QGC Pty Ltd v Bygrave (No 2) (2010) 189 FCR 412; [2010] FCA 1019

Reeves J, 17 September 2010

Issue

Two main issues were dealt with in this case. First, could the Native Title Registrar's delegate decide *not* to give notice pursuant to s. 24CH of the *Native Title Act 1993* (Cwlth) (NTA) of an agreement if the delegate decided it was not an indigenous land use agreement (ILUA) as defined in the NTA? Second, did the 'registered native title claimant' become a party to the agreement by naming one or more of the nine people named as 'the applicant' in the Register of Native Title Claims as a party to the agreement? It was found that:

- the delegate had no power to refuse to give notice of the agreement; and
- naming any one of those persons whose names appear in the Register as the applicant is sufficient to make the 'registered native title claimant' a party to an ILUA.

These findings raise several issues which are noted below.

Background

QGC Pty Ltd (QGC) entered into an agreement with the Iman People that was intended (among other things) to deal with 'future acts' in relation to the development of a natural gas project. The Iman People #2 claim, which is registered, covers the agreement area. Nine people's names appear on the Register as the applicant for that claim. One of those persons, Madonna Barnes, refused to sign the agreement. The application for registration was certified under s. 203BE by Queensland South Native Title Services Limited (QSNTS), a body funded under s. 203FE to carry out the functions of a representative body.

The delegate determined that s. 24CD(1) was not met and, therefore, that the agreement was not an ILUA as defined in s. 24CA because it was not signed by all the persons who jointly comprised the registered native title claimant (the RNTC) as defined in s. 253. The RNTC was a mandatory party. As a result, the delegate decided not to give notice of the agreement under s. 24CH because she was only authorised or required to do so if the agreement was an ILUA.

QGC applied for review of the decision to refuse to notify. The delegate was the first respondent and the persons comprising the RNTC were the second respondents. QSNTS applied and was joined as a respondent—see *QGC Pty Limited v Bygrave* [2010] FCA 659, summarised in *Native Title Hot Spots* Issue 33. The RNTC supported QCG's submissions. QSNTS made submissions in support of the delegate's decision.

Basis for review

QGC submitted that the decision not to give notice of the agreement was a decision within the terms of s. 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (the AD(JR) Act), and if not, it was a decision of a Commonwealth officer for the purposes of s. 39B of the *Judiciary Act 1903* (Cwlth) (Judiciary Act). If the decision was to be reviewed under s. 5 of the AD(JR) Act, it had to be of an administrative character and 'made under an enactment'—see s. 3(1) of that Act. Justice Reeves noted it was necessary to construe the provisions of the NTA as a whole and to consider the context, including the purpose and policy of the relevant provisions—at [16] to [17].

The delegate purported to make the decision pursuant to s. 24CH(1) which provides that the Registrar 'must' give notice of the application to register an agreement which, in the delegate's view, was a reference to an agreement meeting the requirements of s. 24CA. It states: 'An agreement meeting the requirements of sections 24CB to 24CE is an indigenous land use agreement'. The delegate considered that, if s. 24CD(1) was not satisfied, then the agreement could not meet the requirements of s. 24CA and so was not an agreement covered by s. 24CH.

Reeves J reviewed the ILUA provisions and, in particular, the provisions relevant to this case, i.e. Pt 2, Div 3 Subdiv C (the area agreement provisions). As his Honour indicated:

> One obvious purpose of these provisions is to ensure the Registrar is provided with the critical details of which notice has to be given under s 24CH ... . Those critical details are spelt out in s 24CH(2)—at [24].

Reeves J identified the general purpose of the area agreement 'procedural' provisions by referring to *Murray v National Native Title Tribunal* (2003) 132 FCR 402; [2003] FCAFC 220 (*Murray*, summarised in *Native Title Hot Spots* Issue 7), where the Full Court said the purpose of ss. 24CG and 24CL was:

> [T]o ensure that all persons who hold, or may hold, native title in the area have been identified and notified of the agreement and have either authorised the making of the agreement or successfully taken steps to formalise their claim to hold native title in relation to land or waters in the area of the agreement—at [23], Spender, Branson and North JJ.

