# Registered native title claimant – all those authorised are deceased

## *Bullen v Western Australia* [2010] FCA 900

**Siopis J, 20 August 2010**

**Issue**

In this case, the two persons comprising the applicant for a registered claimant application were deceased. The State of Western Australia granted two mining leases in relation to the area covered by the application. The main issue was whether there was a 'registered native title claimant' at the time of those grants. Justice Siopis found that there was a registered native title claimant at the relevant time because the names of the two deceased men appeared on the Register of Native Title Claims at that time.

**Background**

Under the NTA, s. 61(1) provides that the applicant for a claimant application is the member or members of the native title claim group authorised in accordance with s. 251B by the native title claim group to make the application. Section 62A provides that the applicant 'may deal with all matters arising' under the NTA 'in relation to the application'. If more than one person is authorised, s. 61(2) provides that all those people are jointly the applicant. 'Registered native title claimant' is defined in s. 253 to mean 'a person or persons whose name or names appear [sic] in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the [relevant] land or waters'. In this case, reference to a 'native title party' is a reference to a 'registered native title claimant'.

The Esperance Nyungar claimant application was registered on the Register of Native Title Claims (RNTC) in July 1999 with Malcolm John Bullen and James Edward Dimer recorded as the applicant. Mr Bullen died shortly afterwards in October 1999. Mr Dimer died on 6 September 2005.

In December 2005, after both Mr Bullen and Mr Dimer had passed away, the Goldfields Land and Sea Council Aboriginal Corporation (GLSC, the representative body) tried to stand in for the applicant and made a future act determination application (FADA) to the National Native Title Tribunal 'on behalf of the Esperance Nyungar People' in relation to some exploration licences. The evidence before the Tribunal was that it was inconvenient for the Esperance Nyungar People to take steps to replace the applicant at that time.

The Tribunal dismissed the FADA on the basis that there was no native title party capable of making it and so it was a nullity. It was noted that, despite the difficulties sometimes encountered with replacing the applicant pursuant to s. 66B:

> [T]here is no alternative ... if all the persons who jointly comprise the applicant, whose names appear on the Register [as so are the registered native title claimant and hence the native title party in the Tribunal proceedings] are deceased—see *Dimer v Stewart* (2006) 200 FLR 385; [2006] NNTTA 70 (*Dimer*) at [17].

On September 2003, when Mr Dimer was still alive, the state gave notice under s. 29 that it intended to grant the two mining leases the subject of these proceedings. Negotiations pursuant to s. 31(1) commenced in October 2003. However, in June 2007 (after both Mr Dimer's death and the Tribunal's decision in *Dimer*), the state granted the leases under the *Mining Act 1978* (WA) without any agreement being reached under s. 31(1)(b) of the NTA and without any FADA being made and determined by the Tribunal. Before doing so, it wrote to the GLSC saying it relied on the Tribunal's decision in *Dimer*:

> As a consequence of this decision there is no legal impediment to the State granting tenements situated within the Esperance Nyungar claim area pursuant to section 28(1)(b) of the Native Title Act, as there is no native title party.

Paragraph 28(1)(b) provides that, subject to the NTA, an act to which this Subdiv P applies (in this case, the grant of a mining lease):

> [I]s invalid to the extent that it affects native title unless, before it is done, the requirements of one of the following paragraphs are satisfied ... (b) after the end of that period, but immediately before the act is done, there is no native title party in relation to any of the land or waters that will be affected by the act.

In September 2008, the GLSC wrote to the state alleging it had not complied with the requirements of the NTA. The state responded in October 2008, repeating its view that there was 'no legal impediment' to the grant of the leases and that each was a valid future act pursuant to s. 28(1)(b).

On 30 October 2008, GLSC repeated its view that the grants of the leases were invalid future acts and contended *Dimer* was 'incorrect'. Further, it was said that 'the deceased applicants' names have at all material times been on' the RNTC 'as the applicant' and that the Tribunal in *Dimer* 'overlooked the fact that native title claims are representative proceedings'. The GLSC sought cancelation of the leases, in lieu of which an application would be made for a declaration of invalidity. The state responded, maintaining its position and noting that the relevant minister had no power in this case under the Mining Act to cancel the leases.

