the exercise of some relevant native title right or interests for so long as the holder of the mining lease carries on that activity. Just as the erection by a pastoral lease holder of some shed or other structure on the land may prevent native title holders gathering certain foods in that place, so too the use of land for mining purposes may prevent the exercise of native title rights and interests on some parts (even, in some cases, perhaps the whole)

> of the leased area. That is not to say, however, that the grant of the mining lease is necessarily inconsistent with all native title.

The Full Court in *De Rose* thought this 'may appear difficult to reconcile' with the High Court's 'emphasis on inconsistency of rights (as opposed to use) and its rejection of the suspension of native title under common law'. Their Honours reconciled this apparent difficulty by finding (among other things) that*:*

- the right to construct improvements on a non-exclusive pastoral lease was, when exercised, 'clearly inconsistent with all native title rights insofar as they relate to' the improved area;
- it was only after construction of the improvement that the precise area affected by the right to construct the improvement could be ascertained;
- extinguishment occurred at the time of exercise of the right (although, as noted earlier, it seems that s. 23G(1)(c) deems extinguishment to have occurred when the lease was granted)—at [170] to [173].

These findings turned on the interpretation placed on what was said in *Ward* at [149] to [150]. In those paragraphs, their Honours pointed out that, in most cases, 'it will only be possible to determine ... inconsistency ... once *the legal content* of both sets of rights said to conflict *has been established*' (emphasis added). Their Honours went on to say that 'the *operation of a grant of rights* may be *subjected to conditions precedent or subsequent*'. This passage was crucial to the findings in *De Rose*. At [156] of *De Rose*, the court said the operation of a grant of the right to construct and use improvements 'should be regarded, *in effect*, as subject to a condition precedent' because the *grant* of the right to improve 'could *become operative ... only when the right was exercised*' (emphasis added).

With respect, this seems to place a strained construction on *Ward*. The High Court referred to 'a grant of rights'. In *De Rose*, it was the 'grant of rights' that constituted the pastoral lease, which included the right to improve. The *operation* of the *grant* of rights was not subject to any conditions, subsequent or precedent (and the right to improve was 'operative' when the lease was granted). Nor, it seems, were the rights under that grant 'incapable of identification *in law* without the performance of a further act or the taking of some further step *beyond that otherwise said to constitute the grant*' because the right to improve was included as part of the grant of rights from the outset—see *Ward* at [150], emphasis added.

What is said at [149] of *Ward*, where their Honours where discussing the notion of 'operational inconsistency', is also of note in this context. As Bennett J states at [173], this was rejected 'as a test of extinguishment'. (In particular, the High Court was rejecting the way in which the court below had employed this notion in considering the Ord Irrigation scheme as a single 'project' when it was not.)

The High Court acknowledged that the term 'operational inconsistency' may 'provide some assistance by way of analogy in this field'. While cautioning against taking it too far, their Honours referred to Justice Gummow in *Yanner v Eaton* at [110] to [112] as, apparently, an indication of when 'operational inconsistency' provides a useful analogy. In that case, Gummow J was considering (obiter) the issue of the effect of performance of conditions in a non-exclusive pastoral lease. After noting native title was not 'abrogated by the mere existence of unperformed conditions', his Honour went on to say that if and when there was

performance, questions would arise 'respecting operational inconsistency between the performed condition and the continued exercise of native title rights'. It was at this point that his Honour drew what the plurality in *Ward* appears to have thought was the 'useful analogy' with the circumstances that arose in *Commonwealth v Western Australia* (1999) 196 CLR 392, where the court was considering whether there was 'operational inconsistency' under s. 109 of the Constitution between Commonwealth legislation and the *Mining Act 1978* (WA). In such a case, if was found, the question is whether inconsistency is 'inevitable' or not—see *Yanner v Eaton* at [112].

Applying an 'inevitability' test would not change the question, i.e. are the two rights inconsistent or are they not? It may not even change the outcome in some cases. However, it would appear to provide a more principled test for inconsistency between the rights of third parties, such as pastoralists or mining tenement holders, and the rights of native title holders. Bennett J made no reference to Gummow J's comments in *Yanner v Eaton*. In *De Rose*, the Full Court referred to them in passing without examining what was said despite the fact it was relevant to the issue before the court.

Finally, there seems to be a logical tension between the *De Rose* decision and the decision *Alyawarr* at [131], where the Full Court concluded that:

> [N]either the *native title right of permanent settlement* nor the *right to erect a permanent structure* was *inconsistent with* pastoral leaseholders' rights. The existence of a structure did not preclude a pastoralist's *right to require removal* in the event that it conflicted with a proposed *exercise by the pastoralist of a right under the lease*. The Full Court was of the view that it was *not inevitable* that such a conflict would arise. Accordingly there was *no inconsistency of rights giving rise to extinguishment of the native title rights to live* on the land and to erect permanent structures (emphasis added).

If there is no inconsistency between a native title right to build a home and make permanent improvements to an area subject to a non-exclusive lease, why is there an inconsistency when the leaseholder makes improvements of the same kind? In the first case, there is acknowledgement that the lessee's rights prevail. Why is this not so in the second case? Does only one give way to the other?

Hopefully, that there will be an opportunity in the near future for the High Court to address the application of the inconsistency of incidents test as expounded in *Ward* to clarify some of the issues raised by subsequent cases.

Appeal against non-claimant determination dismissed

Worimi v Worimi Local Aboriginal Land Council (2010) 181 FCR 320; [2010] FCAFC 3

Moore, Mansfield & Perram JJ, 2 February 2010

Issue

The issue for the Full Court of the Federal Court was whether to overturn a determination by the primary judge that native title did not exist over an area of land held in fee simple by the Worimi Local Aboriginal Land Council (the land council) under s. 36(9) of the *Aboriginal Land Rights Act* 1993 (NSW)(the ALRA). The appeal was dismissed.

Background

The relevant area was transferred to the land council under s. 36(9) of the ALRA on 16 March 1998. This transfer was subject to any native title rights and interests existing in relation to the lands immediately before the transfer. On 11 October 2004, the land council resolved that the land was not of cultural significance to Aborigines of the area and should be disposed of. On 14 September 2007, the land council entered into a conditional contract to sell the land. A non-claimant application was filed by the land council seeking a determination that native title did not exist over the relevant area. Worimi (aka Gary Dates) sought to be, and was, made a respondent to the non-claimant application. He also filed two claimant applications outside the notification period but both were dismissed for failure to comply with s. 61. The court made a determination that native title did not exist over the area in *Worimi Local Aboriginal Land Council v Minister for Land for New South Wales (No 2)* (2008) 181 FCR 300; [2008] FCA 1929, summarised in *Native Title Hot Spots* Issue 30.

Grounds of appeal

Worimi appealed from that judgment on the grounds that the primary judge erred in concluding that:

- there was evidence upon which an inference was capable of being drawn that there was no native title in relation to the land; and
- the land council bore no onus to demonstrate the nature and content of the pre-sovereignty native title rights and interests in relation to the land; and
- where the formal requirements for a non-claimant application for a determination of the absence of native title had been met, then in the absence of any evidence as to the existence of native title in relation to the land, the land council would be entitled to the determination it sought.

Evidence to draw a conclusion that native title did not exist

Justices Moore, Mansfield and Perram held that, in reaching her conclusion, the primary judge did not divert from her (correct) view that the onus of proof of the negative proposition – that no native title rights and interests existed in relation to the land – remained throughout on the land council. The primary judge considered the evidence provided by 11 persons (three of whom were cross examined), including eight who

identified as Worimi people. This evidence was to the effect that the land was not considered to be subject to native title rights and interests. The evidence of Worimi was not of such weight as to cast doubt on the overall assessment of the evidence to that effect. Their Honours held that:

- there was sufficient evidence to support the conclusion of the primary judge and that the primary judge had not fallen into error in reaching it;
- upon the evidence, and having regard to the assessment of significance of Worimi's evidence, the primary judge's conclusion was the correct one—at [74], [76] to [77] and [81].

Onus to demonstrate the nature and content of pre-sovereignty rights and interests

The court held that the approach contended for by Worimi would involve a 'roving inquiry' into whether any person, and if so who, held any, and if so what, native title rights and interests in the land and waters at settlement, and chronologically to the time of the application. The court considered that such an approach was expressly rejected by the Full Court in *Jango v Northern Territory* (2007) 159 FCR 531. Further:

- it was not necessary routinely for a non-claimant applicant such as the land council to prove that native title rights and interests existed at settlement, the community or group that possessed and enjoyed them, and their detailed content, and then to prove the circumstance or circumstances that led to each of those rights ceasing to be possessed or enjoyed by any contemporary Aboriginal persons or groups;
- this might be necessary in certain circumstances but that would depend on the nature of the evidence which is sought to be adduced by the non-claimant applicant and by any respondents—at [56] and [58].

The court held that no circumstances were identified by counsel for Worimi to show that the approach of the primary judge in this matter was incorrect—at [60].

Entitlement to determination sought if formal requirements are met

The court held that this ground of appeal was misconceived. The primary judge expressly held that, while compliance with the formal requirements for a non-claimant application may entitle the land council to the determination sought in the absence of evidence as to the existence of native title in relation to the land, it did not necessarily follow automatically that, 'without more', the court will make a declaration that native title does not exist—at [83].

The court considered that, in any event, the primary judge did not simply make the declaration sought on the basis that the formal requirements for a non-claimant application were met and that there was no evidence as to the existence of native title in relation to the land. Her Honour embarked upon a detailed consideration of the evidence, from both the land council and from Worimi, and concluded that the evidence lead to the finding that no native title rights and interests existed in relation to the land and that the evidence adduced by Worimi had failed to cast doubt on the absence of native title—at [84].

Decision

The court ordered that:

- the appeal be dismissed; and
- Worimi pay the costs of the appeal—at [88].

Court's observations about 'connection' for future reference

The court thought it 'desirable' to note (among other things) that it is 'self-evident' that:

- an Aboriginal community or group may have an ongoing connection with land, 'even though their access to, or use of, that land is restricted or spasmodic';
- such a connection may be mainly spiritual rather than physical and may have evolved over time to a less specific use of all or many parts of that land;
- it may not involve physical access to each and every part of the land—at [86] to [87].

According to the court:

> At least in each contested non-claimant application for the determination of native title, it is necessary to bear in mind that the particular area of land in question may be part only of a larger area of land over which there may be existing native title rights and interests. That is a matter to be determined on the facts of each case—at [87].

Common law native title holders lack standing

Santo v David [2010] FCA 42

Logan J, 5 February 2010

Issue

The question in this case was whether common law native title holders have standing to bring proceedings seeking injunctive relief when their native title rights and interests are held in trust by a prescribed body corporate (PBC). It was found they did not have standing and so the proceedings were dismissed.

Background

For the purposes of these proceedings, the applicants (Pancho and Cyril Santo) were presumed to be members of the Erubam Le people, the group determined to be the common law holders of native title to Erub (Darnley Island) in *Mye on behalf of the Erubam Le v Queensland* [2004] FCA 1573 (*Mye*). They sought injunctive relief in relation to a dwelling constructed on a part of Erub called Zaum (or Zaum Keriem) without their permission. They alleged that Zaum was traditionally owned and occupied by members of the Sam-Santo family and, on that basis, sought orders that the land be restored to the state it was in before the dwelling was built.

It was accepted that Zaum was subject to the approved determination made under s. 87 of the NTA in *Mye*. On and from 24 May 2005, the native title recognised in that determination (which includes a right to possession, occupation, use and enjoyment of the determination area) has been held in trust by the Erubam Le Traditional Land and Sea Owners (Torres Strait Islanders) Corporation (the corporation) pursuant to a determination under s. 56 of the NTA that it was the PBC for the determination area. The corporation holds the native title in trust for the benefit of the native title holders, including members of the Santo family, and is registered on the National Native Title Register as so doing. Therefore, according to s. 224(a) of the NTA, the corporation is the 'native title holder' for the determination area. In these circumstances, a question arose as to whether the Santos had standing to being these proceedings.

This question was explored by addressing three rhetorical questions posed by counsel for the Santos:

- does placing native title rights and interests in trust mean that the common law native title holder retains no 'interests'?
- what, precisely, does it mean to say that the native title rights and interests are held in trust by the prescribed body corporate, e.g. has there been a movement from each individual native title holder to the prescribed body corporate and, if so, does this mean each native title holder now does not hold native title, the prescribed body corporate does?
- has the native title holders' right to pass on their land been lost by the transfer to the trustee?

These questions were posed 'against the background of a reminder' that s. 24OA of the NTA provides that a 'future act' is invalid to the extent it affects native title unless that NTA otherwise provides. The applicants submitted that the construction of the dwelling relevant to these proceedings was an invalid future act.

Does a common law native title holder retain any 'interests'?

The court accepted that the NTA contemplates an individual common law holder retaining some rights even where a PBC holds the native title concerned in trust. Justice Logan summarised the applicants' main submission as being that the applicants retained standing to seek the relief claimed in this case:

> [E]ither because they enjoyed native title rights in respect of the land which were vested in them individually or, even if the native title were to be regarded as communal and that their rights were dependent upon that communal native title, they, as members of the Erubam Le people, were nonetheless entitled to sue to enforce those dependent individual rights—at [24].

It was noted that:

- the native title rights and interests recognised in *Mye* were found to be held by 'the persons who are or are entitled to be or become members of the claim group called the Erubam Le';
- it was not (for example) found that the Santos, as individuals, held any native title right or interest in the subject land—at [25].

Putting the operation of the NTA to one side, his Honour did not think it inconceivable that the Santos might have standing to claim relief in the context of a proceeding for the recognition by judicial declaration of particular native title rights and interests. The following example was given:

> Were it proved that, at the time of the onset of local British sovereignty a body of traditional laws and customs of the Erubam Le people existed, that, under those laws and customs there was provision for the ownership or enjoyment of rights in respect of land by an individual or a particular family, as opposed to communally, that, under those laws and customs, either the Applicants [the Santos] or at least their family were regarded as the traditional owners of or having rights in respect of the land known as "Zaum" ... to the exclusion of all others, that thereafter there had been uninterrupted "connection" by the Applicants and their predecessors and if no act of State had hitherto occurred in respect of that land which was inconsistent with that ownership or continued existence of those rights, the Applicants might

> well have standing to seek injunctive relief as against a trespasser to what was found to be their land or against a person otherwise violating their native title rights in respect of that land—at [26].

Indeed, the affidavit of Pancho Santo filed in these proceedings made his Honour 'suspect, strongly' that Mr Santos conceived his family to have 'just this kind of native title right or interest' in respect of Zaum. Further, as the court noted, the Santos could have made an application under the NTA for the recognition of their asserted 'individual or familial native title rights and interests ... in respect of ... Zaum ... and, as an associated matter, a claim for related interlocutory or final injunctive relief as against a person said to be acting in violation of the asserted rights or interests'—at [27] to [28].