Justice Reeves failed to see 'how applying the prerequisite provisions of the Act ... before giving notice ... serves to do that'. It was found that the use of the word 'must' in s. 24CH 'indicates in the clearest terms' that the delegate was 'obliged to give notice of the agreement ... without ... giving any consideration to ... whether the agreement could be classified as an ILUA'—at [25] to [26].

Review not available under AD(JR) Act but used Judiciary Act

His Honour concluded that:

- the delegate was neither required nor authorised under s. 24CH to make any decision about whether the agreement satisfied ss. 24CB to 24CE and, specifically, 'whether the persons specified in s. 24CD were parties' to it before giving notice under s. 24CH;
- therefore, the delegate's decision was not a 'decision under an enactment' within the terms of s. 5 of the AD(JR) Act—at [32].

The proceedings could have been disposed of by ordering the delegate to give notice of the agreement but his Honour decided not to do so because it would not resolve 'the primary issue' between the parties, i.e. the interpretation of s. 24CD as to how the 'registered native title claimant' becomes a party to the ILUA. Since the applicant also sought review under s. 39B of the Judiciary Act, and the Registrar's counsel supported this approach, his Honour dealt with the primary issue under that provision—at [34] and [37] to [38].

Comment – no decision on notification

Reeves J noted that:

- this case required the court to 'review the Act in some detail and … grapple with its many novelties, complexities and idiosyncrasies'; and
- 'in this statutory environment, any exercise in construction is fraught with difficulty and it is not always possible to achieve an entirely satisfactory result'—at [1].

This is an entirely apposite comment. The NTA is densely populated with interrelated provisions, particularly in relation to ILUAs.

Circular reasoning?
With respect, the reasoning applied appears to be circular. The general purpose of the area agreement provisions (as described in *Murray*) relates to the process set up for *registration* of ILUAs. It does not provide support for the view that *notice* must be given of any agreement submitted for registration regardless of whether or not it is an ILUA.

Parliament's intent
It seems unlikely Parliament intended notice must be given of an agreement that is clearly not an ILUA given the expense involved. Yet this decision means the Registrar is obliged to do so even if the agreement in question could never be registered. Reeves J supported this conclusion by pointing out that the ILUA registration process concludes with an express requirement for a decision as to whether or not to register the agreement (see s. 24CJ). This was said to carry 'an implicit requirement' for a decision as to 'whether the agreement meets all of the prerequisite provisions for an ILUA'. In support, at [27] Reeves J quoted Justice Logan in *Fesl v Delegate of the Native Title Registrar* (2008) 173 FCR 150; [2008] FCA 1469 (*Fesl*, summarised in *Native Title Hot Spots* Issue 29) at [39]:

> The only decision which falls to the Registrar ... to make under Subdiv C of Div 3 of Pt 2 ... which has the requisite quality of statutory provision and affectation of legal rights to make it a "decision" for the purposes of the AD(JR) Act is a decision under s 24CJ as to whether or not to register an agreement on the Register.

However, Reeves J did not note that Logan J also found in *Fesl* at [85] that:

> [T]he Delegate was perfectly entitled, as a matter of good public administration, to make a pre-notification assessment of whether the agreement presented with a registration application was indeed an ILUA. There is obvious good sense in not progressing an application to the notification stage if it does not relate to what is truly an ILUA.

Therefore, there is a difference of opinion expressed in these two decisions, albeit that Logan J's comments are obiter dicta.

Registration conditions
Reeves J noted the intersection between ss. 24CD, 24CH(2)(d)(ii) and 24CL(2). While s. 24CL was not relevant (because, in this case, the application for registration of the agreement was certified by QSNTS), his Honour considered s. 24CH 'has to be construed by reference to the Act as a whole', taking into account 'a range of circumstances in which the provisions may apply'—at [29].

