CASE NOTE

THE APPLICATION OF *YORTA YORTA* TO NATIVE TITLE CLAIMS IN THE NORTHERN TERRITORY – THE CITY AND THE OUTBACK

Risk v Northern Territory of Australia [2006] FCA 404: ***Jango v Northern Territory of Australia*** [2006] FCA 318

Authorisation under section 61 of the Native Title Act-proof and section 223 – adoption of land claim evidence – section 44h and exercise of rights-section 47b, disregarding extinguishment and proclamation of towns-'statutory authority' – effect of northern territory pastoral leases-compensation

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On 13 April 2006 Justice Mansfield delivered his decision in the 'Larrakia' native title claim (*Risk v Northern Territory of Australia* [2006] FCA 404) over parts of Darwin and Palmerston. This claim was the first in Australia to proceed to hearing seeking a recognition of native title to areas of land and waters within a capital city.

In his decision, Justice Mansfield found that the Larrakia people did not meet the requirements of section 223 of the *Native Title Act* 1993 (Cth) in that, for various reasons, they had not maintained a system of traditional laws and customs since the date of sovereignty. Accordingly, Justice Mansfield found that he could not make a determination recognising any native title within the claimed area.

Several weeks earlier, on 31 March 2006, Justice Sackville had handed down his decision in the 'Yulara' compensation claim (*Jango v Northern Territory of Australia* [2006] FCA 318), in which compensation had been claimed for the extinguishment of native title over the Town of Yulara in the far south of the Northern Territory.

In that decision, Justice Sackville found that compensation was not payable because members of the compensation claim group had not established that the laws and customs relating to rights and interests in land which were acknowledged and observed by the compensation claim group at the time the extinguishment occurred, were 'traditional'.

1. BACKGROUND

1.1 The Larrakia native title claim – the City

The area covered by the various applications the subject of the Larrakia proceedings was made up of 214 separate areas of land and waters, comprising some 30 km2, encompassing areas of Crown land, coastal waters, beaches, public parks and recreational areas, swamps and mangroves, and parcels of land owned by the Darwin and Palmerston City Councils.

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There were initially three different Applicants who had made the 19 applications which were consolidated to form the subject of the proceedings. The Roman Applicants, who had made one of the applications within the overall claim area, withdrew their claim part way through the proceedings. The remaining applicants were the Larrakia Applicants and the Quall Applicants, who respectively had made 7 and 11 of the applications in the consolidated proceedings. The term Larrakia people encompasses both the Larrakia applicant group and the Quall applicant group.

The Larrakia Applicants pleaded that the Quall applicant group were included within their claim group, but the Quall Applicants asserted that they, and they alone, as a Larrakia clan, were the appropriate claim group for the areas the subject of their applications. This was put on the basis that the Larrakia people were simply a language group, and had lost their culture, but that the clan alone had continued to acknowledge and observe traditional laws and customs.

Each applicant group in the Larrakia claim sought a determination recognising various native title rights and interests over the areas of their respective applications, including claims to exclusive possession in parts of the overall claim area.

Both the Northern Territory Government and the Darwin City Council, as the 'major respondents' in the case, contended throughout the case that neither applicant group had established the existence of any native title rights and interests in the claim area under the *Native Title Act,* and in the alternative, that any rights to be recognised were not exclusive nor as extensive as those sought. Extensive extinguishment evidence, by way of legislative and executive actions (including various tenure documentation and records of the construction and maintenance of public works over a number of years) was also presented by the major respondents.

The operation and application of sections 47A and 47B of the *Native Title Act* were also in dispute amongst the parties. A further issue was whether the applications were properly authorised in accordance with section 251B of the Act as required by section 61.

1.2 Yulara compensation claim – the Outback

The area covered by the Yulara compensation claim was the Town of Yulara, including the Yulara Tourist Village and Connellan Airport.

The members of the compensation claim group were almost exclusively Yankunyjtjatjara or Pitjantjatjara people who claimed to be entitled to compensation because their native title rights and interest had been extinguished by certain 'compensation' acts occurring between 1979 and 1992.The threshold issue, therefore was whether the compensation claim group was able to establish that they held native title when the compensation acts occurred, so as to ground a right to compensation.