If they had, in the light of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 51 to 52 and 61 to 62 (where Justice Brennan referred to native title as 'communal title') and the language of ss. 223 and 225, the question of whether it is a 'fundamental principle' that native title rights and interests had a communal character might have been starkly raised. However, in the circumstances of this case, it was 'neither necessary nor desirable further to explore such matters' because the 'existence of the determination is a given'. Therefore, the NTA 'has particular meaning and effect' which had to be considered—at [29], referring to *Bodney v Bennell* (2008) 167 FCR 84 at [151].

Relevant NTA provisions go to jurisdiction

The determination made in *Mye* is an 'approved determination' as defined in s. 13 of the NTA. Therefore, s. 68 operates to prevent the court from conducting any proceeding relating to an application for another determination of native title or making any other determination of native title in relation to the determination area, except in proceedings to revoke or vary the first determination or in review or appeal proceedings relating to the first determination. The Santos did not seek to revoke or vary the determination. Nor was this an application for the review of, or an appeal against, that determination. Logan J noted that, in any case, their application did not comply with the 'manner and form requirements' of a revised native title application found in s. 61(1) and the Santos did not fall within 'any of the listed classes of person who have standing' to make such an application. Further, s. 61A(1) provides that an application must not be made in relation to an area for which there is an approved determination of native title. As his Honour pointed out, these provisions 'transcend a question of standing. They go to an absence of jurisdiction at all to entertain the application'—at [31] to [34].

Nature of native title recognised

Logan J went on to note that, even if the focus was placed on the determination made in *Mye* (rather than provisions such as ss. 61A(1) and 68), the native title recognised in relation to the determination area (including Zaum) 'is *communal, not individual* in character' (emphasis in original). Further, it was determined to be held 'by the persons who are or are entitled to be or become members of the claim group called the Erubam Le' and is now held for such persons 'in trust' by the corporation, not by the Santos 'or even by the Santo family'.

As his Honour observed:

- this was not a result that was dictated by the NTA, i.e. there was no requirement that the native title rights and interests found to exist at Erub had to be held in trust by a PBC;

- native title was determined to be so held because of a nomination made by a representative of the people the court proposed to include as the native title holders i.e. the people s. 56(2) calls 'the common law holders';
- if no such nomination had been made, pursuant to s. 56(2)(c) the court would have been required to determine that the native title rights and interests were held by the common law holders—at [35] to [36].

No residual common law role

In the circumstances of this case, it was found that the PBC, not the Santos, had standing:

> [T]o seek the vindication or enforcement of the native title as determined and held in trust by it by, for example, seeking a declaration that a particular action affecting that native title is an invalid act and consequential relief—at [37].

As noted, instituting such proceedings falls within the functions 'consigned to' a PBC by reg. 6 of the *Native Title (Prescribed Bodies Corporate) Regulations* (the regulations), which are the regulations made for the purposes of s. 56(3) of the NTA. According to his Honour:

> In providing that, on the making of a determination by the Court, the nominated prescribed body corporate holds in trust the rights and interests from time to time comprising the native title, s 56(3) ... leaves no direct, residual or individual role for ... [common law holders] in relation to litigation of the kind just described. In that context, the role envisaged by those regulations for common law holders ... is indirect and found in an ability, evident in reg 6(1)(e) ... , for the common law holders to direct the prescribed body corporate to perform a function relating to native title. ... [T]he effect of the ... [NTA] and these regulations is comprehensive so far as any question as to who has the requisite standing—at [38].

Further, acceptance of the applicants' submission that the term 'trust' was 'not a term of art in public law' did not 'alter the comprehensive managerial function consigned to' a PBC in relation to the determined native title rights and interests and was not 'inconsistent with those rights and interests being held "in trust"'—at [39].

The Santos' submitted that s. 211 indicated the NTA 'envisaged ... an individual must retain some rights even where a prescribed body corporate is appointed' because otherwise 'a literal effect of reading the protection afforded' to a 'native title holder' by s. 211 would mean it was only extended to the trustee PBC and not to the common law holders undertaking the classes of activity covered by s. 211 in the exercise of native title rights. His Honour rejected this submission because:

> Read in context, the reference in s 211(2) to the "native title holders" means no more than, where that "native title holder" as defined is a prescribed body corporate [as in this case], then those on whose behalf the native title is held in trust by that body corporate are not prohibited—at [40].

It was found that, in providing for native title rights and interests recognised in an approved determination to be held in trust by a PBC and for the prescription of the functions for such a body, the NTA and the regulations left 'no common law role' for the Santos. Therefore, they did not have standing to bring the proceedings. If an application was made to have the building of the dwelling declared an invalid future act, it would have to be made by the corporation—at [41] to [42]

Decision
The application was dismissed because the Santos did not have standing to make it.

Application for review of registration test decision dismissed — insufficient factual basis

Gudjala People #2 v Native Title Registrar (2009) 182 FCR 63; [2009] FCA 1572

Dowsett J, 23 December 2009

Issue
On remittal from the Full Court, Justice Dowsett considered whether or not the claim made in the Gudjala People #2 claimant application satisfied the conditions of the registration test found in ss. 190B(5), 190B(6) and 190B(7) of the *Native Title Act 1993* (Cwlth) (the NTA). It was found that the claim did not meet these conditions, essentially because the factual basis provided was insufficient. Therefore, the application for review of the registration test decision was dismissed.

Background
Gudjala People #2 was made in 2006 over an area in central Queensland. In November 2006, a delegate of the Native Title Registrar decided the claim must not be accepted for registration because it did not meet all of the conditions of the registration test as required by s. 190A(6). Subsequently, the applicant filed a claim registration application pursuant to ss. 69(1) and 190D(2) (as it was then – now, see s. 190F) seeking review of the delegate's decision. In August 2007, Dowsett J found that the claim did not meet the conditions found in ss. 190B(5), 190B(6) and 190B(7) and so dismissed the application for review: *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*), summarised in *Native Title Hot Spots* Issue 26.

In November 2007, an application for leave to appeal out of time was filed on behalf of the Gudjala People. Leave was granted in May 2008 when the matter was heard. The Full Court set aside Dowsett J's order dismissing the application for review and remitted it to his Honour for reconsideration: see *Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala FC)*, summarised in *Native Title Hot Spots* Issue 28. According to Dowsett J:

> It did not consider the correctness of my conclusions. Their Honours rather suggested ... that ... I may have approached the matter on the basis that the adequacy of the factual material should be evaluated as if it were evidence furnished in support of a claim. The Full Court also considered ... that I had not given appropriate weight to a report by Mr Hagen, an anthropologist—at [2].

The decision summarised here should be read in conjunction with the reasons of Dowsett J at first instance and those of the Full Court.

Statutory context important

One of the provisions relevant to this case was s. 62, the proper construction of which led his Honour to consider the purpose of a claimant application 'as contemplated' by the NTA. Determining the proper construction of the provisions which 'regulate the registration of claims made by application' (i.e. ss. 190A, 190B and 190C) involved 'consideration of the purpose of registration'.

Purpose of a claimant application

When considering the 'purpose' of a claimant application, Dowsett J noted that:

- the NTA 'prescribes a judicial procedure for determining whether an identified claim group holds native title rights and interests' and confers jurisdiction on the Federal Court to 'make determinations as to the existence of native title';
- section 60A 'regulates the making of applications ... for such determinations and other applications';
- Pt 3, Div 1 of the NTA 'sets out the process by which the jurisdiction of the Court is to be engaged for the purpose of deciding whether or not there should be a determination as to the existence of native title';
- pursuant to s. 62, which is found in Div 1, a claimant application must contain specified details—at [7].

One purpose the application serves is to assist people who become aware of it via notification under ss. 66 or 66A to decide whether or not to be joined as respondents:

> It ... [the application] ... must provide sufficient information to enable the notified persons, including members of the public, to determine whether or not they should enquire further—at [9].

In this case, the most relevant of the s. 62 requirements were:

- the identification of the particular rights and interests claimed as per s. 62(2)(d), which expressly forbids 'a general claim for unspecified native title rights and interests' and seems to suggest that 'some degree of specificity is required';
- the provision of 'a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist' as per s. 62(2)(e), a provision that 'clearly distinguishes' between the 'claim' made in the application and the 'factual basis' of that claim—at [10].

Purpose of registration

His Honour noted that s. 190A requires the Registrar to 'consider "the claim made in the application" and not merely the application itself'—at [11].

As to the purpose of the registration test, Justice French's observation in *Strickland v Native Title Registrar* [1999] FCA 1089 at [9] was noted:

> [R]egistration ... constrains the ability of the State government to proceed to do a valid future act until, in the case of those acts to which Subdiv P applies, it has negotiated an agreement with the applicants or secured an arbitral determination that the act may be done.

So too was the explanation of the 'deficiency' to be remedied by the registration test given in the Explanatory Memorandum (EM) to the Native Title Amendment Bill 1997 (Cwlth), which

was the decision in *Northern Territory v Lane (Native Title Registrar)* (1995) 59 FCR 332 which required applications to be registered upon receipt by the Registrar and so:

> [A]ll claims, regardless of their prospects of ultimate success, would initially attract the right to negotiate until such time as they underwent the acceptance test. That test could take some months to apply in any given case, so that a claim which ultimately failed the test could remain on the Register for some time before being removed—EM at [3.32].

Finally, Dowsett J noted what was said by the Full Court in *Commonwealth of Australia v Clifton* (2007) 164 FCR 355 at [50]:

> The Attorney-General stated in the second reading speech [to the Native Title Amendment Bill 1997 (No. 2)] that one of the outcomes the Bill was designed to achieve was 'to put in place a registration test for claims which ensures that those negotiating with developers have a credible claim'. The Attorney-General also stressed that 'an effective registration test as the gateway to the statutory benefits which the act provides is essential' and that it was 'essential to the continuing acceptance of the right to negotiate process that only those with a credible native title claim should participate'.

After considering the purpose of registration, Dowsett J found that:

- the requirements of s. 62 'inform the process to be followed by the Registrar in performing the function prescribed' by s. 190A;
- the material available to the Registrar 'must constitute a factual basis, in general terms, for the claim that native title rights and interests exist'—see [16].

Traditional laws and customs

After noting that it was of particular importance in this case that ss. 62 and 190B(5) both refer to 'traditional laws' and 'traditional customs', his Honour set out s. 223(1), which provides that native title rights and interests claimed under the NTA must be possessed under 'traditional' laws and customs. The findings in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [45] to [47], [50] and [186] as to the meaning of that term in the context of s. 223(1) were also set out—see [19] to [21].

According to Dowsett J, in order to demonstrate 'traditional' laws and customs for the purposes of s. 223(1), one must demonstrate:

- a system of laws and customs which recognises that the relevant claim group has a connection with the land or waters in question;
- that such laws and customs 'have been passed down continuously through a society which existed prior to sovereignty and continues to exist';
- that current laws and customs 'have their roots' in the pre-sovereignty laws and customs—at [22].

Further, the claim in this case 'necessarily' involved the assertion that:

- the claim group holds native title rights and interests in connection with the claim area pursuant to laws and customs 'which they, as a group, recognize and observe'; and
- those laws and customs are traditional, 'being derived from the laws and customs of a pre-sovereignty society which has continued to exist, the claim group being its current manifestation'—at [24].

His Honour then linked this to s. 62(2)(e), which requires 'a general description of the factual basis upon which the applicant claims to satisfy these requirements' and to s. 190B(5), which requires that the Registrar 'be satisfied that such factual basis is sufficient to do so'—at [24].

It was also noted that:

> In describing the factual basis of a claim for rights and interests in land and waters, the applicant must take account of the specificity required by s 62(2)(d) [the description of the rights and interest claimed]. The general description required by s 62(2)(e) must be, one would expect, commensurate with the detail required by the former provision—at [28].

Drawing inferences as to pre-sovereignty society

It was accepted that the date for the assertion of British sovereignty was 1788 but that first contact was not until 1850-1860. Dowsett J was prepared to infer that 'circumstances as at the time of first European contact were probably the same as the circumstances in 1788'—at [26].

Before turning to the provisions of the registration test, his Honour considered the applicant's submission that:

> [I]t is not necessary to start by looking for something that one might regard as a pre-sovereignty "society". Rather, it is permissible to look for (factual assertions of) laws and customs ... and consider whether they can be laws and customs having a normative content which can define a relevant "society". Where the evidence is that such laws and customs have been handed down from generation to generation, inferences can be drawn to the effect that they form part of a normative system at the time of sovereignty.

His Honour was unsure how one would decide whether laws and customs have a "normative content which can define a relevant 'society'" as submitted by the applicant. In any case:

> The relevant enquiry is as to laws and customs acknowledged and observed by an existing claim group, laws and customs acknowledged and observed by a pre-sovereignty society and the connection between those societies and between the laws and customs, attributable to them—at [27].

It was also submitted that only a general description of the laws and customs presently acknowledged and observed and the process by which they had been handed down was required. In his Honour's view:

> In assessing the adequacy of a general description of the factual basis of the claim, one must be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof. In my view it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim—at [29].

His Honour noted that, as established in *Yorta Yorta*, a society and its laws and customs are inextricably linked. It is impossible to identify a system of laws and customs without identifying the society which recognises and adheres to those laws and customs: 'It would

mean nothing to say that A had a legal interest in Blackacre unless one identified, or at least knew, the society which recognized that right'—at [36].

Dowsett J identified two approaches that may be useful in relation to drawing inferences in respect of a pre-sovereignty society.

In some cases, it will be possible to identify a group's continuous post-sovereignty history in such detail that it can be inferred that it must have existed at sovereignty 'simply because it clearly existed shortly thereafter and has continued since'. In those circumstances, it would also be possible to infer that 'the assertion of sovereignty had not significantly affected its laws and customs, so that the laws and customs shortly after sovereignty were probably much the same as the pre-sovereignty laws and customs', i.e. the 'necessary link' between the pre-contact society and its laws and customs and the claim group and its laws and customs 'may be inferred primarily from continuity', without necessarily having to closely examine each society and its laws and customs because 'the evidence of actual events will demonstrate continuity'—at [30] and [32].

If the history of the claim group was not sufficiently well known to allow this approach to be taken, there may be information relating to the circumstances before or shortly after first contact to support an inference that the claim group 'is a modern manifestation of a pre-sovereignty society and that its laws and customs have been derived from that earlier society' even if there was no recorded history of the society and the way in which it has continued since the 'earlier "snapshot" of the society'. However, at some point, there would still need to be a comparison of the earlier and later societies and their laws and customs—at [31] and [32].

According to Dowsett J, there was no clear distinction between these two approaches and many cases would involve elements of both. However:

> [I]t must be kept in mind that it is necessary to demonstrate both a pre-sovereignty society having laws and customs, from which the laws and customs of the claim group are derived, and continuity of the pre-sovereignty society, including its laws and customs. Clear evidence of the existence of such a society and acknowledgement and observance of its laws and customs shortly after first European contact, and continuity thereafter, may satisfy both requirements, the first, by available inference and the second, directly. Clear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity. However when the evidence as to both aspects is weak, the combined effect may, in some respects, be further to undermine, rather than to strengthen, the claim—at [33].