Sections 24CH and 24CL (which relate to applications for registration that are not certified) set out a process that allows persons claiming to hold native title in relation to any part of the

agreement area to make a claimant application pursuant to ss. 13 and 61(1) over the relevant area (the new claim). If the new claim is made in time and eventually registered, it can either block registration of the area agreement or give rise to a requirement that the RNTC for the new claim be made a party to that agreement—see s. 24CL(2)(b). This led Reeves J to draw the following conclusions:

> It is ... possible ... that a registered native title claimant – one of the persons specified in s. 24CD(2)(a) .... – may come into existence after an agreement is made and, more importantly, in response to a notice under s 24CH. It follows that it would be premature ... for the Registrar, before giving notice ... and, therefore, before ascertaining whether any more registered native title claimants may come into existence in response to that notice, to decide whether or not all of the persons specified in s 24CD are parties to the agreement—at [31].

However, with respect, ss. 24CL and 24CK indicate the opposite is correct for the following reasons.

Among other things, s. 24CD requires that all RNTCs and all Registered Native Title Bodies Corporate (RNTBsC) in relation to any of the area covered by the agreement must be parties to the agreement.

The second condition for registration of an area agreement where the application for its registration is certified - see s. 24CK(3) - is that '*when the Registrar proposes to register the agreement*, there is a [RNTBC] ... in relation to any of the land or waters in the area covered by the agreement, *that body corporate* is a party to the agreement'. There is no mention of RNTCs having to be parties to the agreement for this condition to be met.

The first condition for registration of an area agreement that is *not* certified - see s. 24CL(2) - is that *any person* who is *at the end of the notice period* a RNTC or a RNTBC must be a party to the agreement. In addition, where a *claimant application* is *made before the end of the notice period* and subsequently registered in accordance with s. 24CL(2)(b), the *RNTC must also be a party to the agreement* before it can be registered. So, where a claimant application is made *after the end of the notice period* but registered *before the ILUA registration decision* is made, *the RNTC need not be a party* for the agreement to be registered.

It is clear that ss. 24CK(3) and 24CL(2) impose conditions that are *contrary to the requirements of s. 24CD*. Neither of those conditions require all RNTCs and all RNTBsC in relation to the agreement area to be parties to the agreement *at the time the registration decision is made*. If read as an integrated set of provisions, all of which are operative, it seems Parliament's intention was:

- compliance with s. 24CD was required prior to notification being given under s. 24CH;
- after the notification day, the conditions in ss. 24CK(3) or 24CL(2) would apply (as the case requires) *instead of* s. 24CD.

If this is correct, then it is contrary to Reeve's J decision.

The construction of s. 24CD

In this case, there was a registered claimant application over the entire agreement area and so the 'native title group' for the purposes of s. 24CD consisted of that RNTC.

His Honour identified the following questions as arising from the parties' submissions. First, according to ss. 24CD(1) and (2), which of the following must be a party, or parties, to the agreement:

- the RNTC as 'a collective entity'; or
- all of the individual persons who comprise the RNTC as defined in s. 253?

Second, must those who are specified to be 'mandatory' parties under s. 24CD consent to being made parties to the agreement?

In construing s. 24CD, Reeves J found it convenient to begin by 'considering its statutory context' and then considering 'its general and particular purpose', concluding that:

> [T]he ILUA process ... is intended to achieve a balance between allowing future acts to be validated, so as to provide certainty for the broader Australian community, but at the same time, ensuring that those who hold, or claim to hold, native title in the land and waters affected by such future acts, agree to them being undertaken and, if they do, to obtain a corresponding benefit from so agreeing—at [59].

The court must 'adopt a construction' of the ILUA provisions that served to 'facilitate that process'—at [61].

Purpose of s. 24CD – an aid to creating a contractual relationship

Reeves J noted that:

- once registered, an ILUA creates a contract between the parties (assuming one does not already exist) which binds persons who hold native title to the agreement area whether or not they are parties to the agreement;
- native title rights and interests are special in nature and are often held by a large unincorporated group with fluctuating membership;
- the 'particular purpose of s 24CD lies' in overcoming the difficulty of contracting with such a group—at [66] to [69].

RNTC not constituted as a legal person

In this case, the RNTC was a group of nine persons. After considering a number of cases and the provisions of the NTA (including the definition of registered native title claimant in s. 253), his Honour concluded that the RNTC, in such cases, had probably not been constituted as a legal person under the NTA—at [71] to [75].

