



FEDERAL COURT OF AUSTRALIA

**NATIVE TITLE USER GROUP
9 JULY 2008
ADELAIDE**

RE-THINKING THE PROCEDURAL FRAMEWORK

JUSTICE JOHN MANSFIELD

My task is a much more modest one. It is to bring together some practical threads of our group discussion this morning, to weave them into the very significant comments of our presenters, and to add the colour from all our experiences of our involvement in cases under the *Native Title Act 1993* (Cth). I am also going to add some comments of my own. I emphasize that they are my own views and not those of the Court or of any other judges of the Court. I would like to add my appreciation to those who have participated so generously, and (if I may presume) so fruitfully in today's meeting.

The positive and co-operative approach of the participants, the enthusiasm with which you have confronted the issues now facing us all – claimant groups and their representatives, the States and Territories and their representatives, other respondent groups and their representatives, and members and registrars of the Court and of the Tribunal – suggest the possibility of a watershed in the process of resolving claims under the Act has been reached.

The time is right for a prospective view of where we might go with such cases in the future. We have all now had many years experience with cases under the Act. You are all experts in the field. There have been a number of seminal decisions, both from the High Court and from the Full Court. Most issues of principle, and of the proper construction of the Act, except perhaps for some of the more subtle issues around extinguishment, have been resolved.

Probably, just as importantly, if not more importantly, I think we have come to realise – or, if I were to speak personally, I have come to realise – that the factual questions arising in claims under the Act are generally not that difficult. True, the facts to be determined are complex. And, true, there may be difficulties of proof. But, to a degree, I think we – or at least I – have been seduced by the apparent (or actual) complexity of the Act and by the apparent impact of the High Court decisions in *Ward*, *Yarmirr* and *Yorta Yorta* on the means of proof of the elements specified in the Act.

But ultimately, in almost all cases now, the issues will be simply issues of fact.

The position I think we should recognise is that, firstly there are now no significant impediments to rapid resolution of most claims, other than the availability of the necessary resources to effect the outcomes. The resources I refer to include the physical capacity of the representative bodies and their advisers and of respondent parties and their advisers to address claims, the availability of anthropologists and other experts, and the financial resources to enable that work to be done. I am brave enough to say that the Court presently has the resources to accommodate the parties' expectations of it in terms of hearing claims or making s 87 consent determinations as required. If I read the tea leaves, they might suggest the Court is seen as pushing a little too hard to bring matters to a conclusion.

How we should progress is my second general theme. It is that our approach to resolution of most claims may not now involve the intense expectations, and consequential resource demands which we have expected and applied up to now.

To explain that, I want to look separately at the issues of proof of native title and proof of extinguishment.

Native Title: There are really five factual issues which generally arise. They are obviously inter-related. They are:

- (1) the existence of a native title holding society with traditional laws and customs at sovereignty;
- (2) the continuance of that society with its laws and customs;
- (3) a current native title holding society still practising/respecting those laws and customs;
- (4) at a practical level, the authorisation by the claim group of the claimants to bring the claim, and sometimes associated with that question the identification of the correct claim group (merged groups etc.); and
- (5) the nature and extent of the native title rights which should be granted.

In respect of each of those matters, I question the general need now for extensive anthropological research and debate in every case, or perhaps even in most cases. Should we not simply treat each claim in a routine manner like other litigation, rather than a "special" case because it is brought under the Act?

Let me look at the five factual elements.

I would be surprised if any government in Australia disputed that, at sovereignty, there was not a community of Aboriginal persons occupying that part or parts of the land the subject of a claim, and which did so in accordance with traditional laws and customs. It is almost invariable practice to acknowledge at the commencement of any public speech being on the land of the particular local indigenous community. Recently, in the dockets for which I am or have been responsible, I have raised that question with the respondent parties because it seems to me that an acknowledgment of that starting point would generally be uncontentious.

The same may be broadly said of each of those five conclusionary factual issues. In particular, is there now generally any foundation for significant dispute in areas remote from densely populated areas that there has been continuity of the native title holding society and of its practices up to the present time, albeit attenuated by more contemporary community standards?

Of course, where there are areas of real and substantial dispute, let us identify and address them. But should not the Court's processes be aimed at identifying any real and genuine disputes?

Let me look at ways the Court, with the co-operation of the parties, might support that identification of any real issues.

One example comes from the Northern Territory, with which I have had a fair acquaintance. It now has about 200 outstanding claims under the Act, and previously had many more. Many of those claims were "polygon" claims – claims by a claimant group in response to a proposed future act and covering only the area of the proposed future act. In consultation with the claimants, the NLC, the CLC, the NT and other respondent groups, the claims were grouped:

- Pastoral claims
- Northern Town claims
- Darwin matters
- Offshore or water claims
- Compensation claims
- Central matters

And "test" cases were identified for each of those groups. The polygons were also subgrouped by identifying common claimants. Those "test" cases have now largely been heard: Newcastle Waters, Timber Creek, Larrakia and Blue Mud Bay. Most future cases will turn on their facts.