It was noted that this was not the 'problem' addressed in these proceedings, which was the 'adequacy ... of the factual basis advanced as underlying the applicant's claim' for the purposes of s. 190B(5). However, the applicant relied to some extent upon inferences and so these remarks 'may have some relevance'—at [34].

Applicant's case

The applicant's case was summarised by his Honour as follows:

> [T]he applicant's claim as to the traditional nature of the claim group's laws and customs is primarily that they are presently acknowledged and observed, coupled with assertions that

> they have been passed down from generation to generation by the claim group, and that the claim area was, prior to first European contact, that of the Gudjala people, a description which the claim group also applies to itself. Some evidence from Mr Hagen generally supports these assertions. He also says something about the named apical ancestors and a little about Aboriginal laws and customs. ... There is a substantial amount of evidence in the affidavits and the report concerning current laws and customs which, it is asserted, are "traditional", but little of it relates to rights and interests in land and waters—at [41].

An annexure to the application set out the parts of the material that apparently addressed the three matters found in s. 190B(5). While this related to 'the alleged existence of the claimed native title rights', there was 'no mention of the concept of a pre-sovereignty society having laws and customs concerning such rights and interests'. This was consistent with the applicant's submission that the applicant 'need only demonstrate a "normative system at the time of sovereignty" without reference to the society to which it relates'—at [43].

Insufficient factual basis for pre-sovereignty society

Putting to one side Rod Hagen's anthropological report, his Honour concluded none of the applicant's material offered a sufficient factual basis for the existence of a pre-sovereignty society or its laws or customs, save for some implied or actual assertions by several of the claimants in affidavit evidence that such laws and customs were the same as present laws and customs—at [44] to [52].

The applicant asserted that the people occupying the claim area at or about the time of sovereignty described themselves as Gudjala people. The claim group identified itself using the same name. Laws and customs were also described as being 'Gudjala' and, in so far as it referred to the claim group, 'Gudjala' meant members of the claim group, i.e. descendants of apical ancestors. However, in this case:

> [N]o attempt has been made to identify the meaning of the word [Gudjala] when applied to those persons who occupied the claim area at the time of first European contact. Nor, apart from Mr Hagen's affidavit, has anything been said about the laws and customs of that pre-sovereignty society, other than that they must have been the same as existing laws and custom. In my view, to assert that current laws and customs are "traditional" is not to provide a factual basis for that assertion, even in a general way. Similarly, to assert that they have been handed down from generation to generation is to do no more than re-state the claim that they are traditional—at [53].

One other aspect was noteworthy:

> There is a degree of emphasis, ... , upon the dates of birth of the apical ancestors. In fact, it is not clear that any of them was born prior to first European contact. That would not necessarily matter if it were alleged that they were born into a society which had existed prior to such contact, or that they subsequently became members of such a society in accordance with its laws and customs. However that subject is simply not addressed. ... . [T]he assertion that those who occupied the area prior to European contact were described as Gudjala says nothing about that society, or about its laws and customs. To infer that such a statement is part of the factual basis of the applicant's claim would be to confuse the claim with its factual basis—at [55].

The Hagen Report

His Honour referred to those aspects of Mr Hagen's report that dealt with the apical ancestors of the claim group and noted that:

> Ms Hann, Ms Thomson and Ms Anning [the three apical ancestors] may all have been associated with Bluff Downs station. However one must look at the circumstances of such association. Ms Thomson took refuge there from violence which was occurring elsewhere and subsequently worked there. The nature of Ms Hann's association with Bluff Downs, and that of Ms Anning, are not stated. If Aboriginal people seeking refuge and/or work assembled on a cattle station, presumably established and managed by Europeans, the group of itself, and without more, could not constitute a pre-sovereignty society. It would be a society formed after first European contact. Ms McLean associates Ms Hann with Maryvale station, not Bluff Downs. She went there to work, tried to leave to join her people, but was returned to Maryvale. As I have said, none of this suggests membership of an identifiable pre-sovereignty society at Maryvale.
>
> In so analysing the evidence, I do not mean to impose a particular burden upon the applicant. I am rather analysing various, largely disconnected, and very general, assertions with a view to identifying available inferences as to the existence of a pre-sovereignty society relevant to the present claim group. Many of the assertions may, in isolation, suggest that a particular inference is available, but such inference may not be available when the whole of the applicant's assertions are taken into account—at [62] to [63].

Dowsett J accepted that, in certain circumstances, Mr Hagen's professional opinion may be, in itself, a fact and so may be part of the factual basis advanced for the purposes of 190B(5). It was also accepted that, in some circumstances, it may be appropriate for certain expert opinions to be expressed without stating the factual basis which underlies them. However, in this case:

> [N]o attempt has been made to identify a pre-sovereignty society, the laws and customs which such a society may have acknowledged and observed in connection with rights and interests in land and waters, any connection between the apical ancestors and such society, or any connection between pre-sovereignty and current laws and customs of the relevant kind. The question is whether the applicant has stated the factual basis of its claim to the extent required by the Act. If it offers no explanation as to how the claim group's laws and customs can be sourced to those of a society existing prior to first European contact, then that obligation has not been discharged. In the present context, I cannot see that Mr Hagen, any more than the applicant or its deponents, can simply re-state the claim so that such re-statement becomes the factual basis of the claim—at [77].

Decision

The application for review was dismissed. His Honour found that the factual basis provided was sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the claim area as required by s. 190B(5)(a). Dowsett J was also satisfied that there was 'a demonstrated factual basis' to support the assertion that the laws and customs acknowledged and observed by the claim group 'give rise to the native title rights and interests claimed'. However, his Honour did not accept that there was 'a factual basis for the assertion that those laws and customs are traditional'. Therefore, s. 190B(5)(b) was not satisfied. Given that finding, it followed that s. 190B(5)(c) was not satisfied because it requires that the factual basis be sufficient to support the assertion that the native title claim group have 'continued to hold native title in

accordance with traditional laws and customs'. It also followed that s. 190B(6) was not met. This requires the Registrar to 'consider that, prima facie, at least some of the native title rights and interest can be established'—at [79] to [84].

Subsection 190B(7) relates to the demonstration of a 'traditional physical connection'. According to the court:

> It seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs. For the reasons which I have given, the requirements of that subsection are not satisfied—at [84].

Relevance to the Registrar's practice

This case does not impact in any significant way on the Registrar's current practice with respect to the application of the registration test. However, it does draw attention to the fundamental problem Dowsett J faced, which was the distinction between using *assertions* to support assertions as opposed to providing a *factual basis* to support the requisite assertions for the purposes of s. 190B(5). His Honour concluded that the applicants had merely re-stated their claim without having provided a sufficient factual basis to support the assertions in ss. 190B(5)(b) and (c).

One final point should be made. In 'Registration of claimant applications following *Gudjala People #2 v Native Title Registrar*' (2010) 9 Native Title News 121, Justin Edwards implies that a significant rise in the number of claims failing the registration test in 2007-2008 can be attributed to Dowsett J's decision at first instance and that a subsequent the increase in acceptance can be attributed the Full Court's decision. Both of these propositions are erroneous. An analysis conducted by the Registrar in September 2008 demonstrates that the rise in the number of failures in the period concerned was attributable to amendments made to the NTA in 2007 that required the re-testing of relatively large a number of unregistered claims (i.e. claims that had already failed the test). Despite being offered the opportunity to amend or provide additional information to meet the conditions of the test, the applicant often chose not to do so and, following re-consideration by the Registrar's delegate, the claim was again unable to be accepted for registration.

Defect in authorisation — applying s. 84D

Ashwin on behalf of the Wutha People v Western Australia [2010] FCA 206

Bennett J, 21 May 2010

Issue

In earlier proceedings, the Wutha People's claimant application was dismissed in part because it was found the applicant was not authorised to make it. The applicant for an overlapping application later sought orders requiring the Wutha applicant to produce evidence of authorisation in respect of the remainder of the application. In response, the Wutha applicant asked the Federal Court to allow its application to proceed notwithstanding the defect in the authorisation. The court refused to exercise its discretion to do so and

instead ordered the Wutha applicant to file evidence to demonstrate that those who constitute the applicant are 'lawfully authorised' to make the Wutha application—at [48].

This case highlights the fact that, for the purposes of the *Native Title Act 1993* (Cwlth) (NTA), a native title claim group must be 'a group recognised under traditional laws and customs', not a 'construct for NTA purposes' such as passing the registration test—at [49].

Background

The Wutha application, made pursuant to s. 13 under s. 61(1) of the NTA, covers an area in the Goldfields in Western Australia. It overlaps the geographical area covered by a claimant application made on behalf of the Yugunga-Nya People (the Yugunga-Nya application).

In *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1; [2007] FCA 31 (*Wongatha*), Justice Lindgren considered the claim made in the Wutha application to the extent that it overlapped the area covered by the Wongatha People's claimant application. It was found (among other things) that the Wutha applicant was not authorised and so Lindgren J dismissed the Wutha application to the extent that it overlapped the Wongatha claim area. Subsequently, the other parties to the remainder of the Wutha application refused to participate in mediation before the National Native Title Tribunal (the Tribunal). In December 2008, the Tribunal recommended that the court order that mediation cease. It also drew attention to the issue of authorisation and to the court's powers pursuant to s. 84D.

Application under s. 84D(1)

The applicant for the Yugunga-Nya application applied for orders under s. 84D(1), which provides that the court may make an order requiring the applicant making an application under s. 61 to produce evidence as to authorisation. It was contended the Yugunga-Nya had an interest in having authorisation dealt with at a preliminary stage because (among other things) they may be put to the expense and inconvenience of a trial if the Wutha application was set down for hearing in circumstances where the *Wongatha* decision apparently indicated the Wutha claim had no reasonable prospects of success. The State of Western Australia supported the Yugunga-Nya People's application.

History of the Wutha application

Justice Siopis set out the history of the Wutha application in some detail. In brief, two applications were made on behalf of Wutha People in 1996. In January 1999, following the 1998 amendments to the NTA, orders were made to combine those applications and to amend the description of the native title claim group in the combined application so that it read as follows:

> The name of the claim group is Wutha and the Wutha people are those persons who identify themselves as Wutha, and are the biological descendants of: ... Wunal (also known as Tommy) Ashwin (m) and Telpha Ashwin (f); and ... those persons adopted by the biological descendants or with marital relations to those persons.

There were other irrelevant amendments made in March 1999.

What was significant in this case (and in *Wongatha*) was a further amendment made in April 1999 which resulted in a 'reduction' of the claim group because it came to be described as:

> [T]he biological descendants of Wunal aka Tommy (m) and Telpha Ashwin (f) ***excluding the following*** individuals and descendants: [a list of 20 people and their offspring] ... [and] those persons adopted by those biological descendants in accordance with Wutha tradition and custom ... [with a description of adoption under Wutha tradition and custom following] (emphasis added).

The notice of motion for the amendment was supported by the affidavit of legal advisor Michael Rynne, who deposed that the Wutha applicant wished to amend the application to ensure that it did not 'offend the [Native Title] Registrar's interpretation of' a 'particular aspect' of the registration test.

Findings in *Wongatha*

In *Wongatha* at [2732], Lindgren J held that:

> For the purpose of the challenge to authorisation, the Wutha "native title claim group", that is to say [as s. 61(1) does], "all the persons ... who ... hold ... the particular native title claim[ed]", must be assumed to be either one of the earlier larger groups or the now reduced group [i.e. as reduced by the April 1999 amendment]. If the former, the only application they authorised was a pre-reduction application. If the latter, neither the original group nor the reduced group authorised that application. Accordingly, the present reduced group application before the Court was not authorised.

Lindgren J was also concerned that the claim was now (impermissibly) being made on behalf of a subgroup of the proper native title claim group. At [2750] of *Wongatha*, his Honour asked how it was that 'the 20 individuals or families at one moment satisfy the criteria' for Wutha claim group membership and 'the next moment', they do not? In the absence of any evidence on point, at [2751] the inference was drawn that:

> The 20 individuals or families were excluded, whether with their agreement or not, because they were in another claim group or other claim groups. This is an NTA consideration, and suggests that the present Wutha claim group is a construct for NTA purposes, rather than a group recognised under traditional laws and customs.

Lindgren J also referred to anthropological evidence indicating there may be other people who had been excluded from the claim group without any proper reason.

Wutha applicant's contentions

The Wutha applicant relied on s. 84D(4) which provides that, 'after balancing the need for due prosecution of the application and the interests of justice', the court may:

- hear and determine the application, despite the defect in authorisation; or
- make such other orders as the court considers appropriate.

As his Honour noted:

> The Wutha applicant contended that s 84D(4) was an ameliorative provision and the discretion thereby conferred was to be exercised with regard to the due prosecution of the litigation and the interests of justice. The applicant went on to contend that the particular circumstances constituted "a powerful case" for the Court to exercise its power under s 84D(4)(a) to allow the application to proceed to hearing and determination "despite the defect in authorisation" found by Lindgren J. Accordingly, the applicant said, the Court should allow the existing application (including the Yugunga-Nya overlap) to proceed to mediation

> or to determination, and not require the Wutha applicant to provide evidence of authorisation—at [34].

Findings

The Wutha applicant's submission that *Wongatha* only applied to the area of the overlap with the Wongatha claim was rejected. Siopis J held the findings in *Wongatha* were 'of general application and have the propensity to invalidate the Wutha claim as a whole'—at [36].

Among other things, his Honour acknowledged at [39] that s. 84D was introduced 'to mitigate any unfairness which may arise from an objection to authorisation being raised at a late stage of the proceeding', as was the case in *Wongatha*. However, while the Wutha claim had been on foot for a long time, it was not close to trial. According to Siopis J:

> [T]he respondent parties ... have considered the impact of the findings of Lindgren J on the continued viability of the proceeding and reacted thereto, timeously; and certainly well before this proceeding is ready to go to trial. ... Accordingly, ... , there has not been any material delay by the respondent parties in responding to the findings of Lindgren J—at [39] to [40].

The applicant attempted to 'downplay' Lindgren J's findings by characterising them as obiter dicta. In his Honour's opinion, whether or not this was so:

> [T]he fact remains that Lindgren J has identified an issue as to authorisation which is fundamental to the viability of the Wutha claim, namely, the precise identity and scope of the persons on whose behalf the claim is brought. The removal of the 20 families from the amended claim group is a serious issue which needs to be explained and justified—at [46].

Decision

His Honour rejected Wutha applicant's application to have the court exercise its discretion under s. 84D(4) because:

- the defect referred to by Lindgren J was 'founded in a matter of such fundamental importance to the Wutha claim' that it weighed 'strongly against' the exercise of the discretion;
- the proceeding was 'a long way from trial' and it was in the interests of justice 'that the question of authorisation be determined as a preliminary matter'—at [47] to [48].