'All' persons in the 'native title group'

Subsection 24CD(1) states that: 'All persons in the native title group ... in relation to the area must be parties to the agreement'. In this case, the 'native title group' was one RNTC comprised of nine persons. In these circumstances, his Honour did not think 'all' could be construed to refer to the individuals who comprise the RNTC but, instead, that the definition of the expression RNTC in s. 253 'performs the role of defining who, or what, constitutes a registered native title claimant for the purposes of it becoming a party to the ILUA'—at [79].

All 'persons' in the native title group
In relation to the definition of 'person' in the *Acts Interpretation Act 1901* (Cwlth), Reeves J found that 'a contrary intention appears' in s. 24CD(1), i.e. it 'must be construed to refer to those persons or entities described in s 24CD(2) and (3) [as the native title group], whether or not one or more of them is a legal person'. Thus, despite the RNTC not being a 'legal' person, it is the 'person' who must be a party to the area agreement—at [82].

Meaning of RNTC
Unless a contrary intention appears, 'registered native title claimant' is defined in s. 253 to mean: 'A person or persons whose name or names appear [sic] in an entry in the Register of Native Title Claims as the applicant'.

Reeves J found that 'the reference to the word "*applicant*"' in s. 253 does not adopt 'the definition of the expression "*applicant*" in ss 253 and 61(2) for the purposes of defining the expression' RNTC. The reasons for doing so were that the s. 253 definition:

- did not use the word 'all' (i.e. did not say 'all persons whose names appear etc.') as did ss. 24CD(1) and (2)(a), both of which refer to 'all' RNTCs and RNTBsC;
- used 'a' person or persons, rather than the 'more specific' word 'the' and so was to be construed to mean 'one or more (but not necessarily all) of the persons who are named in the entry on the Register may comprise the registered native title claimant';
- referred to 'the name or names of persons appearing in an entry on the Register as the applicant'; and
- since the only part of an entry on the Register that mentions 'the applicant' is s. 186(1)(d), which requires the name and address for service of the applicant to be entered, 'this must be the part of the entry that is being referred to'—at [83].

Conclusions on ss. 24CD(1) and (2)
His Honour concluded that:

- each RNTC 'may be made a party to an area agreement by naming one or more ... of the persons named in that part of the entry in the Register of Native Title Claims which identifies the name and address for service of the applicant', i.e. s 186(1)(d);
- these persons then 'act as representative parties for the native title contracting group to allow that group to enter into the ILUA', with their role being 'limited' to being named as a representative party—at [84].

It was found that:

> [T]he specified party or parties under ss 24CD(1) and (2), in this case, was [sic] not the RNTC, as a collective entity, because it is not a legal person, and nor was it all the individuals who comprise the RNTC. Instead … it was *one or more* of the persons *named in the relevant entry* in the Register of Native Title Claims *acting in their capacity as representative parties* to the ILUA—at [85], emphasis added.

The consequences of this conclusion
In summary, his Honour considered that the consequences of this decision include:

- there is no requirement for the persons named on the Register as the applicant to act collectively or unanimously because 'there is no purpose to be served by them acting jointly, or otherwise';

- their only role is 'to be named as representative parties as a statutory mechanism or device to provide a means by which the native title contracting group can enter into an ILUA';
- no veto is created because a member of the RNTC group will be unable to frustrate the will of the 'native title contracting group';
- the 'representative party' under s. 24CD has no role in assenting to, signing or consenting to be a party to an ILUA;
- the group of persons who hold or may hold native title to the relevant area are the 'native title contracting party' or the 'principal indigenous contracting group' under an ILUA;
- this is the group that must authorise the making of the agreement pursuant to s. 251A;
- no privity of contract is created between the members of the RNTC and the person or persons wishing to carry out the future acts on the agreement area;
- rather, there is privity of contract between those who want to do the future acts and the native title contracting group;
- 'no purpose would be served' by creating privity of contract between those wishing to carry out future acts and the members of the RNTC because the RNTC will already be members of the principal (the native title contracting group), i.e. s. 61(1) requires that the persons who comprise the applicant and, therefore, the RNTC, must be members of the native title claim group;
- it is the native title contracting group that must 'assent' to the agreement, not the members of the RNTC;
- none of the members of the RNTC need to sign the agreement or consent to being a party to it because s. 251A provides a specific identification and authorisation processes for the making of the agreement;
- the use of the word 'must' in s. 24CD(1) (i.e. 'All persons in the native title group ... *must* be parties to the agreement) is an 'obligation or a necessity' that the native title group be a party—at [88], [95], [99] to [103], [108].