The Court has provisionally suggested the polygon claims which should be heard together. In respect of those claims, it is also in the process of proposing to the parties (the applicants first, and then the respondents) a form of possible determination adapted from the test case for pastoral claims. It has raised with the respondents, in particular the Northern Territory, the extent to which it actually disputes the existence of a native title holding society at settlement, and the relationship of the present claim group with that native title holding group. The responses of the parties to date suggests that, at least in a number of instances, the process may lead to a consent determination without the extensive anthropological research required for the earlier cases.

Another option is by the "pleading" process. It is a way the Court can work towards the same result. The application under s 61 requires extensive information. It is in the nature of a statement of claim. If it is not adequate for that purpose, it is often tidied up by a requirement for Points of Claim. The response generally is found in Points of Defence. The "do not know and cannot admit" pleading in a defence is now out of favour. Order 11 r 10 of the Federal Court Rules requires a party to plead specifically any matter of fact or point of law that the pleading party alleges makes a claim (or defence) of the other party not maintainable, or which might take the other party by surprise, or which raises new

issues of fact. I suggest that generally the respondent parties in the first place should generally be expected to identify why they dispute that the present claim group is not the same native title holding society as that which first enjoyed native title rights at sovereignty. The proof of that fact in a very complex and formal way is very difficult and expensive but it is now hard to see the benefits of such a dispute. Again, is it not unreasonable to expect that a State or Territory respondent in particular should have recourse to anthropological advice, having regard to published literature, to see where the areas of real dispute are or may be. Once those areas of real dispute are identified, the Case Management Conference contemplated by O 10 r 1 of the Rules should occur, to consider how best and most efficiently to address those issues.

There have been disputes about the integrity of the putative claim group where the State or Territory has said that an alternative or more confined group was the relevant claim group. Such disputes may continue to arise. But, so long as there are no competing claimants asserting native title rights, I ask rhetorically why a respondent would wish to ventilate such matters. Let us remember that s 66 requires the Tribunal to notify the Commonwealth and the relevant State or Territory, the relevant representative body; potentially affected competing claimants and any registered native title body corporate; any potentially affected person holding an interest in the land; and any other person whose interests may be affected by the proposed determination. It must also advertise the application publicly. That is an adequate means of “service” of the claim. Section 84 then establishes a process for any such persons to become parties. Competing native title claimants have the right to become claimants. If, following that process, there are no competing claimants, why should the other respondents be concerned?

As a matter of interest, in South Australia we have had an extensive series of overlapping claims, to the extent that they became described as a “daisy-chain”. Over time, I have requested the Tribunal in its mediations to endeavour to resolve those overlaps. The Tribunal has successfully achieved that result in most instances. Its mediation processes are ongoing. I mention that because, clearly where there are overlapping or competing claimants, there is a need to confront and to endeavour to resolve such issues.

Experience and the decided cases also suggest that, in many cases, there should not be much scope for disputes as to the nature of claimed and sustainable native title rights and interests. As I have said, in South Australia and in the Northern Territory the Court has adopted the process of suggesting the likely native title rights and interests, based upon other decisions. It has given the applicants the opportunity to indicate that their claims are more extensive or less extensive, and then the respondents the opportunity to respond. The process to date seems to suggest that there is not likely to be much disagreement in many cases.

Hence, subject to particular issues of extinguishment, why should there not be in many cases a progressive and expeditious process of consent determinations based upon the common acknowledgment of the parties.

The issue of extinguishment presents slightly different issues. Extinguishment is a matter to be raised by respondents. For the reasons I have just mentioned, in many cases the claimants will have adopted a bundle of native title rights and interests as their claim which reflects what has been granted in other like cases. It takes account of generic extinguishment. Short of some special circumstances, the respondents are likely to

acknowledge them. There will be no need for extensive extinguishment material to be prepared and analysed.

Where extinguishment remains an issue, generally speaking, respondents are seeking to protect their own interests, and in the case of States and Territories, the interests of their respective communities. I raise for consideration whether, in the first place, it is necessary to consider extinguishment beyond current tenure extinguishment. Of course, there may be some extinguishing events which occurred subsequent to 1975. In such cases, it may be significant to consider tenure at 1975. If that equates to the current tenure, then extinguishment so as to protect existing interests and community interests may be sufficiently addressed. I raise for consideration whether the community interests or present interests of tenure holders require the expansive extinguishment exercise which has been embarked upon in previous cases. That is especially so in the context of claims which generally now are for non-exclusive native title rights and interests which are relatively straightforward and seen as less controversial than previously. My point is that respondents need to consider the extent to which they need to go beyond that exposure of extinguishing events in many instances.

Of course, I acknowledge that any township claims, or claims beyond those over land with rural or pastoral interests, may involve more complex extinguishment issues. I will turn to that shortly. However, that is not per se a reason not to consider the process.