In order to fairly determine the question, those who comprise the applicant were ordered to file any further evidence they wish to rely upon to demonstrate that the Wutha application 'is lawfully authorised' pursuant to ss. 61 and 251B of the NTA—at [48] at [51].

Comment – what will be required?

It appears that the additional evidence will need to address both 'the rationale for the definition of the Wutha claim group by reference to the reduced claim group' and 'the justification for the removal of the 20 families' via the 1999 amendment. Siopis J was inclined to the view that the evidence at present confirmed Lindgren J's observation that the reduced claim group appeared to be a 'construct for NTA purposes, rather than a group recognised under traditional laws and customs' as required by s. 61(1) of the NTA—at [49].

Future act – declaration where no native title determination

Edwards v Santos Limited [2009] FCA 1532

Logan J, 18 December 2009

Issue

Relief was sought in relation to the grant of petroleum leases under the *Petroleum Act 1923* (Qld) because a dispute had arisen between the parties as to whether this would be a pre-existing rights based act (PERBA). If it was, then the right to negotiate provisions of the *Native Title Act 1993* (Cwlth) (NTA) would not apply. The application was dismissed because it had no reasonable prospects of success in relation to the Federal law question and, given there was no 'matter' in the requisite sense before the court, because the applicants lacked standing and the court lacked jurisdiction on the State law question (i.e. the validity of an act done under State law).

Background

The applicants in these proceedings are the 'registered native title claimant' for a claimant application brought on behalf of the Wongkumara People. As noted, there was a disagreement about whether the grant of a petroleum lease would be a PERBA for the purpose of Pt 2, Div 3, Subdiv I of the NTA. In an attempt to resolve the dispute, the applicants applied for:

- a declaration that the grant of any such lease to Santos Limited (Santos) or Delhi Petroleum Pty Ltd (Dehli) in respect of any land covered by an authority to prospect (ATP 259) held by Santos would not be a PERBA under the NTA;
- a declaration that the grant of a petroleum lease to Santos in respect of any land covered by the ATP 259 would not be valid pursuant to s. 24ID unless the requirements of Pt 2, Div 3, Subdiv P the NTA (the right to negotiate provisions) had been satisfied; and
- an order restraining the State of Queensland from granting a petroleum lease under the *Petroleum Act 1923* (Qld) to Santos in respect of any land covered by ATP 259.

The applicants relied upon their status as the 'registered native title claimant' for the claimant application but the application for relief dealt with in this case was brought as a separate proceeding (i.e. it was not brought 'in the context of' the Wongkumara People's claimant application). It raised both a Federal law question (i.e. a matter arising under the future act provisions of the NTA) and a State law question (i.e. the validity of an act done under State law)—at [49] to [50].

Santos and Delhi sought dismissal of the proceeding because:

- the court had no jurisdiction to entertain the application;
- even if the court had jurisdiction, the application had no reasonable prospects of success, relying on s. 31A of the *Federal Court of Australia Act 1976* (Cwlth) (FCA), which provides that the court may 'give judgment for one party against another' if (among other things) it is satisfied the other party has no reasonable prospect of success.

Santos and Delhi also sought strike-out of the statement of claim pursuant to O 11 r 16 of the Federal Court Rules because:

- it failed to disclose a reasonable cause of action; and
- it was embarrassing in that, if it was to have any prospect of success, it would 'necessitate' a determination of native title in respect of the claimed land, a question 'already at large' in the claimant application and so there was the 'potential for inconsistent findings'—at [10].

Santos and Delhi also raised the question of standing. The state sought summary dismissal on the basis that the application had no reasonable prospects of success. It did not concede jurisdiction, submitting it was unnecessary to decide the question.

Reasonable prospects of success – FCA s. 31A

Justice Logan noted that, while s. 31A of the FCA softened the tests previously applied to applications for summary judgment and summary dismissal, a generally cautious approach should still be adopted because s. 31A was concerned with substance, not just form—at [13] to [14].

The submission that the application had no reasonable prospects of success was, in essence, that:

- the applicants did not seek a determination recognising the existence of native title in these proceedings;
- a 'future act', as defined in s. 233(1), is an act that 'apart from' the NTA, either validly 'affects' (as defined in s. 227) native title or would do so if valid;
- to secure final relief of the kind sought in this case, it was not sufficient to establish that an act might affect native title if native title were found to exist;
- as a corollary, mere status as a registered native title claimant could never supply the requisite element in the definition of future act, which is also an element of any entitlement to the relief sought in these proceedings—at [16], relying upon *Lardil Peoples v Queensland* (2001) 108 FCR 453; [2001] FCA 414 (*Lardil*).

The applicants:

- sought to distinguish *Lardil* on the basis that it related to procedural rights conferred by Subdiv H or Subdiv N of the NTA and not the right to negotiate found in Subdiv P;
- argued that, in any event, a declaration that the grant of a petroleum lease is not a PERBA did not require them to establish they had native title because, if there was no valid ATP259, there could be no valid grant of a petroleum lease.

The second submission was considered in conjunction with the jurisdictional challenge. As to the first, his Honour found that, rather than being distinguishable, *Lardil* confirmed 'in a binding way' that a future act is one which 'affects' native title, not an act which, if native title existed, 'might' affect it—at [19].

As in *Lardil*, the applicants in this case sought final relief but did not advance a claim to native title in these proceedings. Rather, they relied on their status as 'registered native title claimant'.

Therefore, the court held that the applicants had no reasonable prospect of securing any of the relief sought insofar as they relied upon anything other than the State law question because:

> [T]he advancing and successful vindication of a native title claim, not status as the "registered native title claimant", is, given the definition of "future act", just as central to the application of provisions upon which the Applicants rely as it was to those under consideration in *Lardil*. To seek to distinguish *Lardil* on the basis that the rights within Div 3 of Pt 2 with which that case was concerned were "procedural rights" ignores this centrality—at [30] to [31].

Jurisdiction – what is the 'matter'?

On the State law question, the applicants relied upon s. 213(2) of the NTA, s. 39B(1A)(c) of the *Judiciary Act 1903* (Cwlth) (Judiciary Act) and s. 21 of the FCA as a source of jurisdiction for the court. The reference to s. 21 of the FCA was found to be misconceived because that section did not, of itself, confer jurisdiction—at [33].

Paragraph s. 39B(1A)(c) of the Judiciary Act provides that:

> The original jurisdiction of the Federal Court of Australia also includes jurisdiction **in any matter** ... arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter (emphasis added).

Subsection 213(2) of the NTA provides that: 'Subject to this Act, the Federal Court has jurisdiction **in relation to matters** arising under this Act' (emphasis added).

The court noted (among other things) that:

- the word 'matter' as used in both provisions means the subject matter for determination in a legal proceeding;
- accordingly, there can be no 'matter' before the court unless there is some immediate right, duty or liability to be established by the determination of the court;
- as 'the giving of an advisory opinion is antithetical to an exercise of Federal jurisdiction', a distinction must be drawn between 'a permissible invocation of judicial power and the impermissible posing of an academic or hypothetical question';
- it is permissible to seek a declaration 'based on a concrete situation' but not one that is 'divorced from the facts' and that will not 'quell any existing controversy'—at [34] to [35], [38] to [39] and [41], referring to the relevant case law.

Impermissibly seeking advice

His Honour found that this case offered 'a paradigm example of an impermissible attempt to secure an advisory opinion' because:

> What is revealed is nothing more than a difference in contractual negotiating positions between the Applicants, who claim in other proceedings, but have not yet been determined to hold, native title in respect of the claimed land and Santos and Delhi Petroleum who may one day seek to obtain from the State a petroleum lease in respect over part of the claimed land on the strength of ATP259P. It is not pleaded that any such lease has been granted or is even imminently to be granted—at [43].

The claim for injunctive relief was 'bedevilled by like problems', i.e. no imminent or even threatened grant of any lease by the state was pleaded—at [46].

Therefore, putting the question of standing to one side, in the absence of a 'matter' the court lacked jurisdiction in relation to the State law question. His Honour also pointed out that, even if the declarations sought were made, this would not have the effect that the NTA obliged Santos, Delhi or the state to negotiate with the applicants. Instead, if the existence of native title was later recognised, a failure to comply with the right to negotiate provisions in the NTA would mean that an otherwise valid future act would (via s. 28) be attended with invalidity to the extent to which it affected that native title—at [45].

No 'matter' as applicants lack standing

As was noted, 'standing is an inherent aspect' of whether the court is 'seized with a "matter"'. In this case, there was no provision giving the applicants standing to seek any of the relief they claimed. Further, the applicants were found to be strangers to any dealings between the state and Santos and Delhi Petroleum with respect to the granting of a particular petroleum lease. Logan J acknowledged that 'the position would be different' if the Wongkumara People had already been recognised as holding native title or the relief had been sought 'in the context of' the Wongkumara People's claimant application—at [49].

No link between Federal and State law questions

A majority in *Lardil* decided the court had jurisdiction to decide the question of the validity of an act done under State law (the State law question) in circumstances where deciding that question was 'an essential step' in any determination of whether there was a 'future act' (the Federal question)—at [50].

However, merely asserting a cause of action under the NTA is not enough to bring the State law causes of action within the court's accrued jurisdiction under s. 23 of the FCA if the NTA claim is 'colourable' and 'not genuine'. Claims that are 'obviously doomed to fail' are 'colourable' and 'not genuine'. As the present case was not materially distinguishable from *Lardil*, it was 'doomed to fail' and so the Federal law aspect was 'colourable'. Therefore, the court had no jurisdiction to entertain the State law aspect of the claim, even if the applicants had standing (which they did not)—at [52] to [54].

Exercise of discretion inappropriate if seeking a staging post

If the foregoing conclusions were wrong, Logan J would not have granted declaratory relief founded on the State law question because 'the true way of conceiving the declarations sought' was as 'staging posts to the end of an assertion in the future of a right to negotiate' and the use of declaratory relief in this way not desirable—at [55] to [57].

Decision

The court made orders dismissing the application. His Honour was not inclined to (instead) strike out the statement of claim because:

> The only way to address the fundamental jurisdictional difficulty ... would be to plead a claim for native title. That would be pregnant with a potential for embarrassment ... given that the Applicants already claim a native title determination in respect of the claim land in other proceedings in the Court—at [58].

Costs & leave to appeal
The parties were given the opportunity to make submissions as to costs, including 'whether s. 85A of the NTA operates so as to require each party to bear their own costs'—at [59]. See *Edwards v Santos Limited (No 2)* [2010] FCA 238, summarised in *Native Title Hot Spots* Issue 32.

An application for leave to appeal, referred to the Full Court, was dismissed—see *Edwards v Santos Limited* [2010] FCA 34 and *Edwards v Santos Limited* [2010] FCAFC 64 summarised in *Native Title Hot Spots* Issue 32.

Appeal proceedings referred to Full Court

Edwards v Santos Limited [2010] FCA 34

Collier J, 4 February 2010

Issue
The issues before the Federal Court were whether to make directions that an application for leave to appeal be referred to a Full Court and whether, subject to any contrary direction of the Full Court, the application should be heard concurrently with, or immediately before, the appeal. It was found this was a case where such directions were appropriate.

Background
An application by the registered native title claimant seeking declaratory orders and an injunction in relation to a dispute about the effect of the future act provisions of the *Native Title Act 1993* (Cwlth) was dismissed in *Edwards v Santos Limited* [2009] FCA 1532 (summarised in *Native Title Hot Spots* Issue 32). An application for leave to appeal was subsequently filed. If leave was to be granted, it would be argued that the trial judge erred in finding the Full Court decision in *Lardil Peoples v Queensland* (2001) 108 FCR 453; [2001] FCA 414 (*Lardil)* was not distinguishable from the case before him. Directions were sought that the application for leave be heard by a Full Court and that the application for leave be heard concurrently with or immediately before the appeal.

Application worthy of referral
Justice Collier noted that there must be 'grounds justifying a departure from the prima facie position that applications for leave to appeal are to be heard and determined by a single Judge'. In this case:

- there was some merit in the submissions concerning the application of the decision in *Lardil* by the trial judge;
- the proceedings did not involve a 'minor interlocutory squabble' but, rather, resulted in an order with important consequences for the parties;
- the case raised issues of public importance;
- on its face, the application for leave was not a hopeless case;
- there appeared to be issues suitable for consideration by the Full Court—at [10] and [13] to [14].

Decision – application referred
The court made the following directions:

- under Order 52 rule 2AA(A) of the Federal Court Rules that an application for leave to appeal be referred to a Full Court; and
- subject to any contrary direction of the Full Court, the application for leave to appeal be heard concurrently with or immediately before the appeal.

Leave to appeal refused

Edwards v Santos Limited [2010] FCAFC 64

Stone, Greenwood and Jagot JJ, 4 June 2010

Issue
Leave to appeal against summary dismissal was sought. The main issue was whether the appeal had reasonable prospects of success, which involved considering whether the primary judge's conclusion that *Lardil Peoples v Queensland* (2001) 108 FCR 453 (*Lardil)* applied was attended by sufficient doubt as to warrant its reconsideration. The court refused to grant leave.

Background
The applicants sought leave to appeal from orders made by Justice Logan in *Edwards v Santos Limited* [2009] FCA 1532 (summarised in *Native Title Hot Spots* Issue 32). Logan J dismissed the application pursuant to s. 31A of the *Federal Court of Australia Act 1976* (Cwlth). The applicants also appealed from costs orders made against them.

Santos Limited and Delhi Petroleum Ltd (the first and third respondents) hold an authority to prospect (ATP 259) issued under the *Petroleum Act 1923* (Qld) that affects land subject to a registered claimant application made on behalf of the Wongkumara people under the *Native Title Act 1993* (Cwlth) (NTA). A dispute arose between the applicant for that application and the first and third respondents during the negotiations for an Indigenous Land Use Agreement (ILUA). As a result of that dispute, those who were the applicant on the claimant application applied for declarations in the proceedings before Logan J that a petroleum lease granted in relation to ATP259 would not be:

- a pre-existing right-based act within the meaning of Pt 2, Div 3, Subdiv I of the NTA; and
- valid unless the requirements of Pt 2, Div 3, Subdiv P (the 'right to negotiate' provisions) had been satisfied.

They also sought an order restraining the second respondent (the State of Queensland) from granting any such petroleum lease. In concluding that the application should be dismissed, Logan J:

- took the view that the claim for relief was premised on the proposition that the grant of a petroleum lease would be a 'future act' within the meaning of the NTA;
- found that *Lardil* applied so that, in order to secure relief of the kind sought, it was not sufficient for the applicants to establish only that an act *might* affect native title *if* native title were found to exist'.

Application for leave to appeal

Justices Stone, Greenwood and Jagot were of the view that, on the pleadings, the applicants could not 'establish the premise of their application' because:

> A future act, by definition, is one that either validly affects native title, or is invalid because of native title and would affect native title if it were valid: NTA, s. 233. The applications have not claimed that they hold any native title rights; they rely solely on their status as registered native title claimants. This is precisely the position that pertained in *Lardil*—at [18].

