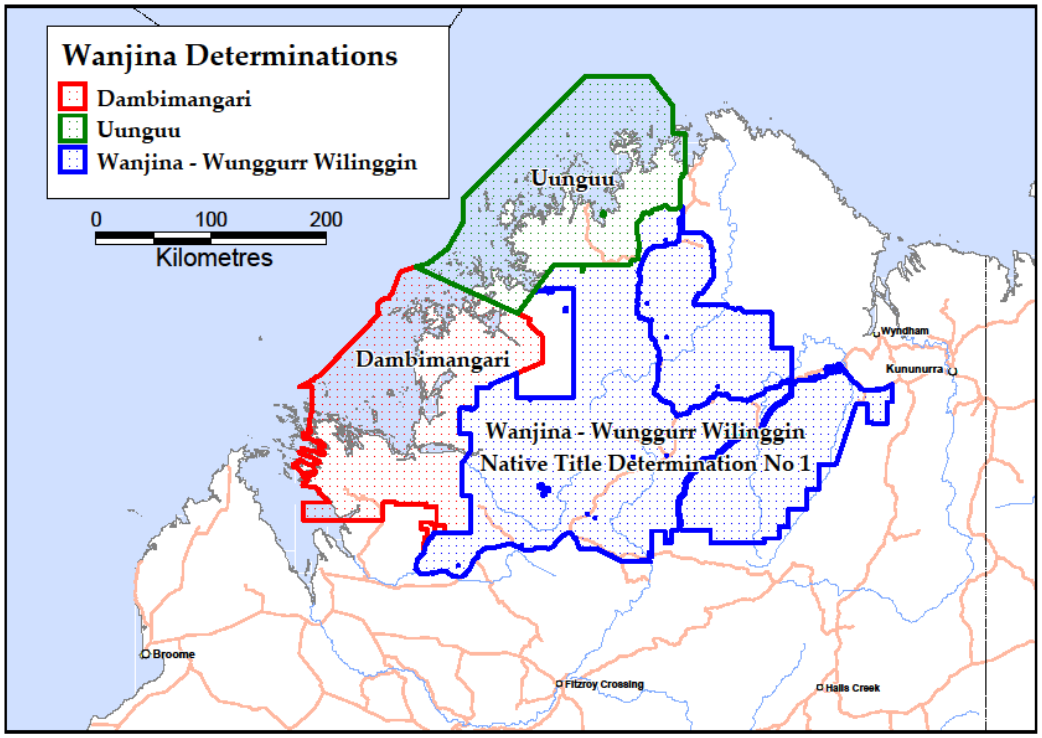
Goonack v Western Australia [2011] FCA 516

Gilmour J, 23 May 2011

Issue

The main issues before the Federal Court were whether to make a determination recognising native title exists under the *Native Title Act 1993* (Cwlth) (NTA) in a case where there may be a defect in the authorisation and whether it was appropriate to make an order that the State of Western Australia and the determined registered native title body corporate (RNTBC) 'negotiate in good faith to reach agreement' about a number of matters, including the negotiation of various indigenous land use agreements (ILUAs). It was decided that it was appropriate for the court to do so.

This is the second of three determinations recognising the Wanjina-Wunggurr Community (WWC) of the West Kimberley as native title holders. The combined area covered by those determinations is around 121,000 square kilometres, an area almost twice the size of Tasmania, as illustrated in the map below. The determination itself is not summarised here.



Background

The Wanjina-Wunggurr Uunguu (WWU) claimant application, made in October 1999, covers about 26,000 square kilometres, including part of the Mitchell River and Lawley River national parks, parcels of unallocated Crown land and some islands and sea areas. It is one of four applications (the Wanjina-Wunggurr applications) made on behalf of those 'who hold in common the body of traditional laws and customs concerning land and waters known as Wanjina-Wunggurr'. The first of two of these (the Wanjina-Wunggurr Willinggin applications) were dealt with in *Neowarra v Western Australia* [2003] FCA 1402 (summarised in *Native Title Hot Spots* Issue 8 and Issue 9), where Sundberg J recognised that the Wanjina-Wunggurr Community (WWC):

> [C]onstituted a society and were bound together by a normative system of laws and customs which had continued to be acknowledged and observed by its members in a substantially uninterrupted manner since prior to the declaration of sovereignty over Western Australia—at [4].