Authorisation to make the agreement

His Honour was of the view that s. 251A provided for a 'wider, sanctioning or approving, form of authorisation'—at [113].

The chapeau ('hat' or first paragraph) to s. 251A states that:

> For the purposes of this Act, persons holding native title in relation to land or waters in the area covered by an indigenous land use agreement authorise the making of the agreement if: … .

Reeves J was of the view that:

> [T]he words "*making of the agreement*" [in s. 251A] encompass matters such as the native title contracting group deciding: to accept the terms of the agreement; to communicate that acceptance to the other party to the agreement; and how it wishes to indicate its assent to the agreement. This means it could do the latter by authorising someone, eg a solicitor, to sign the agreement on its behalf or, as here, by authorising all, or some, of the members of the RNTC to do that. Alternatively ... it could elect... to rely ... upon the certificate of the authorised representative body … to the effect that it had properly authorised the making of the agreement under s 251A … . Conversely, for these reasons, I do not consider the words "*making of the agreement*" ... can be construed as providing any authority to the members of a registered native title claimant who are named as representative parties under s 24CD, to perform any wider role in relation to an ILUA—at [113].

His Honour provides further support for this view by distinguishing the role of the RNTC and the applicant under the various provisions of the NTA—at [114] to [117].

Decision
It was found that:
- the RNTC must be a party to the agreement;
- this could be achieved by naming one or more of those whose names and addresses appear on the Register as the applicant;
- those so named do not need to assent to, or sign, or consent to becoming a party to, the agreement;
- therefore, the agreement in this case met the requirements of s. 24CD.

Reeves J set aside that part of the delegate's decision dealing with the requirements of ss. 24CD(1) and 24CD(2)(a). A declaration was made that the agreement complied with those provisions by naming as parties to the agreement the nine members of the RNTC. The court also ordered that the delegate give notice of the ILUA in accordance with s. 24CH and otherwise deal with the application to register the agreement according to law.

Comment
The ILUA provisions considered in this case are ambiguous. Those who drafted them may not have given sufficient consideration to the issues that arise where multiple persons constitute the applicant (and are named on the Register, if the claim is registered). However (and with respect), his Honour's analysis appears to overlook provisions of the NTA suggesting Parliament's intent was that the RNTC have a less passive role than that proposed in this decision.

Operation of s. 24EA - is privity relevant?
In looking at the role of the 'native title group' as defined in s. 24CD, his Honour noted that s. 24EA(1)(b) introduces a concept 'quite foreign to the common law', namely that 'certain indigenous persons are bound by the ILUA even though they are not parties to it'. This is 'contrary to common law principles such as privity of contract and the voluntary assumption of contractual obligations'—at [63].

However, having noted this, Reeves J then considered the issue of privity of contract, finding that:
- privity is created between the native title contracting group and the person or persons wishing to carry out the future acts on the land concerned (the proponent);
- no privity of contract is created between the proponent and 'the members of the registered native title claimants who are acting as representative parties' under s. 24CD—at [97] to [98]

In doing so, his Honour accepted scenario (a) and rejected scenario (b). Those scenarios are:
- by creating privity of contract between the third party [the members of the RNTC acting as representative parties] and his principal [the native title contracting group] without himself becoming a party to the contract;
- by creating privity of contract between the third party and his principal, whilst also himself becoming a party to the contract.

His Honour says that paragraph (b) (among others) is:

> [Q]uite inapposite in relation to an ILUA because no purpose would be served by creating privity of contract between the persons or persons wishing to carry out the future acts on the land concerned and the members of the registered native title claimant as representative parties. This is so because they will already be members of the principal.