Further, the applicants' submission that *Lardil* was distinguishable because only 'procedural rights' were involved was found to be misconceived: '*Lardil* is authority for a proposition that a future act is one that **affects** native rights not one that **might** affect native title rights'. As Logan J noted, the definition of a 'future act' in the NTA means that the 'successful vindication of a native title claim' was 'just as central to the application of the [right to negotiate] provisions' found in Subdiv P as it was to the procedural rights under consideration in *Lardil*—at [20].

For these reasons, the court was satisfied that the primary judge's decision was not attended with sufficient doubt to warrant granting leave to appeal, which was sufficient to dispose the application. However, the court went on to comment on other matter in deference to submissions made by the parties.

Advisory opinion

After noting the High Court's view about advisory opinions and declaratory judgments in *Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334, the court said that:

- the legal status of a petroleum lease that had not been granted, and may never be granted, was 'an archetypical hypothetical situation';
- an injunction 'must be directed to the protection of an existing legal or equitable right', not a right that may arise in the future, and the right to be protected must be identified;
- in this case, there was no such legal or equitable right to be protected and so the primary judge was correct in refusing the injunction—at [24] to [27], referring to *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199.

Conclusion

Leave to appeal was denied as the case had no prospect of success. Their Honours saw no reason to set aside the orders as to costs made by Logan J in *Edwards v Santos Limited (No 2)* [2010] FCA 238 (summarised in *Native Title Hot Spots* Issue 32).

Costs - native title party to pay

Edwards v Santos Limited (No 2) [2010] FCA 238

Logan J, 17 March 2010

Issue

The issue in this case was whether the applicants for declaratory and injunctive relief (who were also the 'registered native title claimant' for a claimant application) should be ordered to pay costs following the dismissal of their application.

Background

The applicants constituted the 'registered native title claimant' in the Wongkumara People's claimant application. They made a separate application seeking declaratory orders and an injunction in relation to the proposed grant of a petroleum lease under the *Petroleum Act 1923* (Qld) to Santos Limited or Delhi Petroleum Pty Ltd (the companies). Justice Logan dismissed the application (see *Edwards v Santos Limited* [2009] FCA 1532, summarised in *Native Title Hot Spots* Issue 32) and directed the parties to make written submissions on the issue of costs.

The 'spirit' of s. 85A

It was common ground, and his Honour agreed, that s. 85A of the *Native Title Act 1993* (Cwlth) (NTA), which provides that (unless the court orders otherwise) each party to a proceeding must bear his or her own costs, was not directly relevant to these proceedings. Therefore, the question was dealt with in accordance with s. 43 of the *Federal Court of Australia Act* 1976 (Cwlth), taking into account the 'spirit' of s. 85A. The matters relevant to the exercise of the discretion as to costs were:

- the reasonableness of the conduct of the applicants in bringing their application;
- whether it involved the construction of important NTA provisions;
- whether it raised novel issues of public importance;
- whether there was a disparity of resources available as between the parties;
- whether the applicants prosecuted their application with due diligence;
- whether the application was advanced on grounds other than native title—at [4] to [5].

Disparity of resources, notice of challenge

While the applicants could not 'command anywhere near the resources' of the respondents, they had notice 'at an early stage that a challenge to jurisdiction was to be made ... on the basis of intermediate appellate authority' (i.e. the decision in *Lardil, Peoples v Queensland* (2001) 108 FCR 453; [2001] FCA 414) and, while they prosecuted their case with due diligence, they did so 'in the face of' such notice—at [6].

Other aspects of prosecution of the application

While it was true that the applicants were motivated to bring the proceedings to resolve a dispute the negotiations for an indigenous land use agreement and that s. 24CD of the NTA made them a proper party to such an agreement without a need to establish native title, it did not follow from this that 'they had any standing to bring their application' for declaratory and injunctive relief or that the court 'had any jurisdiction to entertain it'. The applicants might have joined an application for the relief sought in this case to their claimant application but they did not 'as a matter of deliberate forensic choice' and in the face of *Lardil*. As they were legally advised, this choice must have been made with 'an appreciation that the Full Court had ordered costs' in *Lardil*—at [7] to [8].

Public interest

While there was a 'public importance' about questions such as the delineation of whether persons in the applicants' position have standing and whether the court may entertain such an application, it was not 'self evidently greater' than that of the companies being able to 'conduct their business affairs without the burden both as to costs and otherwise of unnecessary litigation', particularly when *Lardil* provided an earlier intermediate appellate authority on the subject—at [9].

Decision
Logan J decided to exercise his discretion as to costs in the usual way (i.e. with costs following the event) for the reasons noted. Therefore, the applicant was ordered to pay the companies' costs—at [10].

Costs – s. 85A and procedural steps

Akiba on behalf of the Torres Strait Regional Sea Claim Group v Queensland [2010] FCA 321

Greenwood J, 1 April 2010

Issue
The issue before the Federal Court was whether the Torres Strait Regional Authority (TSRA) was entitled to costs associated with complying with a subpoena and in respect of a notice of motion (NOM) it made in response to the subpoena. This, in turn, raised a question as to whether s. 85A of the *Native Title Act 1993* (Cwlth) (NTA) applied, which provides that, unless the court orders otherwise, each party to a proceeding must bear its own costs. It was found that s. 85A is 'very likely' to apply to a procedural step that is 'necessarily interconnected with the ventilation of a party's interest' in a s. 61 application, e.g. a claimant application—at [59].

Background
A claimant application made on behalf of the Torres Strait Regional Sea Claim Group (the Torres Strait Regional Seas Claim) was filed in 2001. The TSRA is a respondent and the solicitor on the record for the applicant. A joinder motion was brought by Pende Gamogab on behalf of the Dangaloub-Gizra Group at Kurpere village (also known as Kupiru) in Papua New Guinea. Mr Gamogab was eventually joined as a respondent in November 2007.

In May 2008, the applicant filed a draft statement by anthropologist Dr Kevin Murphy in support of the claims which made reference to a report by Dr Murphy about:

> [V]arious claims and counterclaims that were being put forward by Papua New Guineans of a number of Western Province villages for inclusion in the category of "traditional inhabitants" for the purpose of the administration of the Torres Strait Treaty.

A subpoena for that report was issued at Mr Gamogab's request in October 2008. TSRA objected to the subpoena and later filed the NOM to set it aside on grounds of relevance. In November 2008, the Commonwealth (a respondent to the Torres Strait Regional Seas Claim) advised the court of a potential claim of public interest immunity in relation to the report. TSRA's NOM was set down for hearing on 15 January 2009 before Justice Greenwood. On 9 January 2009, Mr Gamogab obtained a copy of the report from the PNG government with no restrictions on its use. The day before the hearing, Mr Gamogab informed the parties he would no longer 'pursue' the subpoena. At the hearing, the court was informed of these events. The parties agreed there was no point in proceeding, save as to costs. The TSRA and

Mr Gamogab agreed this could be determined on the papers. The other respondents withdrew.

Section 85A NTA applied

The threshold question was whether s. 85A applied to these proceedings, i.e. the subpoena and the NOM. The Torres Strait Regional Seas Claim is an application for a determination of native title made pursuant to s. 13 under s. 61(1), which is found in Part 3 of the NTA. Part 4 of the NTA, which contains s. 85A, deals with 'processing ... applications, and making of determinations, relating to native title', as noted in the overview of Part 4 given in s. 79A. According to s. 80, the provisions of Part 4 apply 'in proceedings in relation to applications filed in the Federal Court that relate to native title'. Section 81, also found in Part 4, confers 'exclusive jurisdiction' on the court to hear and determine applications that 'relate to native title'.

His Honour observed that, while it was plain that s. 85A applied to a claimant application and any appeal (because such an application is within the exclusive jurisdiction conferred by s. 81), such an application is 'framed' by litigation. Events such as an order for the production of documents by way of subpoena 'represent procedural *steps*, between the parties ... , *along the way* to a judicial determination of the justiciable controversy' which was, in this case, the application under s. 61(1) for a determination of native title—at [43], emphasis in original.

Part 3 also contains Div 1A, which provides for the making of other kinds of application to the court. Under s. 69(2), 'any other application ... in relation to a matter arising under' the NTA may be made to the court. The language of s. 69(2) reflects s. 213(2), which provides that (subject to the NTA) the court 'has jurisdiction in relation to matters arising under' the NTA. This is the conferral of 'subject matter jurisdiction' which 'is not conferred exclusively'. As his Honour noted, an application under s. 69(2) is not a native title determination application made under s. 61(1)—at [40].

In *Lardil Peoples v Queensland* (2001) 108 FCR 453; [2001] FCA 414 (*Lardil)*, it was found that s. 85A did not apply. Greenwood J distinguished that case on the basis that:

- it concerned a 'matter arising' under the future act provisions of the NTA and so fell within the subject matter jurisdiction conferred by s. 213(2); and
- in this case, both the subpoena and the NOM were 'matters arising' under the *Federal Court of Australia Act* 1976 (Cwlth) and the Federal Court Rules (FCR) and, therefore, s. 213(2) was not relevant—at [46], [48] to [53].

On the face of it, what Mr Gamogab sought was access to a document to have determined (within the limits imposed on him by the court) the interest he seeks to 'ventilate as a respondent in the s. 61 application exclusively vested' in the court. Greenwood J found that:

> If the application [concerned] involves a procedural step necessarily interconnected with the ventilation of a party's interest in a s 61 proceeding where the addressee is a participant in the proceeding, ... s 85A is very likely to apply and, in the case of the subpoena Mr Gamogab caused to be issued and the challenge to it, s 85A does apply—at [59].

Operation of s. 85A

Among other things, it was noted that:

- section 85A removes any ground of expectation that unless cause is shown, costs will usually follow the event;
- the discretion available under s 85A to award costs is not confined but is to be exercised judicially;
- the starting point in s. 85A(1) is that each party 'must bear his or her own costs' unless the court determines it is appropriate in all the circumstances to make an order for costs;
- one express basis upon which a party may be ordered to bear costs is that the party has engaged in unreasonable conduct as mentioned in s. 85A(2)—at [61], referring to *Ward v Western Australia (No 2)* (1999) 93 FCR 305 and *Davidson v Fesl (No 2)* [2005] FCAFC 274.

Conclusions on the facts

Justice Greenwood's conclusion on the material and submissions filed by the parties included that:

- a conclusion was open that Mr Gamogab sought to obtain Dr Murphy's report to aid the articulation of his interest in the claimant application;
- Mr Gamogab knew the report was prepared for both the governments of Australia and Papua New Guinea and the reason for its preparation;
- he also knew it was likely to address sensitive questions of treaty inclusion and that, in all probability, it was confidential and would raise questions of public interest immunity;
- the TSRA, as (among other things) a representative body under the NTA, is a 'mezzanine' party rather than a non-party, i.e. it assumes a position between a party agitating its own interest and that of a non-party;
- Dr Murphy's report, commissioned by the TSRA for the governments of Australia and PNG, was directed to treaty questions, not to facts or issues in controversy in the claimant application, notwithstanding that research discussed in the report may have been relevant to that application—at [70] to [82].

Costs where no hearing on the merits

The TSRA submitted that Mr Gamogab acted unreasonably and so caused the TSRA to incur costs within s. 85A(2) in relation to the NOM. Greenwood J considered at length the principles that apply in relation to costs when there is no hearing on the merits—at [83] to [96].

His Honour when on to find that the correct approach was:

- if the parties acted reasonably throughout, there would usually be no order allocating costs because the absence of findings on the merits deprived the court of the 'primary factor informing where the cost burden should lie';
- in rare cases, a judge may feel so confident that one party was almost certain to have succeeded if the matter had been fully heard that a cost order would be justified, even where both parties acted reasonably;
- however, these principles had to be considered within the framework of s. 85A;
- where the statute selects as a starting point such as s. 85A(1), even one subject to an unconfined judicial discretion, findings of fact on the merits after a hearing are 'critical in the exercise of a discretion in moving the parties from the statutory starting point to some other position, taking account of all the circumstances of the case;

- in such circumstances, the exercise of the discretion to displace the statutory starting point is made even more difficult—at [97] to [100].

It was found that, in the absence of a hearing on the merits, for the purposes of s. 85A the court 'must be satisfied that the conduct of a party was so unreasonable that the other party should obtain the costs of the action'. As was noted:

> [I]n the absence of a hearing, the material may show that a judge can be confident that one party was almost certain to have succeeded ... . However, in the context of s 85A ... , if one party is shown, on the material, to be so likely to succeed even without a hearing as to the merits, the conduct of the other party in contesting the proceeding is very likely to bear the description of conduct so unreasonable that the other party should obtain the costs of the action—at [101].

This led the court to conclude there was no basis for making an order as to costs in relation to the TSRA's NOM to set aside the subpoena—at [102].

Compliance costs

This final issue was whether the TSRA was entitled to an order that Mr Gamogab pay costs incurred by the TSRA in complying with the subpoena. Order 27, subrule 11(1) of the FCR provides that the court may 'order the issuing party to pay the amount of any reasonable loss or expense incurred in complying with the subpoena'. Among other things, the TSRA argued that it should be considered a non-party in the circumstances in order to 'invoke the principle that a non-party is entitled to its solicitor and client expenses reasonably incurred in relation to the subpoena'. However, his Honour had already determined that, because it performs 'an engaged statutory role as a skilled addressee of the issues inherent in the determination of the s. 61, the TSRA is a 'mezzanine' party rather than a non-party—at [80] to [81], [106] and [111].

Greenwood J concluded that:

> [T]he TSRA acted reasonably in taking steps to determine its compliance position and its obligations in relation to the report especially having regard to the circumstances in which it was commissioned [by the TSRA] and the purpose for which it was obtained. The question of public interest immunity became a matter of particular focus having regard to those circumstances—at [113].

These expenses incurred in taking those steps were found, in fact, to be 'legal costs ... necessarily incurred' and, therefore 'costs of and incidental to the subpoena'. On the face of it, they fell within s. 85A and, therefore, it might be thought no order as to costs should be made. However, in this case Greenwood J thought it appropriate to 'order otherwise', as contemplated by s. 85A(1), because:

- the TSRA was 'necessarily required' to examine its obligations in relation to Dr Murphy's report, which raised quite separate issues of sovereign immunity and thus public interest immunity;
- the TSRA 'ought not to be put to expense (including legal expenses) in addressing that matter at the hands of the issuing party'—at [115] to [116].

If any of the expenses his Honour identified 'do not fall within the characterisation of costs' for the purposes of s. 85A(1), then it was found that they would fall within O 27, r 11(1) of the FCR—at [117].

Decision
The court decided to make orders that:

- the TSRA be excused from further compliance with the subpoena;
- Mr Gamogab pay the reasonable expenses incurred by the TSRA in taking steps to comply with the subpoena; and
- the TSRA's NOM be dismissed with no order as to costs.

Indemnity costs to be paid forthwith

Tullock v Western Australia [2010] FCA 351

Gilmour J, 13 April 2010

Issue
The issue in this case was whether a person who unsuccessfully sought to change the native title claim group description in a claimant application should pay the costs of the applicant for that claimant application.