In *Neowarra v Western Australia* [2004] FCA 1092 (*Neowarra*), Sundberg J determined that native title existed in relation to most of the area covered by the Wanjina-Wunggurr Willinggin application and that the native title was held by the WWC. In *Barunga v Western Australia* [2011] FCA 518 (summarised in *Native Title Hot Spots* Issue 34), Justice Gilmour determined that the WWC hold native title existed in relation to most of the area covered by the Wanjina-Wunggurr Dambimangari application.

Through mediation with the National Native Title Tribunal, the parties reached an agreement that, among other things, provided for the recognition of native title held by members of the WWC. They agreed the area claimed in the three Wanjina-Wunggurr applications together make up the traditional country of the WWC. It was not disputed that the WWC's traditional system of law comes from spirit beings called Wanjina. The parties subsequently sought a determination by consent recognising native title is held by the members of the WWC 'for their respective communal, group and individual rights and interests in the proposed determination area'.

John Catlin, on behalf of the State of Western Australia, provided affidavit evidence that:

- the state advised the applicant that, subject to establishing the members of the WWC had maintained the requisite connection to the claim area, Sundberg J's findings as to the WWC applied and could be adopted in the WWU application;
- the state assessed the relevant materials in accordance with its guidelines;
- that material and Sundberg J's findings satisfied the state that a body of traditional laws and customs existed under which the members of the WWC hold rights and interests within the proposed determination area.

Authorisation issues – s. 84D applied

Subsection 84D(4) provides that if there is a defect in authorisation:

> The Federal Court may, after balancing the need for due prosecution of the application and the interests of justice ... hear and determine the application, despite the defect in authorisation ... or ... make such other orders as the court considers appropriate.

As seven of the 15 persons named as the applicant had died, there was a question as to whether the surviving eight people were authorised as required. Written evidence as to the terms of the authorisation given in 1999 could not be found. In these circumstances, it was not possible to determine whether terms of the authorisation accommodated the death of one or more of the 15 authorised persons. Justice Gilmour exercised the discretion available under s. 84D(4) to make the determination 'despite any perceived defect in authorisation' on the basis that:

- the purpose of authorising the original 15 people was to prosecute the native title holders' claim to the area concerned and it was now all but finally prosecuted successfully;
- there would be a denial of justice if it did not proceed to determination;
- the delay, cost and confusion resulting from requiring strict compliance at such a late stage would 'bring no credit upon the legal system'—at [16] to [17], applying the same rational as Justice Finn employed in *Akiba v Queensland (No 2)* [2010] FCA 643 at [930] to [931].

Native title claim group description v native title holders – s. 84D applied

The description of the native title claimant group in the WWU application was close, but not identical, to the description of the native title holders in the determination made by Sundberg J in

Neowarra (the WWW determination). The order sought in this case was in the same terms of the WWW determination. If it was made, it would effectively mean the determination was 'referable to an expanded native title claimant group. However, there had been no amendment to the WWU application to reflect this expanded group. Gilmour J noted the court was 'not limited to making a determination in the form sought in the application and may ... make a determination in such form as it sees fit based on the evidence, provided the application is valid'—at [18], referring to *Patch v Western Australia* [2008] FCA 944 at [18].

His Honour found that, pursuant to s. 84D(4), it was 'in the interests of justice to make the determination sought' despite any 'defect in authorisation'. Reliance was placed on s. 84D(3), which covers circumstances where those who are (or were) the applicant have dealt (or do deal) with a matter arising in relation to the application in circumstances where they were (or are) not authorised to do so. In this case, this apparently refers to the seven surviving members of the applicant seeking a determination in favour of an expanded group as native title holders—at [19].