It was said by the Yulara applicants that they and their predecessors held native title under the traditional laws and customs on the Western Desert bloc until their native title was extinguished by the compensation acts. On the applicants' case, the date that native title was finally extinguished was March 1994 when the *Validation (Native Title) Act* (NT) came into force.

The principal argument of the Respondents (the Northern Territory and the Commonwealth) was that the Yulara applicants had not established, on the evidence, that the members of the compensation claim group held traditional native title rights and interests at the time of the compensation acts. In particular, the Respondents argued that the applicants had not established

the acknowledgment and observance of the laws and customs pleaded by them. In any event, it was said that the laws and customs pleaded had not been shown to be the traditional laws and customs of the Western Desert for the purposes of section 223 of the *Native Title Act.*

Despite his Honour's ultimate finding that the compensation claim group did not hold native title at the time of the compensation acts, some extinguishment issues were dealt with in the reasons on the contrary assumption that native title had continued to exist to the date of the relevant acts. The main issues considered were: the extent of inconsistency between native title rights and interests and the rights of pastoral lessees; the effect of registration of Crown grants under the Torrens system; whether the construction of public works was invalid to any extent by reason of the *Racial Discrimination Act* 1975 (Cth); and the time when the entitlement to any compensation would have arisen.

2. AUTHORISATION UNDER SECTION 61 OF THE ACT

2.1 The Larrakia native title claim

Prior to the amendment of the *Native Title Act* in 1998, there was no requirement that an application brought on behalf of an applicant group be 'authorised' by that group. However, with the 1998 amendments, any person(s) making a claimant application had to be authorised to do so by the claim group, pursuant to sections 61(1) and 251B of the Act. Although the applications in the Larrakia proceedings had been made between 1994 and 2001, most of the applications had been brought before the 1998 amendments. However, all but one of the applications made before the 1998 amendments had been subsequently amended after the 1998 amendments came into force.

Justice Mansfield (at [68]-[75]) followed the approach of Justice O'Loughlin in *Quall v Risk*,[1] where it was held that an application made prior to the 1998 amendments which is amended subsequent to the commencement of 1998 amendments is required to comply with the authorisation requirements of section 61.After reviewing the decision in *Quall v Risk*, including subsequent decisions in which it had been followed (including *Dieri v South Australia* and *Edward Landers v South Australia*) and discussed, Justice Mansfield said (at [75]) that the decision of *Quall v Risk* was of some years standing, and had been followed in a number of subsequent single judge decisions of the Court.

Justice Mansfield noted that section 251B of the Act provided two mutually exclusive means for all persons in a native title claim group to authorise the making of claimant application, and noted that the requirement did not mean that every single person within the group was required to give their authorisation.

After summarising the evidence given during the hearing in relation to the authorisation processes followed by the applicant groups, Justice Mansfield deferred making any ruling on whether or not the applications were authorised until after making findings in relation to section 223 of the Act. In the event, after making his findings on that section, his Honour was not required to address the authorisation issues further.

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1 [2001] FCA 378 at [65].

2.2 Yulara compensation claim

The Yulara compensation application was lodged prior to the commencement of the 1998 amendments, however it was amended in 2003. The application stated 'in apparent compliance' with s 61(1) of the *Native Title Act* (as amended) that the applicants were authorised by the compensation claim group to make the compensation application.

In the Yulara proceedings, Justice Sackville indicated his preference to follow the obiter views expressed by the Full Court in *Branfield v Wharton*[2] to the effect that the new authorisation requirements were not required to be met in respect of an application made before the commencement of the 1998 amendments, at least in the absence of a material change to the claimant group. As it was not submitted by any respondent in the Yulara proceedings that the amendment of the application had the effect of materially changing the composition of the compensation claim group, his Honour found that no issues concerning authorisation arose (at [28]).

However, it should be noted that, for the purposes of the application before it, the Full Court in *Wharton* had been prepared to assume the correctness of the principle established in *Quall.*

3. PROOF AND SECTION 223 OF THE ACT

3.1 Larrakia native title claim

Justice Mansfield noted (at [45]) that the *Native Title Act* is premised upon the fact that, on the acquisition of sovereignty in Australia, certain rights and interests held by indigenous people under their traditional laws and customs may be recognised by, and become enforceable under, the common law, and it is the Act which provides the circumstances in which, and the manner in which, the recognition of ongoing native title rights and interests may be determined.