Background
In December 2007, Les Tullock, Friday Jones, Elisabeth Wonyabong and Cyril Bingham (the Tarlpa applicant) filed a claimant application in the Federal Court. In November 2008, Reynold Allison filed a notice of motion seeking the removal of an apical ancestor from the native title claim group description in that application, the removal of the descendants of that apical ancestor from the native title claim group and his own removal as a member of that claim group but did not actively pursue the matter until June 2009, when it was listed for a directions hearing in July 2009. However, the directions hearing had to be adjourned to 5 August 2009. The court made an order requiring Mr Allison to file and serve an affidavit explaining the reasons why that which ought to have been done had not been done but no such affidavit was filed. The day before the hearing, Mr Allison's legal representative advised that instructions not to proceed further with the motion had been received. At the hearing, the notice of motion was dismissed and Mr Allison was ordered to make submissions as to costs before 20 August 2009. No such submission was filed.

The Tarlpa applicant submitted that:

- Mr Allison's motion was without merit and served little, if any, practical purpose;
- the motion was discontinued without reason but, no doubt, because that course was considered to be in Mr Allison's own best interests;
- the Court should exercise its discretion under O 62 r 3 of the Federal Court Rules to order that costs shall be payable forthwith and the Tarlpa applicant entitled to have its bills taxed forthwith, referring to *O'Mara v Minister for Lands* [2008] FCA 84, summarised in *Native Title Hot Spots* Issue 27.

Section 85A applied
As Mr Allison's notice of motion 'arose out of a native title determination application' pending in the court, Justice Gilmour was satisfied s. 85A of the NTA applied to the question of costs, i.e. unless the court orders otherwise, each party to a proceeding must bear his or her own costs. However, (but without in any way controlling or limiting the court's discretion in any way), s. 85A(2) puts beyond doubt that the court may decide 'otherwise' if satisfied a party to a proceeding has, by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding. In such a case, that party may be ordered to pay some or all of those costs—at [20] to [25].

Decision
His Honour held that the motion was, as a matter of law, without merit and also accepted the Tarlpa applicant's unchallenged submissions. Therefore, Mr Allison was ordered to pay the Tarlpa applicant's costs in relation to the motion, including the question of costs, on an indemnity basis to be taxed and payable forthwith—at [28].

Evidence —'without prejudice' material

Pinot Nominees Pty Ltd v Commissioner of Taxation (2009) 181 FCR 392; [2009] FCA 1508

Siopis J, 15 December 2009

Issue
The interaction of 'without prejudice' provisions in the *Federal Court of Australia Act 1976* (Cwlth) (FCA) and the *Evidence Act 1995* (Cwlth) (Evidence Act) are considered in this case, with the question being whether the bar found in s. 53B of FCA on giving evidence of things said at a mediation conference convened pursuant to the FCA was lifted by the Evidence Act, which allows for the admission of evidence of 'without prejudice' communications in a hearing as to costs. This case provides useful context for considering the interaction of those same provisions of the Evidence Act with s. 94D(4) of the *Native Title Act 1993* (NTA).

Background
Pinot Nominees Pty Ltd (the company) appealed to the Federal Court against the Commissioner of Taxation's decision to disallow its objection to certain tax assessments. The court referred the parties to mediation pursuant to s. 53A(1)(b) of the FCA and a mediation conference but no settlement was reached. When the trial commenced, the company advised the court no case would be argued and it sought to lead evidence only as to costs. It contended the Commissioner acted unreasonably in rejecting three offers of compromise, two made during the course of the mediation conference and a third in a 'without prejudice' letter, and sought orders to pay the Commissioner's costs only up to a certain date (i.e. before the offers to compromise). It relied on an affidavit setting out details of the offers of settlement, including a description of what happened at the mediation conference. The Commissioner objected, contending this evidence was inadmissible because s. 53B of the FCA 'precluded the admission into evidence of anything said during the course of a mediation conference' ordered by the court—at [13].

Federal Court Act
Section 53B of the FCA provides that evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under s. 53A is not admissible in any court (whether exercising federal jurisdiction or not) or in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

Evidence Act
Subsection 131(1) of the Evidence Act provides that evidence is not to be adduced of:

- a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute, or
- a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

However, s. 131(2)(h) provides that s. 131(1) does not apply if 'the communication or document is relevant to determining liability for costs'.

Earlier cases distinguished
The company relied on *Silver Fox Co Pty Ltd (as Trustee for the Baker Family Trust) v Lenard's Pty Ltd (No 3)* (2004) 214 ALR 621 (*Silver Fox)*, where Justice Mansfield found that s. 131(2)(h) of the Evidence Act applied to affidavit evidence of offers and counter offers made during the course of a mediation conference conducted pursuant to a mediation agreement. As a result, that evidence was admitted. However, neither *Silver Fox* and nor any of the three cases Mansfield J referred to in his reasons dealt with communications made during the course of court-ordered mediation. Nor did Mansfield J deal with the mediation conference in that case on the basis that it was a mediation conference to which ss. 53A and 53B applied. Therefore, it was found that the decision in *Silver Fox,* and the cases referred to therein, could be distinguished because there was no consideration of the relationship between s. 53B of the FCA and s. 131(2)(h) of the Evidence Act.

Decision
Since this case concerned a mediation conference convened pursuant to an order made under s. 53A(1), it followed that s. 53B of the FCA applied and that 'anything said during the course of that conference is inadmissible in this proceeding'. Therefore, the only evidence as to the offer to compromise that was admissible was the 'without prejudice' letter. His Honour reconciled s. 53B of the FCA with s. 131(2)(h) of the Evidence Act on the basis that s. 131(2)(h) applied to 'without prejudice' communications *other than* communications made during the course of a mediation conference to which s. 53B applied—at [29] to [32].

Relevance to mediators under the NTA
Subsection 94D(4) of the *Native Title Act* 1993 (Cwlth) (NTA) provides that: 'In a proceeding before the Court, unless the parties otherwise agree, evidence may not be given, and statements may not be made, concerning any word spoken or act done at a conference'. It is not in the same terms as s. 53B of the FCA. The main differences are that:

- the parties can agree to give evidence and make statements that are otherwise covered by s. 94D(4) of the NTA, which is not the case under s. 53B of the FCA (but there is a similar 'by agreement' provision in s. 131(2)(a) of the Evidence Act);

- s. 53B applies much more broadly that s. 94D(4), which only applies to proceedings before the Federal Court;
- the prohibition in s. 94D(4) relates to the giving of evidence and the making of statements 'concerning any word spoken or act done at a conference' whereas s. 53B applies to 'anything said, or of any admission made' at a conference 'conducted by a mediator in the course of mediating anything referred' under s. 53A(1) of the FCA.

However, despite these differences, it seems s. 131(2) of the Evidence Act would not apply to statements about, or evidence of, things said and done at a mediation conference convened under s. 94D(1) as a result of a referral under s. 86B of the NTA, assuming s. 94D(4) was otherwise attracted. Support for this proposition comes from Justice Dowsett's comments in *Walden on behalf of the Waanyi People v Queensland* [2009] FCA 1179 (*Waanyi*, summarised in *Native Title Hot Spots* Issue 31), where it was argued that s. 131(2)(g) of the Evidence Act applied. It lifts the s. 131(1) prohibition on adducing evidence of 'without prejudice' communications or documents if:

> [E]vidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence.

Dowsett J expressed the view that the court may not receive evidence of things said or done at a mediation conference because there was 'no cogent argument for implying the terms' of s. 131 of the *Evidence Act* into s. 136A (now s. 94D) of the NTA 'so as to qualify the general prohibition in the absence of the agreement contemplated' by s. 94D(4), i.e. without the agreement of the parties. 'For that reason alone', his Honour was inclined to think that the evidence in question 'may not be received'. However, note that his Honour's views in *Waanyi* are obiter.

Subsection 131(2) of the Evidence Act provides a wide range of circumstances in which s. 131(1) does not apply. The breadth of these provisions, and the finding in *Pinot Nominees* that the 'without prejudice' letter was not covered by s. 53B of the FCA, highlight the fact that 'without prejudice' communications conducted outside of a s. 94D(1) conference can be introduced into the proceedings (and elsewhere) in a relatively wide range of circumstances (assuming they are not otherwise inadmissible). Mediators acting in relation to a referral under s. 86B of the NTA should take this into account when determining whether the parties would be better served by communicating under the protection of s. 94D(4).

Further, as noted earlier, the wording of s. 94D(4) of the NTA is relatively narrow, i.e. it relates to 'any word spoken or act done at a conference'. So, for example, the act of tabling a document, and any word spoken about its contents during the conference, are covered but the document itself may not be. If the parties seek to prevent disclosure of such a document, a direction from the mediator under s. 94L should be considered. Such a direction can place wider prohibitions or restrictions on the disclosure of 'information given, or statements made' at a mediation conference than those imposed by s. 94D(4).

Expedited procedure objection application not accepted

Edwards/Queensland/Gellard Enterprises Pty Ltd [2010] NNTTA 20

DP Sosso, 16 February 2010

Issues

An expedited procedure objection application was made but subsequently withdrawn. The question was whether it could be used to cure defects in another non-compliant objection application lodged pursuant to s. 75 of the *Native Title Act 1993* (Cwlth) in relation to the same proposed future act by the same native title party. The Tribunal found that it could not.

Background

Two different legal representatives acting for the same native title party lodged expedited procedure objection applications in relation to an exploration permit. The Tribunal made inquiries of the legal representatives and, as a result, the first objection application was withdrawn prior to the inquiry commencing. However, the remaining application was defective, particularly in relation to paragraph 7 which said that 'Attachment B' included a statement as to why the native title party asserted that the proposed act did not attract expedited procedure when, in fact, there was no Attachment B. There was no other document addressing paragraph 7.

The Tribunal rejected the contention that the first (withdrawn) objection application should be used to cure the defects because:

- that objection application was not before the Tribunal; and
- while the Tribunal looks at an application as a whole in assessing compliance, it cannot go beyond the actual application—at [14] and [16].

Form for making an objection application

In examining an objection application, the National Native Title Tribunal's approach is to:

> [L]ook at the totality of the material before it and be ... careful not to deprive a native title party of its right to object unless it is clear that the objection application is manifestly defective in a key area—at [9].

The Tribunal reiterated its view that paragraph 7 of the application form is central to the objection inquiry because it puts the other parties on notice of substantive concerns of the native title party, noting that:

> The completion of a Form 4 [objection application] is not a mechanistic exercise designed to comply with an arid bureaucratic requirement. It puts the government and grantee parties on notice of a native title party's concerns. Failure to properly complete a Form 4 should be seen not just as an oversight, but as a possible impediment to a consensual outcome—at [12].

Decision
The Tribunal found it was 'unable to accept' the expedited procedure objection application because it did not contain any substantive information as to why the 'native title party believed that the proposed future act was not an act that would attract the expedited procedure'—at [17] to [18].

Appeal
The native title party has filed an appeal under s. 169 of the NTA and an application for review of the Tribunal's decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) in the Federal Court.

Dismissal of respondent parties

Butterworth on behalf of the Wiri Core Country Claim v Queensland [2010] FCA 325

Logan J, 26 March 2010

Issue
The issue before the Federal Court was whether to remove as respondents to a claimant application people who were acknowledged as included in the native title claim group for the Wiri Core Country Claim and who were also parties as of right to that application. Orders were made to remove them. The consideration of the relationship between 'the applicant' and the claim group is of particular interest.

Background
An amended claimant application was filed on behalf of the Wiri Core County Claim in April 2009. Notice of the amended application was given as required by the *Native Title Act 1993* (Cwlth) (NTA). On 8 February 2010, within the three month notification period specified in the NTA, the court received a letter from Norman Johnson enclosing Form 5 applications for Mr Johnson and others who sought to be joined as respondents. Mr Johnson was asked by the Deputy Registrar of the Federal Court to show cause why he and those other persons should become respondents.

Relationship between applicant and claim group
It was expressly acknowledged in open court by the applicant for the Wiri Core County Claim that Mr Johnson had standing as a Wiri man. It was also acknowledged that 'the applicant' for a claimant application, brought as it is on behalf of a native title claim group, has 'responsibilities ... from time to time to consult with' that group—at [30].

According to Justice Logan:

> To consult with a native title claim group means to extend an opportunity to that group to be heard on appropriate occasions. It does not mean that a single member or group of members in a native title claim group can presume to dictate the decisions which a native title claim group might have from time to time to make as a way of giving guidance to an applicant in respect of the carriage of a native title application—at [31].

Later, his Honour commented that:

> Consult does not equate with "be dictated to by a member of". A member of a native title claim group, where a need for consultation arises, is entitled to be given an opportunity to be heard, nothing more and nothing less than that. There may be circumstances whereby, having regard to the taking advantage of that opportunity to be heard or, perhaps, a failure to give it, ... , those dissentient members ought properly to be joined as parties so that they can be heard directly in the proceedings—at [39].

While there were circumstances that may arise where it would be appropriate to join 'what have been termed in earlier cases dissentients', it seemed to the court that, 'in the ordinary course of events' the scheme of the NTA was that the claim group authorise particular persons to act on that group's behalf in the management of an application:

> That, to me, is an indication of a parliamentary intent that there be a reasonable and practical way of giving instructions in respect of the conduct of an application, for the benefit not only of the members of the native title claim group but also for the benefit of those respondents who necessarily have to deal with the native title application—at [31].

Comment – consultation with claimants

His Honour's view that the consultation required by the applicant does not equate with being 'dictated to' by a member of native title claim group needs to be read to take account of the fact that certain members of the claim group (such as the elders) may have the right to 'dictate' to the applicant under their traditional law and custom.

Parties to the proceeding

Logan J found that Mr Johnson and each of the other persons concerned fell within s. 84(3)(a) of the NTA and, further, were persons who had given notice in writing in Form 5 within the period set out in s. 84(3)(b). Consequently, his Honour held that each was a party to the proceedings as of right by force of s. 84(3)—at [3] to [9].

Power to dismiss

Pursuant to s. 84(8), the court may order at any time that a person (other than the applicant) cease to be a party to the proceedings. Subsection 84(9) provides that the court 'is to consider making an order' under s. 84(8) 'in respect of a person who is a party to the proceedings' if it is satisfied that:

- the person's interests may be affected by a determination in the proceedings merely because the person has a public right of access over, or use of, any of the area covered by the application; **and**
- the person's interests are properly represented in the proceedings by another party; **or**
- the person never had, or no longer has, interests that may be affected by a determination in the proceedings.

It was held that the power to dismiss a party in s. 84(8) of NTA was not constrained by the circumstances referred to in s. 84(9) and that provision did not provide an exhaustive list of the circumstances where the dismissal power could be exercised—at [39].

Should they remain as parties?
His Honour held that:

- while Mr Johnson and the other people concerned were joined as of right, s. 84(8) indicated it did not follow that they must necessarily remain respondents; and
- to take a contrary view would, in effect, be 'subversive to the very reason for the existence of an applicant'—at [33].

