

Prescribed body corporate determination — Kiwirrkurra

***Brown v Western Australia (No 2)* [2003] FCA 556**

French J, 4 June 2003

Issue

The Federal Court considered whether the requirements of the *Native Title Act 1993* (Cwlth) (NTA) and the *Native Title (Prescribed Body Corporate) Regulations 1999* (the Regulations) were met in this case.

Background

Section 55 of the NTA requires the court, at the time of determining that native title exists, to make a determination under either s. 56 (which deals with holding the native title on trust by a prescribed body corporate) or s. 57 (which deals with non-trust functions of prescribed bodies corporate). Section 59 provides for making regulations to prescribe the appropriate body corporate (see reg. 4 of the Regulations).

Following a consent determination recognising that the Kiwirrkurra People were the common law holders of native title to the determination area, the Tjamu Tjamu Aboriginal Corporation (Tjamu Tjamu) was nominated as the prescribed body corporate to hold native title on trust for the common law holders—see s. 56(2)(a).

The material before the court included:

- affidavit evidence from Jimmy Brown deposing (among other things) to the fact that he was authorised by the common law holders to nominate Tjamu Tjamu and describing the manner in which he came to be so authorised;
- a document evidencing the written consent of Tjamu Tjamu to act as trustee, as required by s. 56(2)(a);
- the certificate of incorporation of Tjamu Tjamu under the *Aboriginal Councils and Associations Act 1976* (Cwlth), the method of incorporation prescribed by the Regulations;
- the rules of Tjamu Tjamu;
- affidavit evidence from the native title holders' legal representative relating to meetings held to finalise the rules of the proposed corporation and to decide that the native title should be held in trust by Tjamu Tjamu. (The evidence was that the motion proposing Tjamu Tjamu act as trustee for the common law holders was carried unanimously.)

Membership clause

The membership clause of Tjamu Tjamu's Rules of Association provided that 'all adult Traditional Owners shall be eligible to be members of the Association'. Rule 8,

which dealt with eligibility for membership, defined a traditional owner ‘in relation to Kiwirrkurra Land’ as:

A Kiwirrkurra person who, in accordance with Aboriginal law and tradition, has social, economic and spiritual affiliations with, and responsibilities for, the Kiwirrkurra Land or any part of them. A reference to a traditional owner *includes* a reference to a native title holder (emphasis added).

Paragraphs 4(2)(a) and (c) of the Regulations limit the membership of a prescribed body corporate to those who are determined to be native title holders.

Decision

Justice French noted that the definition of ‘traditional owner’ in Rule 8 could be read as covering a class wider than that of the native title holders the subject of the determination. However, given the linkage of membership to social, economic and spiritual affiliation with, and responsibilities for, the Kiwirrkurra land in accordance with Aboriginal law and tradition, his Honour was satisfied that there was no case in which a traditional owner would be other than a native title holder as contemplated by the determination—[12].

To put the matter beyond doubt, French J recommended the definition of ‘traditional owner’ be amended to coincide with the class of native title holders in the determination. Notwithstanding this suggested amendment, French J was satisfied that Tjamu Tjamu was a body in respect of which he could make a determination under s. 56—at [12] to [13].