Comment on ss. 47A(3) & 47B(3) and the group recognised

There is one issue that may arise if the claim group described in application is not the same as the group recognised as holding native title. Subsections 47A(3) or 47B(3) both state that if 'the determination on the application is that the *native title claim group* hold the native title rights and interests claimed' (emphasis added), then the effect of determination recognising native title is as prescribed in ss. 47A(3) and 47B(3) e.g. the non-extinguishment principle applies to the creation of certain prior interests. 'Native title claim group' is defined in s. 253 as 'the group mentioned in relation to the application in the table' in s. 61(1). In turn, s. 61(1) describes that group as 'all the persons ... who, according to their traditional laws and customs, hold the common or group rights and interests comprising the *particular native title claimed*' (emphasis added). Therefore, in this case, if it can be said that the 'particular native title claimed' is that of the WCC, it seems the conditions of ss. 47A(3) and 47B(3) are satisfied.

Section 87 or 87A?

One area of unallocated Crown land that was included in the application area was excluded from the determination area to allow for mediation to continue with a view to a later determination being made that the excluded area is subject to s. 47B. This meant the determination area related to part of (rather than the whole of) the application area. In such a case, the determination could be made under either ss. 87 or 87A but it was 'preferable to use s 87A' because:

- the WWU application will then be 'deemed' to have been amended to remove the determination area;
- the excluded area will remain registered on the Register of Native Title Claims;
- that Register will be amended to reflect this;
- the registration test will not be applied—at [20] to [21].

Comment – s. 87A and the registration test

With respect, it is only if pursuant to s. 64(4) the Registrar is given a copy of an registered application that is amended because 'an order was made under s 87A' that 'the Registrar need not consider the claim made' in the amended application against the conditions of the registration test—see s. 190A(1A).

However, regardless of whether ss. 87 or 87A is relied upon, if the court's Registrar gives the Tribunal's Registrar notice of the orders made as required under s. 189A, then pursuant to s. 190(4)(e), the Register must amend the Register of Native Title Claims to reflect those orders and no question of applying the test to any undetermined area (such as the excluded area in this case) arises.

Applying s. 87A

His Honour set out s. 87A which (in paraphrase) provides that the court may make a determination of native title by consent over part of an application area without holding a hearing provided certain pre-conditions are met, the court is satisfied the orders sought is within power and it appears appropriate to the court to make those. The pre-conditions were either met or not relevant. It was accepted there was no reason not to be satisfied that an order in, or consistent with, the terms of the agreement was within power and complied with ss. 13(1)(a), 67(1), 68, 94A and 225 of the NTA—at [22] to [23].

In considering whether it would be appropriate to make the orders sought, it was noted (among other things) that:

- the exercise of discretion under to s. 87A 'imports the same principles as those applying to the making of a consent determination of native title under section 87' and so it 'must... be exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose' of the NTA;
- it is appropriate to make orders under s. 87A 'where no evidence of the primary facts ... has been received' if the court is satisfied 'that the parties have freely and on an informed basis come to an agreement';
- orders under 87A may be made if the court 'is satisfied that the State, through competent legal representation, is satisfied as to the cogency of the evidence upon which the applicant relies';
- the court might consider 'the findings on the evidence on which the State relies ... for the limited purpose of being satisfied that the State is acting in good faith and rationally'—at [24] to [26], citing various authorities.

In this case:

> The State ... played an active role in the negotiation of the proposed consent determination ... . [I]n so doing, the State, acting on behalf of the community generally, having regard to the requirements of the Native Title Act and through a rigorous and detailed assessment process has satisfied itself that the determination as sought is justified in all the circumstances—at [27].