There is room in a Case Management Conference for a lateral approach. In one claim in South Australia involving land traversed by the River Murray, a number of persons became respondents because they feared that their water rights might be adversely affected. Directions were made that they should more explicitly identify what rights they were concerned about and how they might be affected. When that particularity was given, the claimant group, having regard to the legislation under which those rights were granted, acknowledged that such native title rights and interests as existed would not impinge upon those water rights. Those respondents ceased to participate in the proceeding to that extent.

Of course, each case must be considered separately but I hope that, by the use of the management tools of the case management conference and the ability to focus on the really contentious issues, resolution of many outstanding claims may now be relatively straightforward.

Let me say something about 2 87 consent determinations.

I appreciate that there is a need for the Court to be satisfied of the existence of facts upon which it may make orders, even by consent. In cases under the *Trade Practices Act 1975* (Cth), consent orders are frequently made on the basis of statements of facts agreed to by the parties or asserted by one party and acknowledged by the other. If all parties (including any respondent parties pursuant to s 84) are agreed not just upon a proposed consent determination, but also upon a satisfactory form of agreed facts upon which that consent determination may be made, I am not sure that more should be required. Of course, a determination of native title rights and interests operates in rem. That is why the Tribunal has an extensive notification process for the application, and why s 84 entitles certain persons to become respondent parties. Generally, the claim will be expressed through a representative body upon the basis of some anthropological investigation and information, and one would expect that the principal respondents at least would have decided not to put

in issue such matters after obtaining their own expert advice. It should not be too onerous for the agreed statement of facts to annex relatively brief information from an anthropologist supporting that which reflects the agreement of the parties. As I say, I am not sure that more should be required.

There are three other matters which I wish to mention.

The case management conference is a very flexible tool. It has been used to facilitate the discussions between anthropologists for the parties with a view to identifying the real issues in dispute between them and determining how those areas of dispute may best be resolved. I am sure you are all aware of the Blue Mud Bay case in which that process was successfully adopted. (As a result, many of the steps in proof of the applicants' claims were facilitated, and the evidence focused on particular features of the claimed rights and interests.) The respondent's anthropologist was not satisfied, on the material he had previously seen, that certain specific rights and interests were traditional and continued to be practised. After hearing some evidence from indigenous witnesses, that anthropologist indicated that he was then satisfied of those additional matters. The respondent, having regard to his further advice, then acquiesced in the additional claims, leaving for resolution principally the matter of law as to the extent of native title rights and interests beyond the low water mark. (That is a matter which is presently subject to an appeal to the High Court.) Clearly, that is one way in which the case management conference may usefully facilitate the real identification of issues and provide a focus for determining how those issues can be best determined. There are likely to be others.

The second matter concerns early evidence and preservation of evidence. I have only had experience of preservation evidence. The quality of that evidence, whether favourable or unfavourable to the applicant's case, at least from my observation, has had a significant impact upon the parties identifying the nature and extent of any real dispute, and at least in one instance (I am assured, as the matter is still subject of negotiation) facilitated negotiations towards a consent determination. Where there are significant issues, sometimes the most efficient way to resolve those issues is to informally embark upon the hearing of some early evidence, so that a better appreciation of the strengths of weaknesses of a particular case may be obtained at an early stage. That is another tool in the Court's armour which, in accordance with its case management obligations, it should not lose sight of. To date, that process has been adopted only upon the application of one or other of the parties. Should it be used at the Court's initiative?

Finally, I am mindful of the fact that in many township claims, issues of compensation and other lateral issues are also negotiated. The solution package is often built into an Indigenous Land Use Agreement, executed at the same time as the consent determination. I do not necessarily want to intrude upon the role of the Tribunal. The Court's role and the Tribunal's role are necessarily complementary. But there may be instances where, in the course of the Court's management of a proceeding, the opportunity for a more extensive form of order than the traditional determination of native title rights and interests would be useful, so as to promptly bring all matters surrounding the claim to an end. There may be claims where a lateral solution, as is often embodied in an ILUA, may be a useful adjunct to determination of native title rights and interests. At present, the Court arguably does not have power to make such a broad determination. It may be appropriate to consider amending the *Federal Court of Australia Act 1975* to make it plain that, in such a matter, in addition to making a determination of the native title rights and interests, the Court may

make such compensatory or other orders as the parties may have agreed (whether through the Tribunal or independently of it) to bring all the issues between them to finality. I confess that I have not embarked upon a drafting exercise to reach that end. There may be scope to clarify or expand “the power of the Court” as referred to in ss 86F, 86G and 87.

My conclusion is this. There are tools available to the Court by which, in the light of past experience and decided cases, many native title determination claims under the Act can now much more readily and expeditiously be brought those claims to finality. It is the Court’s responsibility to bring all proceedings before it to completion as expeditiously and as fairly and economically as possible. That depends very much on the attitude of the parties. Will they adopt a robust approach to identifying the real issues? I have every reason to be confident that, with the tools at our collective disposal, the process of resolving many outstanding native title claims will now be quite rapid and will enable the Courts and the parties to focus on those claims where there are outstanding significant issues. I do not think they are likely to be many.