If his Honour is correct, i.e. scenario (a) applies to cases where the native title group is constituted by an agent RNTBC (i.e. a BCA) or includes an agent RNTBC for some of the area, or where the NTRB for the area is the only person in the native title group (i.e. an AA or an APA), they would not be parties to the agreement because those entities will not be 'members of the principal'. With respect, scenario (a) cannot apply in those cases because s. 24CD(1) *requires* those persons in the 'native title group' to be parties to the agreement. Further, and more importantly, s. 24EA(1)(b) provides that, while registered, the ILUA:

> [H]as effect, in addition to any effect it may have apart from this subsection, *as if* ... all the persons holding native title in relation to ... the area covered by the agreement, who are not already parties to the agreement, *were bound* by the agreement *in the same way as* the *registered native title bodies corporate* [for a BCA], or *the native title group* [for an AA or an APA], as the case may be' (emphasis added).

Thus, for this key provision to operate the RNTC (which, in this case, is the native title group) must be a party to the agreement and the RNTC must be bound by it 'in the same way' as it is intended native title holders who are not parties to the agreement would be bound. Similarly, where the native title group includes an agent RNTBC or NTRB, they must be parties to the agreement and be bound by it in same the way it is intended to bind the native title holders who are not parties to the agreement.

With respect, if one of the scenarios noted earlier is applicable, it is scenario (b). However, the better view seems to be that none of the scenarios mentioned by his Honour need to be posed in order to interpret the legislative scheme. If the native title group is a party to the agreement as required, s. 24EA(1)(b) is the 'radical' provision that will bind all native title holders for the area who are not parties to the agreement 'in the same way' as the 'native title group' is bound. This, with respect, appears to more accurately reflect what Parliament intended.

Meaning of RNTC

Reeves J compared the 'entity' described in the definition of RNTC in s. 253 with the 'applicant' under s. 61. However, the applicant and the RNTC relate to different things. A RNTC is an entity 'in relation to land or waters'. There may be a number of RNTCs in relation to any particular area (e.g. if it is shared, or contested, country). This is recognised in the use of 'a' before 'person or persons' in the definition of RNTC. However, there can only be one 'applicant' in relation to any particular claimant application. Further, it is not surprising that the definition of RNTC in s. 253 refers to an entry on the Register rather than to s. 61(2) or the 'applicant from time to time'. Not every applicant is a RNTC, i.e. only an applicant with a registered claim is a RNTC. Therefore, the definition of RNTC can (and, it is suggested, should) be interpreted to mean all those persons named in an entry on the Register.

The 'native title group'

The role of the 'native title group' as defined in ss. 24CD(2) and (3) (which was the RNTC in this case) seems to be more than to be named as a party (as found) given that s. 24CD(7) provides that:

> If there are any representative Aboriginal/Torres Strait Islander bodies for any of the area and none of them is proposed to be a party to the agreement, a person in *the native title group*, before entering into the agreement:
>
> (a) must inform at least one of the representative Aboriginal/Torres Islander bodies of *its intention* to enter into the agreement; and
>
> (b) may consult any such representative Aboriginal/Torres Strait Islander bodies about the agreement (emphasis added).

It seems Parliament intended the 'native title group' (in this case, the RNTC) would have an active role and that it was this group (not the native title contracting group) that would 'enter into' the agreement. The 'contracting group' do, of course, authorise the making of the agreement. However, when s. 24CD(7) is read with s. 251A, it seems Parliament intended the 'native title group' would be authorised to make the agreement on behalf of the relevant contracting group and would enter into the agreement on the contracting group's behalf.

Multiple contracting groups

Some difficulties in interpreting s. 251A stem from the fact that there may be multiple groups who claim to hold native title to an area agreement ILUA. For example, the relevant area may be:

- in part, subject to a determination recognising the existence of native title with a RNTBC in place;
- in part, subject to a registered claimant application made by an unrelated native title group with a RNTC;
- in part, have neither a RNTBC nor a RNTC and a different group claims to hold native title to the area but has not made a claimant application over the area.