Orders giving effect matters other than native title – s. 87A(5)

Subsection 87A(5) was introduced by the *Native Title Amendment Act 2009* (Cwlth). According to the Explanatory Memorandum to the Native Title Amendment Bill 2009 (EM), it was intended:

> [T]o enhance the powers of the Court. The changes would encourage and facilitate more negotiated settlements of native title claims. These changes would also create a more flexible native title system and one that produces broad benefits to Indigenous people and certainty to stakeholders—EM at 31.

The parties asked the court to make orders pursuant to s. 87A(5) that Wanjina-Wunggurr (Native Title) Aboriginal Corporation (the RNTBC) and the state 'will negotiate in good faith to reach agreement on the matters in Attachment A to these orders, as provided for in Attachment A'.

This would give effect to an agreement that those parties 'enter into negotiations in good faith to reach agreement on the relationship between the native title rights and interests ... and the non-native title rights and interests which exist' within the determination area. It includes an agreement to negotiate ILUAs dealing with:

- the relationship between the native title rights and interests and the rights and interests of the Department of Environment and Conservation with respect to certain conservation reserves;
- the validation, joint management and protection of native title rights and interests with respect to those reserves;
- alternative processes for the grant of future exploration and prospecting tenements and standard heritage agreement provisions for the determination area.

The parties sought orders under s. 87A(5) so as 'to have their agreement to negotiate the matters formally recorded'. The court accepted it was:

> [I]n the public interest that orders that give effect to the terms of an agreement that involve processes for formalising and regulating the exercise of the rights of the native title holders and of the broader Australian community are made in open court and are on the public record—at [29].

At [32], Gilmour J found that what was said of s. 87 by Justice Mansfield in *Brown v South Australia* [2010] FCA 875 at [24] 'applied equally' to s. 87A, namely that it:

> [C]ontemplates that ... the Court may make such orders as it considers appropriate even if it does not proceed to make a determination of native title. ... [I]t is difficult to see that the parties ... could not agree upon any of the matters encompassed within the coverage of an ILUA ... . Nor is there any apparent reason why the range of matters which may be the subject of an agreement incorporated into ... orders under s 87 is confined to those matters ... . The only step the Court must take to include the terms of an agreement is to be satisfied that it is appropriate to do so.

Therefore, his Honour was satisfied that 'it would be appropriate and within power' to make the orders.

Comment on scope of s. 87A powers

As noted, his Honour agreed with Mansfield J's comment that: '[I]t is difficult to see that the parties to an application under s 61 could not agree upon any of the matters encompassed within the coverage of an ILUA'. However, with respect, there may be occasions when the NTA will require either an ILUA or that the matter be otherwise be dealt with in accordance with Pt 2, Div 3 (the future act regime) rather than ss. 87 or 87A. For example:

- One of the conditions in s. 28 must be met to ensure that a future act that attracts the right to negotiate is valid and an order under s. 87 or 87A is not one of those conditions. The only alternative means of ensuring validity is where the future act is covered by registered ILUA in which parties consent to it being done and it includes a statement that Subdiv P is not intended to apply—see s. 26(2).
- Section 24OA provides that a future act is invalid to the extent that it affects native title unless a provision of the NTA' otherwise provides'.
- Section 24EC provides (in paraphrase) that government parties can make 'other agreements' (i.e. other than an ILUA) with native title holders that 'relate to their native title rights ... (*other than agreements consenting to the doing of future acts*)' (emphasis added). Sections 87 and 87A refer to orders being made in terms of agreements reached. If the relevant government is to be

a party, it seems the agreement cannot involve the native title parties 'consenting to the doing of future acts';

- Section 11 provides that native title cannot be extinguished contrary to the NTA. Where the parties agree to a surrender of native title, an area agreement ILUA, a body corporate ILUA or a s. 24MD(2A) agreement would seem to be required because it is only under these agreements that provision is made in the NTA for extinguishment via surrender.
- An ILUA may also be required where the parties agree that the non-extinguishment principle should apply to a future act that would otherwise extinguish native title given that principle is a creature of the statute.

Decision

Orders were made as sought by the parties.