The court was not persuaded that there was a need for a Mr Johnson and the other persons to have party status. In this case, Logan J saw no need 'at all' for them to have 'direct input as opposed to an indirect input via consultation ... between the applicant and the members of the native title claim group'—at [37] and [39].

Decision
For the reasons given and 'of my own motion' Mr Johnson and the other persons concerned were dismissed as parties with no order as to costs. Indeed:

> [T]he fact that Mr Johnson has been moved to seek to take advantage of s 84(3) ... and what I have heard from him today would persuade me that under no circumstances would a costs order, ... , be appropriate. It was very important that he be heard ... and that the applicant ... acknowledge its role in terms of representing all members of a native title claim group—at [40].

Mr Johnson and the others concerned were given liberty to apply in respect of joinder—at [41].

Future act - negotiation in good faith

Australian Manganese Pty Ltd/Western Australia/Stock [2010] NNTTA 53

DP Sumner, 16 April 2010

Issue
The issue was whether Australian Manganese Pty Ltd (the grantee party) had negotiated in good faith as required by the *Native Title Act 1993* (Cwlth) (the NTA) before making a future act determination application (FADA) under s. 35 of the NTA to the National Native Title Tribunal.

Background
The grantee party lodged a FADA on the basis that negotiation parties had been unable to reach agreement. The native title party (the registered native title claimant for the Nyiyaparli People's claimant application) contended the grantee party had not negotiated 'in good faith with a view to obtaining the agreement' of the native title party to the grant of a mining lease (the lease) as required under ss. 31(1)(b) and 36(2) of the NTA.

The lease area is in the eastern Pilbara in Western Australia. It is situated wholly within the area covered by the Nyiyaparli People's registered native title claim. The lease area is part of the grantee party's Davidson Creek Iron Ore Project. Some of the members of the Nyiyaparli People's native title claim group are also members of the Jigalong Community based at

Reserve 41265 for the use and benefit of Aborigines (the Jigalong reserve). Earlier negotiations between the parties leading to an agreement about the related Robertson Range Iron Ore Project provided the background to the dispute between the parties in this case. Those negotiations, and the agreement reached, involved dealing with the government party's requirement that the grantee party reach agreement with the Jigalong Community to access the Jigalong reserve—see *Australian Manganese Pty Ltd/Western Australia/ Stock* [2008] NNTTA 38 and *Australian Manganese Pty Ltd/Western Australia/ Stock* [2008] NNTTA 163. However, the lease involved in this case was not on the area subject to the Jigalong reserve.

The grantee asserted the agreement reached in the earlier negotiations applied to all future acts in the native title party's claim area. The native title party contended:

- the agreement was confined to tenements on the Jigalong Reserve;
- the grantee adopted a rigid non-negotiable position for a whole of project or tripartite agreement and would not negotiate specifically about the lease;
- because the lease area was outside the Jigalong reserve, negotiations should not have involved the Jigalong community.

The Tribunal held:

- earlier negotiations demonstrated that the grantee party made genuine efforts to negotiate with the native title party to obtain agreement on other tenements in the grantee's projects;
- the evidence supported the grantee party having negotiated for a land access agreement (LAA) that included the lease;
- the fact that the grantee party was prepared to consider a separate agreement on the lease was indicative of negotiating in good faith;
- the LAA terms, and correspondence related to it, were evidence the grantee party proposed a substantial agreement in the negotiations, the lease was a subject of those negotiations and the grantee party was prepared to reach agreement about the lease once a counter proposal was received from the native title party;
- there was no impediment to making a finding that negotiation in good faith had occurred in relation to a particular tenement where negotiations about it were conducted in the context of a broader project;
- there was no breach, or absence, of good faith 'such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct' by grantee party;
- therefore, the requirements of s. 31(1) had been met and the Tribunal had power to conduct an inquiry and make a future act determination—at [31], [33] to [40], [44] to [47] and [50], referring to *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141; [2009] FCAFC 49 (summarised in *Native Title Hot Spots* Issue 30) at [27] and [49].

The Tribunal noted that the records of the meeting in which the earlier agreement was made were ambiguous and that, if the Tribunal had not found there was subsequent evidence to satisfy good faith negotiation obligations, oral evidence would have been required to clarify the intentions of the parties.

Decision
While there was some dispute over the scope of the earlier agreement, the Tribunal held the grantee party negotiated in good faith in the subsequent negotiations and during Tribunal mediation over the proposed grant.

Replacing the applicant – s. 66B

Barnes on behalf of the Wangan and Jagalingou People v Queensland [2010] FCA 533

Collier J, 28 May 2010

Issue
This case concerns an application under s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) to replace the applicant in a claimant application. The main issues were whether members of claim group were intimidated and bullied at a meeting held to authorise a replacement applicant and whether those who attended that meeting were actually members of claim group. Justice Collier decided to make the order to replace the applicant.

Background
The s. 66B application related to a claimant application made by a claim group whose members identify as Wangan and Jagalingou. It covers a large area in the Central Queensland. The s. 66B application was made after an authorisation meeting of the claim group was held in Bundaberg in February 2010 (the authorisation meeting). Resolutions were passed to replace the applicant at that meeting. Notice of that meeting was given in the three newspapers on three separate occasions. It was clear from the advertisement that the meeting:

- was an authorisation meeting relating to the claimant application;
- called for attendance by persons who fit the description in the advertisement or otherwise claimed to be Wangan and Jagalingou People;
- was to be held for a number of reasons, including 'to ensure that the Applicant for the claim is properly authorised by the claim group and if not to appoint a new Applicant'.

The advertisement nominated Christine Royan, an officer with Queensland South Native Title Services (QSNTS) responsible for liaising with the claim group and the applicant, as the contact person.

Those making the s. 66B application submitted that the authorisation meeting resulted in the claim group duly authorising a new applicant. The most relevant of the resolutions passed were, in summary, that:

- the meeting confirm those in attendance who were not, in accordance with the public notice, entitled to attend, 'may remain but only as passive observers and may not speak and cannot vote';
- the meeting confirm all other persons attending were 'accepted as descendants of the pre-sovereignty society for the claim area and under the laws and customs of the claim group are entitled to fully participate in the proceedings as members of the claim group';

- the meeting decide that the current applicant was no longer authorised and determined to select a new applicant;
- the seven people making the s. 66B application constitute the new applicant.

Ms Royan gave evidence that, among other things:
- on her attendance sheet, she recorded 102 people and, on her analysis, the vast majority of them were descendants of an apical ancestor recognised as being of the Wangan and Jagalingou people;
- all of the resolutions were moved and seconded, attendees were asked whether they wished to speak for or against each resolution and, in particular, members of the current applicant group were invited to address the meeting before the resolution to replace them was put to the meeting;
- QSNTS staff left the meeting for approximately 45 minutes and, when they returned, seven claim group members had been put forward by the respective family groups to be the new applicant;
- all of the resolutions were passed by overwhelming majorities;
- the meeting was conducted in an orderly fashion over approximately six and a half hours, partly to ensure that anyone who wished to speak was given an opportunity to do so; and
- she did not see or hear anybody being coerced, rushed or bullied into making decisions at the meeting.

Those making the s. 66B order all gave evidence that (among other things):
- they were members of the claim group and supported the notice of motion to replace the applicant;
- they attended the authorisation meeting at which they were authorised to apply to the court for an order that they be named as the applicant and they consented to becoming the applicant;
- they believed that those members of the claim group in attendance were both broadly representative of the claim group and capable of making decisions on behalf of the claim group;
- while attending the meeting, they observed the decision-making process agreed to and adopted for the purpose of selecting the persons who are to constitute the applicant was properly followed.

The 'key changes to the composition of the applicant' sought were:
- the Jessie Diver and Patrick Fisher would remain as part of the group constituting the applicant;
- Janice Barnes, Owen McEvoy, and Deree King would be removed from that group; and
- Lynette Landers, Irene White, Elizabeth McAvoy, Patrick Malone and Les Tilley would be added to that group—at [5].

Janice Barnes, Owen McEvoy, and Deree King opposed the s. 66B application. Their evidence was that:
- they were invited by QSNTS to attend an authorisation meeting in Bundaberg in February 2010;

- on behalf of their respective families, they were of the opinion that the authorisation process was not transparent and that they were 'railroaded' by QSNTS and people who were not members of the claim group.

Jessie Diver gave evidence expressing similar concerns, despite having earlier given evidence as to the contrary. Ms Diver did not appear at the hearing. Since the inconsistencies in her evidence were not explained, Justice Collier found no weight could be attached to any of her evidence—at [16].

Were individuals intimidated and bullied?

The main question the court considered was whether 'participants were given a reasonable opportunity to put forward their respective points of view before the resolutions were carried'. Her Honour was not satisfied 'that individuals were intimidated or bullied at the authorisation meeting, or prevented from giving their views'. In her Honour's view:

- there was 'sound evidence that effective processes were followed which gave participants fair and reasonable opportunities to promote their views';
- there was no evidence to support the claim that members of QSNTS intervened in the deliberations of the members of the claim group and 'ample evidence' indicating this did not occur;
- the 'strong demeanour' of Ms Barnes and Mr McEvoy suggested that it would have been 'very difficult for either one of them to be intimidated or bullied' at the meeting;
- the 'significant period of time' over which the meeting was conducted suggested that 'anyone who wished to speak had the opportunity to do so'—at [22] and [23].

Were attendees claim group members?

The description of the Wangan and Jagalingou People in the public notice advertising the authorisation meeting was the same as the description of the claim group in the claimant application, although the advertisement also referred to descendants of four other apical ancestors identified as being associated with the Wangan and Jagalingou People. The resolutions noted earlier indicated that:

> [N]ot only were those entitled to attend and vote at the authorisation meeting required to be members of the Wangan and Jagalingou People, but that the significant majority of the persons in attendance at the authorisation meeting accepted that this was the case—at [28].

Collier J accepted that the process of recording attendance as described in Ms Royan's evidence 'was an adequate one' and that Ms Royan's record of attendance was accurate and 'reflective of the right of such persons to attend'. The evidence indicated that 90 of 102 attendees were entitled to vote. Ms Royan's evidence included the details of who moved and seconded each resolution and how it was carried. While only the numbers of those opposing each resolution were recorded, 'given the large numbers of people voting and the very small numbers opposing each resolution ... I do not consider that the failure to specifically count those voting in favour of each resolution detracts from the validity of the process'. There was no evidence of 'a significant presence of persons who were not recognised as members of the claim group'—at [31] and [34] to [35].

Incomplete anthropological and genealogical reports

In compliance with orders made in June 2009, the QSNTS commissioned an anthropological report and a genealogical report. Preliminary reports had been prepared. Mr McEvoy was

concerned about the replacement of the applicant in circumstances where uncertainty of the composition of the claim group had been generated by the unfinished reports. While her Honour thought these were proper concerns:

> Nonetheless, the primary issue for determination at present is the validity of the authorisation process. With this in mind, I do not find that the status of the anthropological and genealogical reports invalidates the process whereby the Applicant was replaced on 6 February 2010—at [42].

This was largely because:

- the applicant 'appears to have an important role in providing instructions and information to QSNTS in relation to the completion of the reports';
- it was 'counter-intuitive to disallow the authorisation' of the applicant because of the incomplete reports 'when this group is integral to the satisfactory completion of the reports';
- the resolutions to replace the applicant were carried 'by overwhelming majorities' and so the 'desire of the claim group' to replace the applicant was 'abundantly clear'—at [43] and [45].

Did Mr McEvoy second the resolution confirming entitlement to vote?

It was submitted that Mr McEvoy seconded the resolution the sought confirmation from the meeting that persons present and entitled to attend the meeting in accordance with the public notice were (among other things) entitled to vote for or against the resolutions authorising the new applicant (Resolution 2). While on the weight of the evidence it was found he did do so, the strong objections he maintained in these proceeding led the court to place little weight on this finding of fact—at [51].

Decision

The court was satisfied that (among other things):

- no individuals were intimidated or bullied;
- those in attendance and authorised to vote were recorded accurately;
- sufficient members of the claimant group were in attendance at the authorisation meeting to authorise the resolutions sought;
- Those making the s. 66B application were found to have satisfied ss. 66B(1)(a)(iii) and 66B(1)(b)—at [54] to [55].

Therefore, her Honour made an order pursuant to s. 66B(2) that the current applicant be replaced.

Mills v Queensland [2009] FCA 1431

Greenwood J, 2 December 2009

Issue

The issue before the Federal Court was whether to make an order under s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) replacing Alfred Mills (the now-deceased applicant for the claimant application brought on behalf of the Naghir People) with Phillip Mills. The matter was adjourned to allow for the resolution of a conflict with an overlapping claim group.

Background
The Naghir People's application covered an area that was also subject (in whole or part) to a claimant application made by the Mualgal People, who were respondents to the Naghir People's application. The court was also aware that Kevin Billy Snr asserted that Naghir Island, which was subject to the Naghir People's application, was his family's island.

The solicitor for the Naghir People conceded that, in addition to replacing the applicant, the application (which was made in 1996) would have to be amended to ensure that the description of the native title claim group reflected the claim group as described in a statement of facts and contentions filed in 2008. The respondents said Mr Mills' affidavit in support of the s. 66B application described the Naghir People as the descendants of ancestors not reflected in the statement of facts and contentions and that there was doubt as to whether Mr Mills was duly authorised. The respondents also had concerns that it did not provide information as to the conduct of the authorisation meeting. The proceedings were adjourned and Mr Mills filed a further affidavit. However, the respondents argued this introduced confusion as to who comprised the claim group and, therefore, who must authorise the applicant.

The Torres Strait Regional Authority (TSRA, the representative body for the area concerned) appeared with leave and submitted that the competing native title claims should be resolved by mediation after further anthropological work was done. In the circumstances, Justice Greenwood held that the s. 66B application should be adjourned generally to enable matters to be progressed in the manner submitted by the TSRA—at [31].

Decision
The matter was adjourned to allow for further research and mediation facilitated and funded by the TSRA.

Dismissal of claimant application

Strickland v Western Australia [2010] FCA 272

McKerracher J, 23 March 2010

Issue
The issue was whether the Federal Court, of its own motion, should dismiss a claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA) where the claim made in the application had failed to meet the merit conditions of the registration test. The application was dismissed.

Background
In this case, the applicant represented the Maduwongga people. In 1999, the Registrar's delegate did not accept the claim made in the application for registration. Following an application for judicial review, the delegate's decision was set aside and the Registrar was ordered to accept the claim for registration—see *Strickland v Native Title Registrar* [1999] FCA 1530, upheld on appeal in *Western Australia v Strickland* (2000) 99 FCR 33. On 12 September 2005, the Registrar's delegate considered the claim made by the applicant in an amended

application and found it did not meet the conditions of the registration test and so it was removed from the Register of Native Title Claims. The area covered by the application was then significantly reduced as a result of the order made in *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 (Wongatha) that it be dismissed in part. In June 2009, a delegate of the Registrar considered the remainder of the claim and decided not to accept it for registration. As a result of that decision, the court's power to dismiss the application pursuant to s. 190F(6) was enlivened because s. 190F(5) was satisfied. On 14 December 2009, Justice Mc Kerracher ordered that, unless submissions in relation to the disposition of the application under s. 190F(6) were filed, he would proceed to determine the matter. No submissions were filed.