Noting that section 223(1) of the Act defined 'native title', and that section 225 provided what is to be determined upon a determination of native title, Justice Mansfield then turned his attention to the High Court decisions on section 223 – in particular *Western Australia v Ward*[3] ('*Ward*') and *Members of the Yorta Yorta Aboriginal Community v Victoria*[4] ('*Yorta Yorta*'). Justice Mansfield noted (at [55]) that in considering the construction of the definition of native title under section 223(1) of the Act, and in particular the meaning of 'traditional' therein, the majority judgement in *Yorta Yorta* imposes a requirement of continuity on both the Aboriginal society and also on the acknowledgement and observance of the traditional laws and customs which are claimed to give rise to rights and interests under the Act. His Honour also noted (at [56]), citing the majority in *Yorta Yorta*, that laws and customs did not exist in a vacuum, and once a society has ceased to exist, it is not possible for descendants of that society to take up again their traditional laws and customs as those expressions are used in the Act. Referring to *Yorta Yorta* again, Justice Mansfield noted (at [57]-[58]) that the requirement for continuity of connection is not absolute, although the acknowledgement and observance of the traditional laws and customs must have continued 'substantially uninterrupted' since sovereignty.

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2 [2004] FCAFC 138.
3 (2002) 213 CLR 1.
4 (2002) 214 CLR 422.

In considering the evidence of the applicant groups, Justice Mansfield (at [97]) noted such evidence was to be considered having regard to the matters required to make out their claims, being:

- Whether the applicants were a society united in and by its acknowledgement and observance of a body of traditional laws and customs which constitutes a normative system;
- Whether the present day body of laws and customs are the body of laws and customs acknowledged and observed by the ancestors of members of the applicants; and
- Whether the acknowledgement and observance of the laws and customs has continued substantially uninterrupted by each generation since sovereignty, and whether the society has continued to exist throughout that period as a body united in and by its acknowledgement and observance of those laws and customs.

Justice Mansfield then examined the evidence in support of the claims for three respective periods, being 1825 (the relevant sovereignty date) to 1910, 1910 to WWII, and WWII to 1970, reflecting the historical periods suggested by the Territory. In respect of the first period, Justice Mansfield found that within the geographical area which included the claim area there existed an Aboriginal society which, by its traditional laws and customs, had a normative system which gave rise to rights and obligations on the part of its members in relation to the land and waters within that area (at [232]).

In respect of the period between 1910 and WWII, Justice Mansfield (at [339]) found that the contemporary material did not point to the Larrakia people having a continuing strong community practising their traditional laws and customs. His Honour noted the material as pointing to some elder structure within the community, to the ongoing holding of corroborees and to the conduct of ceremonies (although noting the material strongly suggested the conduct of ceremonies had barely persisted), but also noted there was no evidence to suggest that all, or most, of the Larrakia people's cultural practices observed in the earlier period continued to be practised.

His Honour, however, deferred any conclusions on that period until recording his findings and the significant evidence in respect of the period between WWII and the present, and the contemporary status of the Larrakia cultural practices (at [340]).

Having reviewed the evidence in the period between WWII and 1970, and the applicants' oral and anthropological evidence of contemporary practices (including a separate review of the evidence of the Quall Applicants), Justice Mansfield then drew his conclusions regarding 223(1) of the Act (at [802] onwards).

Justice Mansfield reiterated his findings that:

> At sovereignty, there was a society of indigenous persons who had rights and interests possessed under traditional laws and customs, giving them a connection to the land and waters of the claim area;
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> That society was the same society as existed at settlement and continued to exist up to the first decade of the 20th century, and continued to enjoy rights and interests under the same or substantially similar traditional laws and customs as those which existed at settlement; and

> The Larrakia people are the same society as that which existed previously, including at settlement. (See [803], [804])

However, Justice Mansfield noted that it was also necessary that the applicants show that they still possess the rights and interests under those traditional laws acknowledged, and the traditional customs observed by them, and those laws and customs give them a connection to the land and waters of the claim area (at [805]).Referring to the principles set out in the majority judgment in *Yorta Yorta* (at [86] – [88] of that decision), Justice Mansfield concluded that a combination of circumstances had, 'in various ways, interrupted or disturbed the presence of the Larrakia people in the Darwin area during several decades of the 20th century in a way that has affected their continued observance of, and enjoyment of, the traditional laws and customs of the Larrakia people that existed at sovereignty'. These circumstances included the development of Darwin into a substantial community following European settlement, the movement of other Aboriginal people into that community, and the consequence of governmental policy. (See [812].)

