

# Amendment to documents post-hearing

## *Neowarra v Western Australia* [2003] FCA 1401

Sundberg J, 8 December 2003

### Issue

The question in this case was whether the applicant should be granted leave to amend a statement of issues, facts and contentions after the conclusion of evidence in the case so as to specifically break general rights claimed into component parts.

### Background

This decision was handed down in conjunction with the decision in *Neowarra v Western Australia* [2003] FCA 1402, summarised in *Native Title Hot Spots* [Issue 8](#).

The applicant's proposed motion to amend was heard during closing submissions. The respondent disputed:

- a list of facts said to support the contention that the laws acknowledged and customs observed are traditional, adding a list of particulars of the applicants' 'distinctive, shared body of beliefs, social and cultural traits and affinities that bind them together and differentiate them from neighbouring regions';
- the proposal to enlarge a paragraph already noting the claimed rights have 'internal dimensions' to specify that they include rights and interests as between members of the claim group in relation to various places, and that particular rights and interests are encapsulated within the generality of the right described;
- the proposal to add new paragraphs further enlarging on those 'internal dimensions', by referring to subgroups ('dambun' and moieties) and specific parts and places on the claim area; and
- various other amendments consequential to the above.

The respondents argued these amendments were a belated attempt to introduce a new basis for the claim. The Wanjina-Wunggurr community was an anthropological construct and the claim should be cast at a language group or dambun level. The applicants had consistently rejected this. Justice Sundberg noted the case for the applicants was opened and argued from the position of making a communal or regional claim and not a language-based or dambun-based claim—at [6].

The applicants contended they were not so much putting an alternative case as 'uncovering and exposing all the detail which your Honour will need' to properly deal with the requirements of ss. 223(1)(c) and 225 of the NTA following the High Court's rulings on extinguishment in *Western Australia v Ward* [2002] HCA 28—at [9].

Sundberg J noted that:

- the proposed amendments did not introduce any particulars that had not been included in the experts' report or applicants' outline of their case; and

- the notion of 'internal dimensions' of native title was not new. The proposed amendments merely particularised those internal dimensions—at [3], [10], [11], [14] and [15].

### **The court's reasoning**

In summarising the rationale for his ruling, his Honour noted that:

- the leave to make the amendments sought in the motion enabled the applicants to unbundle the general right of possession, occupation, use and enjoyment of the application area as against the whole world into its component parts, so that they will not be at risk of losing the general right in the course of the extinguishment enquiry and having no other more specific rights to rely on; and
- the ruling did not enable the applicant to mount a case that any native title it established was held by anyone other than the members of the Wanjina-Wunggurr community, the native title claim group—at [21].

### **Decision**

Leave was granted to further amend the amended statement in accordance with the applicants' motion, save for certain minor matters.