As a result, the application dealt with in this case was made on 19 October 2009. It sought a declaration that, 'at the relevant time, there was a registered native title claimant notwithstanding the death of both Mr Bullen and Mr Dimer'. On 23 April 2010, the application was amended so that the relief sought was a declaration that, 'immediately before the grant' of the mining leases in question, 'there was a registered native title claimant as defined by section 253' of the NTA 'in respect of the areas to which the mining leases relate'.

**The issues**

The applicants contended (among other things) that:

> [T]he Native Title Act should be construed beneficially in a manner guided by the content of the Preamble to the Native Title Act, and that the objects of the Native Title Act would be frustrated if the State's approach was correct. This was because the native title claim group would be deprived of one of the main benefits derived from the Native Title Act, namely, the right to negotiate. Accordingly, said the applicants, the declaration sought should be made.

The state contended there was no native title party within the meaning of s. 28(1)(b) at the relevant time in relation to the land that would be affected by the grant of the mining leases because there were no living persons comprising the applicant at that time. The state argued (among other things) that the applicants' submissions 'were entirely inconsistent with the reality of the right to negotiate process provided for in Subdiv P of Div 3 of Pt 2', i.e. the process would be stymied if there was no living applicant with whom to negotiation. The state also argued that:

> [T]he native title claim group and the representative body must act conscientiously to ensure that the necessary person or persons are authorised to act on behalf of the claim group in relation to future acts and other matters arising under the Native Title Act—at [42].

**Question was not hypothetical**

Justice Siopis rejected the contention that the declaration sought by the applicants 'related to a matter which was entirely hypothetical' because there was 'a real controversy as to whether there was, immediately before the grant of the mining leases, a registered native title claimant in respect of the relevant land' and deciding the question 'would quell that controversy'. Further, the applicants had 'a real interest in having the question determined' because the mining leases relate to land subject to their claimant application and 'quelling of the controversy will have very significant practical consequences'. If there was no registered native title claimant at the relevant time, 'the validity of the mining leases cannot be impugned' whereas if the applicants are right, there is a risk that the validity of the leases would be 'impugned to the extent' that native title is subsequently proven that is affected by the rights held under the leases. There were 'obvious commercial consequences' to these two 'risk profiles' and 'resolution of the question' would allow for risk mitigation. Further, the court was 'being asked to grant a declaration in relation to an established factual scenario in relation to past conduct'—at [26] to [29].

**Construing the NTA**

The answer to the question in this case turned on the proper construction of the relevant provisions of the NTA, something Siopis J had 'some difficulty' in ascertaining. As was noted:

> The difficulty has arisen in relation to trying to reconcile the competing considerations of, on the one hand, the importance of the right to negotiate to a native title claim group as a benefit under the Native Title Act; and, on the other hand, the public interest in having applications for mining tenements dealt with within a reasonable time—at [44].

Despite this difficulty, it was found that there was a native title party within the meaning of s. 28(1)(b) in relation to the land the subject of the leases immediately before the grant were made on 27 June 2007 because 'there was in existence on that date a "registered native title claimant" in relation to the relevant land, for the purposes of that section of the Native Title Act'—at [47].

This conclusion was reached firstly because:

- the applicants' contentions were 'consistent with the fundamental concepts which underlie' the NTA;
- among other things, they prescribe that recognition of native title 'is to occur by means of a representative proceeding brought on behalf of a native title claim group by a person or persons from that claim group, authorised by that claim group, and referred to as "the applicant"';
- subsection 190(1) provides that claims accepted for registration must be registered on the RNTC and s. 186(1)(d) provides that 'the name and address for service of the applicant' must be entered onto the RNTC;
- the applicant is 'the person or persons who is, or are, authorised to bring the native title determination application on behalf of a native title claim group';
- only 'an authorised applicant can act on behalf of the native title claim group' and ss. 61(2) and 62A provide that 'only the applicant has the power to do things necessary to prosecute the native title claim';
- section 25B 'provides for the process' the claim group must undertake 'in order to authorise a person or persons to act as the applicant' on the claim group's behalf—at [49] to [52].