Justice Mansfield noted that there was evidence that early in the 20th century the 'practice of Larrakia traditional laws and customs in the Darwin area was waning' (at [813]), and that thereafter there was 'progressively little evidence of the continued practice of, and respect for, the Larrakia traditional laws and customs until the 1970's' (at [814]).His Honour found that the present laws and customs of the Larrakia people were 'not simply an adaptation or evolution of the traditional laws and customs of the Larrakia people in response to economic, environmental and historical and other changes' (at [835]). It was his Honour's judgment that 'the present laws and customs of the Larrakia people reflect a sincere and intense desire to re-establish those traditional laws and customs adapted to the modern context', and that such effort was an 'entirely proper objective' that was 'enriching the lives of the Larrakia people, and of the Darwin community'. His Honour, however, noted that that 'was not a sufficient factual foundation for making a determination of native title rights and interests' (at [836]).

Accordingly, Justice Mansfield found that, by reason of that interruption, the applicant groups' laws and customs they now respected and practised were not 'traditional' as required by section 223(1) of the Act (at [839]).

3.2 Yulara compensation claim

Justice Sackville noted (at [192]) the principles which govern whether native title exists in relation to land are those to be found in section 223(1) of the *Native Title Act*; and these principles were accepted by the Yulara applicants, on the authority of *Yorta Yorta*.

It was asserted by the Yulara applicants by reference to *De Rose v South Australia* (2003) FCR 325 ("*De Rose No 1*"), and accepted by his Honour, that account can be taken of adaptation and change and that, in accordance with *Yorta Yorta* (at [84]-[85]), interruption to use and enjoyment of native title rights and interests is not necessarily fatal to establishing present (or recent) possession of native title rights and interests (*Jango* at [193]).

Because the Yulara applicants had pleaded that their native title was held under the traditional laws and customs of the Western Desert bloc, it was necessary for the Court to find that that society had had continued existence since sovereignty. Applying the principles in *Yorta Yorta* (set out in *Jango* at [353])) Justice Sackville found (at [364]) that the Western Desert bloc had existed as a society at all times since sovereignty and that members of that society had maintained their

acknowledgment and observance of certain traditional laws and customs in the eastern Western Desert, including the relevant area around Yulara.

This conclusion did not mean that members of the compensation claim group had established that they acknowledged and observed certain traditional laws and customs ' that can be said to have normative content' as opposed to engaging in 'observable patterns of behaviour' (at [395]). The conclusion reached by Justice Sackville at [449] was that the Yulara applicants had not established that the members of the compensation claim group 'observed and acknowledged at the relevant times laws and customs of the Western Desert bloc as pleaded in the Points of Claim'.

Given this finding, it was not necessary for his Honour to decide whether the laws and customs relied upon were 'traditional' in the *Yorta Yorta* sense. Nonetheless, Justice Sackville did examine the evidence in this regard, noting at [460] that '[v]irtually all the indigenous witnesses who gave evidence about their laws and customs referred to them as being derived from the *Tjukurrpa*, or handed down by their parents, grandparents or other ancestors", but that this evidence of itself does not 'establish that those laws and customs are traditional in the sense required by *Yorta Yorta (HC)*". As his Honour explained further, at [461], this is because 'the content of those laws and customs may have expanded or altered so much over time that they can no longer be regarded as being founded on the laws and customs of the relevant society' at the date of sovereignty.

Turning to the anthropological evidence, Justice Sackville found that the weight of that evidence established that the content of the traditional laws and customs of the Western Desert relating to rights and interests in land were inconsistent with the Yulara applicants' case (at [497]-[499]).