Decision

The application was dismissed because:

- on the basis of the history of the claim, the court was satisfied for the purposes of s. 190F(6) that the application had not been amended since it was considered and rejected by the delegate;
- there was no evidence that the application was likely to be amended in a way that would lead to any different conclusion being reached by the Registrar's delegate;
- there was no other reason why the application should not be dismissed—at [20] to [21].

Mitakoodi and Mayi People #1 v Queensland [2009] FCA 1528

Dowsett J, 8 December 2009

Issue

The issue before the Federal Court was whether to dismiss the Mitakoodi and Mayi Peoples' claimant application and three associated applications.

Background

In October 2008, the court made an order requiring the applicant to deliver connection material to the State of Queensland and to any respondent who asked for it in writing before 1 December 2009. The applicant failed to comply with that order and the court also became aware of serious dissent within the claim group. Justice Dowsett noted that:

- the recent difficulty in finding an anthropologist did not explain the fact that very little had been done between 14 October 2008 and 30 November 2009 with a view to complying with the order;
- in the end, it was not so much a matter of the non-compliance as it was that the applicant was not presently in a position to progress the claims—at [2] and [3].

Decision

The court held that 'it was in the interests of the applicant, the claimants and the public' that all four applications be dismissed.

Tucker on behalf of the Narnoobinya Family Group v Western Australia [2009] FCA 1459

Marshall J, 4 December 2009

Issue

The issue was whether the Federal Court should dismiss a claimant application for failure to prosecute. In the event, the applicant was ordered to produce details and a time frame for the progressing of the application, failing which the application would stand dismissed. The applicants subsequently took sufficient action to avoid dismissal under a self-executing order but the application for dismissal remains on foot, adjourned to a date to be fixed.

Background

Two claimant applications made under the *Native Title Act 1993* (Cwlth) (the NTA), referred to as the Narnoobinya claim and the Ngadju claim, substantially overlap as to the area claimed. The latter was well advanced and part-heard. The former had not been prosecuted with any diligence since it was filed 13 years ago. The Goldfields Land and Sea Council (GLSC), on behalf of the Ngadju applicants, sought dismissal of the Narnoobinya claim because of a failure to progress the application. The Narnoobinya applicant had been a respondent to the Ngadju application but had ceased to be a party because of a failure to comply with a court order to file an address for service. In November 2006, Narnoobinya applicant sought restoration of party status in the Ngadju claim. This was the catalyst for the GLSC's dismissal motion. Justice Marshall noted that the only formal step the Narnoobinya applicants had taken in their own proceeding was to contest the dismissal application in the course of seeking rejoinder to the Ngadju application—at [4] to [6] and [8].

GLSC had standing

The Narnoobinya applicant argued GLSC lacked standing. The court found that the GLSC was entitled to seek dismissal at 'the very least' because it was a respondent to the Narnoobinya application and represented the Ngadju people in their claim. In any case, 'technicalities should [not] be a barrier to the doing of justice' and, if necessary, the court had 'ample power to act on its own motion to grant the relief sought'—at [7].

Decision

Marshall J noted that the power of the court to strike out a claim should be exercised cautiously. Therefore, his Honour considered it 'fair and just' to make a self-executing order that the Narnoobinya application would stand dismissed pursuant to O 20 r 4(2) of the Federal Court Rules unless, by 11 December 2009, the applicant filed and served a document setting out 'precisely what steps they intend to take in their proceeding and a reasonable timeframe for carrying out such steps'. This took into account the 'drastic step involved in terminating a proceeding' and gave the Narnoobinya applicant a chance to 'give serious consideration to the tasks which confront them'—at [9] to [11].

Motion to restore party status adjourned

The Narnoobinya applicant's motion to rejoin the Ngadju application was adjourned pending the outcome of the dismissal motion because the Narnoobinya applicant showed

'little interest in pursuing their own application with appropriate diligence' and, in any case, if the Narnoobinya claim is not dismissed, s. 67 of the NTA will 'require, prima facie, joinder of both applications', a step that 'should not be taken lightly' in the circumstances—at [12] to [13].

Comment – s. 67
If sufficient steps are taken to avoid dismissal, it will be necessary for the court to grapple with the question of what might be appropriate orders to ensure that, to the extent of the overlap, the applications are heard in the same proceeding in circumstances where one of the applications is well advanced (including being part heard) but the other lags well behind, procedurally at least. On this issue, see *Rose on behalf of the Kurnai Clans v Victoria* [2010] FCA 460, summarised in *Native Title Hot Spots* Issue 32.

Wakka Wakka People #2 v Queensland [2009] FCA 1527

Dowsett J, 3 December 2009

The issue before the Federal Court was whether to dismiss a claimant application in circumstances where the applicant's legal advisors informed the court that they could not certify that, in its present form, the application could be successfully prosecuted. There was no opposition to the claim being dismissed. The application was dismissed.

Angale on behalf of the Irlpme Arrernte People v Northern Territory [2009] FCA 1488

Mansfield J, 18 December 2009

Issue
In this case, the Federal Court, on its own motion, dismissed a claimant application pursuant to s. 94C of the *Native Title Act 1993* (Cwlth) (the NTA), which deals with claimant applications made in response to a future act notice.

Background
A claimant application was made in 2006 in response to a future act notice dealing with an exploration licence application (ELA). The external boundary of the application coincided exactly with those of the ELA. The application passed the registration test. In February 2008, the court was informed that the claimants had reached an agreement with the tenement holder. In August 2009, the applicant was directed to produce a program for the further progress of the matter but did not do so within the time allowed. In December 2009, the Central Land Council (the applicant's legal representative) indicated the applicant was not willing to give instructions for the withdrawal of the application and was 'apparently content [for it] to sit inert for an indefinite duration'. Therefore, the court considered whether it should, of its own motion, dismiss the application 'having regard to' ss. 94C(1) and 94C(3)—at [9] to [10].

Dismissal under s. 94C

As Justice Mansfield noted:

> Section 94C ... defines the circumstances in which native title applications, apparently made in response to future act notices given in relation to land or waters wholly or partly within the area covered by the native title application, are subject to dismissal by the Court. This circumstance arises where the procedural rights of the native title claimants in relation to the future acts have been exhausted and no steps are taken to advance the resolution of the application itself—at [11].

Subsection 94C(1) provides (among other things) that the court must, on its own motion, dismiss an application made under s. 61 if certain conditions are met, provided the applicant has been given a reasonable opportunity to present a case against dismissal first and that there are no 'compelling reasons' why the court should not do so. After setting out the relevant provisions, his Honour noted that:

- it was clear from the circumstances that s. 94C(1)(b) was satisfied, i.e. it was apparent that the application was made in response to a future act notice;
- paragraph 94C(1)(c) was satisfied, i.e. the future act requirements in relation to the future act identified in the notice were satisfied in that an agreement had been reached and the ELA withdrawn;
- the Native Title Registrar had given notice pursuant to s. 66C;
- the court had given the applicant directions pursuant to s. 94C(1)(e)(i) as to future progress of the claim but the applicant did not comply with those directions and failed to take steps within a reasonable time to have the claim resolved—at [15] to [16].

Therefore, the 'mandatory dismissal power' under s. 94C was 'available' to the court, subject to s. 94C(3), i.e. were there any compelling reasons why the court should not dismiss the application? According to his Honour, there were none—at [16] to [17].

Decision

Pursuant to s. 94C, the application was dismissed.

Determination of native title

Combined Dulabed Malanbarra Yidinji People v Queensland [2009] FCA 1498

Spender J, 17 December 2009

Issue

The issue in this case was whether the Federal Court should make a determination of native title pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA) in terms of proposed consent orders. The court decided to do so. The determination area comprises approximately 166 square kilometres in the Goldsborough Valley in the Wet Tropics World Heritage region of far north Queensland. The determination will become effective if and when four related Indigenous Land Use Agreements (ILUAs) are registered. Objections to the registration of all four ILUAs have been received and are being dealt with by the Registrar's delegate.

Background

The claimant application dealt with in this case was made on behalf of the Combined Dulabed Malanbarra Yidinji People. The respondents included the State of Queensland, the Cairns Regional Council, the Tablelands Regional Council and Ergon Energy Corporation Limited. According to Justice Spender, this application had 'a long and chequered history'. An application was made on behalf of the Malanbarra Yidinji People lodged with the National Native Title Tribunal (the Tribunal) in 1994. An application on behalf of the members of the Dulabed Aboriginal Corporation was lodged with the Tribunal in 1995. In 1996, the Malanbarra Clan of Yidinji People also lodged a third application. As a consequence of amendments to the NTA, all three became proceedings in the court in September 1998. In 2000, the Malanbarra Clan of Yidinji People application was discontinued. In 2001, the Dulabed and Malanbarra Yidinji applications were combined to become the Combined Dulabed Malanbarra Yidinji People's application. The combined application, which was amended four times, was referred for Tribunal mediation in 2004. With the Tribunal's assistance, the parties reached agreement as to the terms of the determination for the purposes of ss. 87 and 94A and the agreed terms were filed in the court late in 2009—at [2] to [7].

Court's power

Spender J was satisfied that the proposed orders that 'have been freely agreed to by all parties on an informed basis are appropriate'. As was noted:

> There are now a number of decisions ... that have considered the requirements of this section of the Act that promotes a resolution of native title applications by way of negotiated agreement. Justice Greenwood, ... [in *Hobson on behalf of the Kuuku Ya'u People v Queensland* [2009] FCA 679] referred to the observations made by Chief Justice French in his paper, *Lifting the Burden of Native Title – Some Modest proposals for Improvement*, that the Court will not lightly second-guess the agreement the parties have reached by requiring formal proof of the content of the subject matter of each proposition contained in the proposed orders which in turn must necessarily address the elements of ss. 223 and 225 of the Act. Otherwise the Applicant would be burdened with, in effect, a subset of a trial in establishing the appropriateness of consensual orders—at [11].

Evidence in support of determination

The court had before it a report called 'Summary of Connection Material' by Dr Sandra Pannell which summarised the findings of three earlier anthropological reports by different authors, all of which were prepared prior to the High Court decisions in *Western Australia v Ward* (2002) 213 CLR 1 and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. His Honour also had a document prepared by Jennifer Gabriel entitled 'Executive Summary on the Dulabed/Malanbarra Yidinji Genealogies'. Spender J was of the view that Dr Pannell's summary 'clearly explored the available evidence on the identification of the claim group, continuity of connection and the normative system of traditional law and custom of the claim group'—at [13].

After examining the material provided, his Honour concluded that:

> The Combined Dulabed Malanbarra Yidinji People's traditional entitlement to ownership of the ancestral lands and waters derives from their physical, cultural and spiritual connection to the claim area—at [20].

As a result, his Honour could:

> [I]nfer from the well documented historical and anthropological material that at the time of sovereignty, a society of persons bound together by observance of traditional laws and customs existed—at [20].

In respect of the 'current society', Spender J found 'the wealth of personal information' in affidavits of senior claim group members 'provided a clear picture of the contemporary society that demonstrates' that society's connection to the determination area—at [13].

Decision

After noting that the terms of the proposed order complied with s. 225 (as required by s. 94A) and other matters, Spender J found that:

> [T]he Court has power to make a determination in the terms proposed by the parties by agreement and ... these orders can give effect to the agreement of all the parties. Such orders determine under the laws of Australia that native title exists in the Determination Area according to the traditional laws and customs of the Combined Dulabed Malanbarra Yidinji People. This is recognition of what the people have always understood the position to be—at [35].

Determination

The native title holders were determined to be those people known as the Dulabed and Malanbarra Yidinji People, who are those Aboriginal people that are either descended from certain named ancestors or recruited by adoption in accordance with the traditional laws and customs of the Dulabed and Malanbarra Yidinji People. The native title is not held in trust. The court was satisfied that the nominated Dulabed Malanbarra and Yidinji Aboriginal Corporation met the requirements of ss. 55 and 57 of the NTA. Therefore, it was determined to be the prescribed body corporate (PBC) for the determination area—at [32] to [33].

In relation to one part of the determination area, where s. 47B applies, the native title holders hold the right to possession, occupation, use and enjoyment to the exclusion of all others, with the exclusion of 'water' as defined in the *Water Act 2000* (Qld). In the remainder of the determination area (and again with the exclusion of 'water'), the native title holders hold non-exclusive native title rights to:

- be present on the area, including by camping, which is defined to exclude permanent residence or the construction of permanent structures (other than grass huts known as bulmba) or fixtures;
- take and use traditional natural resources from the area for personal, domestic or non-commercial communal purposes; and
- perform cultural or spiritual activities on the area.

'Traditional natural resources' are defined to mean 'animals' (excluding fish) and 'plants' as defined in the *Nature Conservation Act 1992* (Qld) and any clay, soil, sand, gravel or rock on or below the surface, that have traditionally been taken and used by the native title holders. In relation to all 'water' in the determination area, the native title holders hold non-exclusive rights to:

- hunt and fish in or on, and gather from, the water for personal, domestic or non-commercial communal purposes; and
- take and use the water for personal, domestic or non-commercial communal purposes.

Other rights and interests in the determination area noted in the determination include:

- the state pursuant to the *Nature Conservation Act 1992* (Qld) and the *Forestry Act 1959* (Qld) and 'subordinate legislation';
- the Wet Tropics Management Authority under the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) and the *Wet Tropics Management Plan 1998* (Qld);
- any existing rights of the public to access and enjoy waterways, beds and banks or foreshores of waterways, coastal waters, beaches, stock routes and areas that were public places at the end of 31 December 1993 'so far as confirmed pursuant to' s. 212(2) of the NTA and s. 18 of the *Native Title (Queensland) Act 1993* (Qld) as at the date of the determination.

Comment on formulaic exclusions from determination area

The determination area is described as being certain identified lots excluding 'any area' within those lots 'on which a public work is, or has been, established' before 24 December 1996 and 'any adjacent land and waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work'. (This last part replicates the extended definition of 'public work' in s. 251D of the NTA.) While it is understandable that the parties wanted to resolve this matter expeditiously by using formulaic exclusions, this does not finally resolve where native title exists and where it does not. Therefore, it is not possible to map the determination area with any precision, the PBC will not have certainty in relation to the area for which it is determined and the state will not have certainty in relation to those areas to which the NTA's future act regime applies. This may not be significant where the history of works is simple but may be problematic in areas where it is not.

For more information about native title and Tribunal services, contact the National Native Title Tribunal, GPO Box 9973 in your capital city or on freecall 1800 640 501.
A wide range of information is also available online at www.nntt.gov.au
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