In this example, there may be three native title contracting groups, each of which would (respectively) have a different mandatory party, i.e. the RNTBC, the RNTC and (say) the representative body to enter into the area agreement on their behalf: see s. 24CD(2). Alternatively, there may be a single contracting group made up of subgroups. However, it seems all three (i.e. the RNTBC, the RNTC and the representative body) would be part of the 'native title group' for the purposes of s. 24CD.

'Deeming' provision

His Honour appears to accept that s. 24CD operates as a kind of deeming provision, i.e. it makes the 'native title group' a party to an area agreement whether or not entities and individuals that constitute that group in any particular case agree to this.

However, when s. 24CD is read with ss. 24CA to 24CE, these are 'requirements that must be met for an agreement to be an [area agreement] ILUA' (see table 7.1 in [7.10] of the Explanatory Memorandum to the Native Title Amendment Bill 1997). For example, s. 24CB says the agreement 'must be about' one or more specified matters. The use of 'must' cannot mean that one could simply 'deem' an agreement to be about at least one of the requisite subject matters if, in fact, it was not. Further, the use of 'may' in ss. 24CD(5) and (6) (i.e. the Commonwealth, State or

Territory '*may* … be a party') indicates clearly that 'must' should *not* be read to require that only the persons in the native title group may be parties (refer to table 7.1 of the EM).

However, his Honour's findings indicate that a RNTBC, a representative body (or s. 203FE funded body) can be made a party to an ILUA without their consent which, as noted, appears contrary to the intent of s. 24EA. If the native title group (or, for a Body Corporate Agreement, the RNTBC) is not really bound by the terms of the agreement, then nor are native title holders who are not already parties to the agreement.

Further, a RNTBC must comply with Reg 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* before making a 'native title decision', i.e. consult with, and obtain the consent of, the affected native title holders before surrendering native title or doing, or agreeing to do, any other act that would affect the native title rights or interests of the common law holders of native title. Therefore, a RNTBC cannot simply be 'deemed' to be a party to the agreement by naming it in the agreement unless the view is taken that making it a party to an ILUA does not involve the RNTBC in the making of a 'native title decision'.

In relation to alternative procedure agreements (see Pt 2, Div 3, Subdiv D of the NTA), there is no authorisation process and the consent of the native title holders is not required before the representative body enters into an ILUA on behalf of its constituents. However, it must comply with s. 203BH. His Honour's reasoning in relation to the 'native title group' being 'deemed' to be a party, and the limited role of that group, does not appear to apply at all to alternative procedure agreements.

No necessary veto or frustration if alternative view is taken

His Honour was concerned that an individual member of the RNTC could frustrate or veto the making of an ILUA by refusing to sign it. However, with respect, using such emotive language may cloud the issue. There is no veto or 'frustration'. A person who is a member of the RNTC acting outside the scope of their authority in an ILUA context can be removed via an order made under s. 66B(2). Depending upon the terms of the original authorisation for the claimant application, this may not require a further authorisation meeting. In any case, it could be dealt with as part of the ILUA authorisation process if it is considered beforehand.

Right to negotiate provisions

The passive role of the RNTC in the ILUA provisions, as found by Reeves J, is directly opposed to the role the RNTC plays in the right to negotiate provisions of the NTA. Pursuant to ss. 29, 30, 31, 32 and 75, the RNTC is a 'native title party'. As a result, the Tribunal has found Reeves J's views 'are relevant only to the execution and registration of ILUAs' and do not affect the Tribunal's decision-making role under the right to negotiate provisions: *Queensland Gas Company Limited/Iman People #2/Queensland* [2010] NNTTA 210 at [44], Deputy President Sosso. It should also be noted that, if his Honour's interpretation of the definition of RNTC is correct, competing persons within the RNTC group may put different positions to the grantee and government parties in negotiations and seek separate representation before the Tribunal. This has occurred previously and the Tribunal has noted it is undesirable: see, e.g. *Coalpac Pty Ltd/New South Wales/North Eastern Wiradjuri People* [2009] NNTTA 133 at [57] to [60].