Even if his Honour had not made the findings he did about the content of the traditional laws and customs he would not have been satisfied that the laws and customs relating to rights and interests in land which may have been acknowledged and observed by the Aboriginal witnesses ' are the laws and customs of the Western Desert' (at [502]).In large part, it was because of the inconsistency of the evidence as to the relevant laws and customs which led his Honour to this view. As Justice Sackville noted (at [504]), if the evidence of the Aboriginal witnesses had 'consistently favoured a particular set of laws and customs, an inference might well have been available that the laws and customs described by the witnesses have remained substantially intact since sovereignty, or at least that any changes have been of a kind contemplated by pre-sovereignty norms'. However, for the reasons his Honour summarises at [505]-[507], the evidence was insufficient to ground a conclusion that the laws and customs pleaded by the Yulara applicants, to the extent that they were acknowledged and observed by the Aboriginal witnesses, are the traditional laws and customs of the Western Desert.

3.3 Another view of section 223

On 28 April 2006, in *Rubibi Community v Western Australia (No 7)*,[5] Justice Merkel handed down the final instalment of his three decisions regarding the continued existence of native title in and around Broome, Western Australia. The earlier decisions were *Rubibi Community v Western Australia (No 5)*[6] and *Rubibi Community v Western Australia (No 6)*.[7]

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5 [2006] FCA 459.
6 [2005] FCA 1025.
7 [2006] FCA 82.

Although in different jurisdictions, the two towns of Broome and Darwin have been subject to similar histories and similar non-indigenous influences which have, in various ways, impacted upon traditional laws and customs of the Aboriginal people who had been in occupation at sovereignty. Nonetheless, the findings of Justice Merkel in respect of Broome, that the Yawuru community had established exclusive native title over the entire area, save for extinguishment, are in stark contrast to the findings of Justice Mansfield that native title had not continued to exist in Darwin because the current laws and customs were not 'traditional' as explained in *Yorta Yorta*.

It is telling that Justice Merkel does not rely heavily (or at all) on *Yorta Yorta* in his legal analysis of section 223 of the Act and application of principle, but applies *De Rose v South Australia (No 2)*[8] instead. In essence, Justice Merkel disregarded the 'historical snapshot' approach to deciding whether there had been a cessation of traditional practices. In 'contrast to Justice Mansfield, his Honour took the present as his starting point and then hypothesized backwards to the situation at sovereignty to find that the present system is in accordance with the traditional laws and customs acknowledged and observed by the Yawuru community (*Rubibi No 5* at [363]).

A rigorous application of *Yorta Yorta* principles, such as undertaken by Justice Mansfield in respect of the Larrakia case and by Justice Sackville in the Yulara case, to the facts in the Rubibi proceedings, could well have resulted in a different result. Likewise the Justice Merkel approach applied in Darwin may have yielded a positive result for the Larrakia and for the Yulara applicants, in respect of the existence of native title at the relevant times.

All of the Larrakia, Yulara and Rubibi matters have been appealed. Consideration by the Full Court of these appeals will focus on the proper approach to be taken to section 223, and the principles to be applied in native title cases.

4. ADOPTION OF LAND CLAIM EVIDENCE UNDER SECTION 86 OF THE ACT

4.1 Larrakia native title claim

All of the Larrakia Applicants, and some of the Quall Applicants, had participated, as competing claimants, in a claim under the *Aboriginal Land Rights (Northern Territory) Act* ('ALRA') to an area of land and waters geographically near to the claim area the subject of the consolidated proceedings (being the Kenbi Land Claim). In fact, many of the witnesses in the applicant groups had given evidence in the inquiry into the claim held before the Aboriginal Land Commissioner.

(There were two other competing claimant groups in the ALRA claim (one of which was successful in that claim), and neither of those other groups sought a determination of native title in the current claim area.)

Justice Mansfield noted (at [430]) that although the Kenbi Land Claim was brought under the ALRA, evidence presented during its hearings, 'in particular about the relationship of Aboriginal people to land and waters', was relevant to the consolidated proceedings. Accordingly, his Honour received into evidence, under section 86 of the Act, extensive transcripts of evidence in the Kenbi Land Claim. (This transcript was tendered by consent and without objection.)His Honour noted that whilst proceedings before the Aboriginal Land Commissioner did not fall within the

8 [2005] FCAFC 110.

descriptions of evidence which could be received under subsections 86(a)(i)-(iv) of the Act, consistent with the approach of Justice Olney in *The Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory of Australia*,[9] the Commissioner is 'any other person or body' within the meaning of 86(a)(v) of the Act. (See [432])

In addition, the Larrakia Applicants also sought to have the Court adopt certain findings made by the Land Commissioner in the Kenbi Land Claim report. Justice Mansfield (at [437]) noted there was 'no precise correspondence between the proof requirements' under the ALRA and the *Native Title Act*, noting the distinctions between the recognised 'traditional Aboriginal owners' under the ALRA and Aboriginals who may have a traditional right to use or occupy the land.