His Honour noted that s. 66B:

> [C]ontemplates the replacement of the "current applicant" in a number of circumstances, including, significantly, in the circumstance where the person or persons, comprising the applicant, has, or have, died. It is apparent from the language and structure of s 66B, that the Native Title Act contemplates that even where the person or persons comprising the current applicant has, or have, died, the current applicant, as comprised by the deceased person or persons, remains the registered applicant, albeit in an inchoate form, until replaced on the register by the "new applicant". This follows from the fact that s 66B(1) uses the term "the current applicant", and not "the former applicant", to describe the status of the applicant, even where the person or persons comprising the applicant has or have died. Further, the Native Title Act contemplates that the name of the deceased person or persons comprising the applicant is, or are, to remain registered as the current applicant until such time as a Court order is made under s 66B(2) and, consequent thereon, the register is amended to reflect the names of the person or persons comprising "the new applicant" and the address for service of the new applicant—at [55].

According to Siopis J, it followed from this that, until the application was 'amended, pursuant to' s. 66B(4), the RNTC would 'continue to show the names of the ... persons comprising the current applicant, as the applicant' even in cases where those persons 'may be incapable of carrying out the statutory functions of the applicant prescribed' under the NTA, including 'the conduct of the negotiations called for' under s. 31—at [56].

Secondly, adopting the applicant's position would not mean (as had been submitted) that a person who is, or persons who are, the applicant would be succeeded by their personal representatives or executors 'as the persons comprising the applicant' because:

> [T]he Native Title Act does not contemplate that the personal representative or executor of a deceased person comprising the applicant would, by operation of law, succeed the deceased person in that capacity. The Native Title Act does not contemplate the replacement of the applicant occurring in any manner, other than by the manner referred to in s 66B of the Native Title Act. That section provides specifically for the circumstance of having to replace the applicant where a person or persons comprising the applicant has, or have, died. It provides for the replacement of the deceased person or persons, with a person or persons, who is, or are, authorised by the native title claim group to act as the applicant, in the specified manner prescribed by the statute. It also provides for the obtaining of an order under s 66B(2), as an essential precondition to effecting the replacement on the register of the current applicant—at [60].

Nor did his Honour accept that the view he took would 'render the right to negotiate provisions unworkable', given that Subdiv P contained provisions that:

> [P]ermit the government and grantee parties to obtain relief in circumstances where the native title claim group delays unduly in appointing a replacement applicant with a capacity to carry out the negotiations called for by s 31 of the Native Title Act—at [61].

Siopis J was satisfied that 'the right of a government or grantee party to apply' to the Tribunal under s. 35 for 'a determination that the future act may be done' provided a 'sufficiently flexible' mechanism 'to deal with any undue delay' in replacing the applicant if the applicant is 'incapable of satisfying the duty' under s. 31(1)(b) to 'negotiate in good faith'—at [63].

As was noted, a FADA can be made pursuant to s. 35 provided at least six months has passed since the notification day included in the relevant notice given under s. 29 and no agreement as contemplated by s 31(1)(b) has been made. According to the court:

> No such agreement could be made unless the applicant in relation to a native title claim in question had the capacity to agree to an agreement. This, in turn, could not happen in circumstances where the registered applicant was comprised of a person or persons, who was, or were, deceased. On an application under s 35, the arbitral body has the power under s 38 to make a determination that the act may be done—at [64].

Finally, Siopis was of the view that adopting the view of the state and the other respondents would lead to the future act being done 'in circumstances where it is unlikely that Parliament would have intended that' it be done, giving the following as an example:

> The applicant of a native title claim is comprised of two persons. The applicant, comprised by those two persons, has been registered as such, for much longer than four months from the notification day. Negotiations under s 31 have been ongoing for a considerable period of time. Both the persons comprising the applicant are travelling in the same vehicle to a

> meeting to continue the negotiations. They are both killed when the vehicle is involved in a traffic accident. In my view, Parliament could not have contemplated that, in those circumstances, the future act could, without more, be done, with the consequence that the native title claim group in respect of the relevant land would be deprived of the right to negotiate—at [67].

**Decision**

For the reasons summarised above, the declaration sought by the applicants was made.

**Comment - *Dimer***

Siopis J's decision does not deal with the situation that confronted the Tribunal in *Dimer*, where the native title party could not make a future act determination application (because all those who constituted it were dead) but a representative body attempted to stand in the applicant's shoes. Section 75 provides that a future act determination may be made by a 'negotiation party' (i.e. grantee, government or native title party). His Honour's decision implies the Tribunal was right to find that it could not deal with the application but that it may have done so for the wrong reasons. In other words, since GLSC was not one of the entities identified in s. 75 and the native title party was legally incapable of making the application, the Tribunal was not entitled to deal with it and so was empowered to dismiss the application pursuant to s. 148(a) as it did.