After discussing the history of section 86, and its application, Justice Mansfield (at [442]) was 'inclined not to adopt any of the findings of the Land Rights Commissioner' in the Kenbi Land Claim report as:-

- The Kenbi Land Claim covered a claim area distinct from that involved in the consolidated proceedings;
- Not all of the witnesses who gave evidence before the Commissioner were called in the consolidated proceedings;
- The expert evidence in each was, in part, from different witnesses, and related to different issues which arose under the ALRA in respect of different land; and
- The matters to which some findings related had also, to varying degrees, been the subject of additional evidence, and in some instance different evidence, in the consolidated proceedings.

4.2 Yulara compensation claim

As with the Larrakia proceedings, a number of the Aboriginal witnesses had given evidence previously in hearing conducted under ALRA: see, for example, *Jango* at [519]. Although various land claim reports are cited, there is no reference in the decision to the tender of transcript from those hearing, nor does the issue of adopting findings made by the Aboriginal Land Rights Commissioner appear to arise.

5. SECTION 44H OF THE ACT

5.1 Larrakia native title claim

Although, by reason of his other findings, Justice Mansfield was not required to make findings on issues of extinguishment, his Honour addressed some of the submissions made on those issues by the parties in the Larrakia proceedings.

In addressing arguments raised in respect of the application of section 44H of the *Native Title Act*, Justice Mansfield stated his view that section 44H was 'intended to indicate that any extinguishment of native title rights and interests occurs by reason of relevant 'tenure' grants of rights, rather than by the exercise of rights under it' (at [872]).Accordingly, his Honour stated that

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9 (2000) 104 FCR 380.

any inconsistency arose at the time of the grant, and resulted in the extinguishment of native title rights and interests by reason of that inconsistency at that time. Justice Mansfield regarded such a view as being consistent with the introductory words of the section, and its place in the *Native Title Act*.

6. 47B OF THE ACT: PROCLAMATION OF TOWNS

6.1 Larrakia native title claim

Section 47B of the *Native Title Act* allows for some prior extinguishment to be disregarded in certain circumstances. Put broadly, section 47B applies when a member a native title claim group occupies vacant Crown land at the date and application for a determination of native title is made. An issue in the case was whether section 47B could apply to disregard extinguishment in respect of areas within the Towns of Darwin, Sanderson and Nightcliff.

The point turned upon the construction of section 47B(1)(b)(ii) which relevantly provides that section 47B only applies if, at the time of the application, the relevant area is not covered by a 'reservation, proclamation … made or conferred by the Crown … under which the whole of part of the land or waters in the area is to be used for public purposes or for a particular purpose'. The issue was essentially whether those words should be read broadly or whether they should be limited and given a narrow interpretation as was done by the Full Court in *Northern Territory of Australia v Alyawarr, Kaytetye, Waranungu, Wakaya Native Title Claim Group*[10] where the Full Court concluded [at 187] that:

> the mere proclamation of a townsite, which might comprise largely private property holdings by lease or otherwise, does not define public purposes or a particular purpose within the meaning of s 47B(1)(b)(ii).

In the absence of a finding that native title existed, the issue did not need to be decided. However, if it had been necessary to decide the issue, Justice Mansfield was bound by the decision in Alyawarr to find that section 47B could apply to a declared township. The issue also arose in the Rubibi matter in respect of the Town of Broome where Justice Merkel also was bound by the decision of the Full Court. Special leave to appeal to the High Court on this point has recently been refused in Alyawarr, in part on the basis that the townsite in issue in that case was a 'paper town' and was never established. The indication from the High Court during interchange with counsel was that it could be prepared to consider the issue in the context of a 'real town'.

If the Larrakia appeal by the Applicants is successful on the question of the existence of native title, the matter will be remitted to Justice Mansfield, at which stage the application of the section 47B to the Towns of Darwin, Nightcliff and Sanderson will again be a live issue. The case could then provide the appropriate vehicle for the High Court's consideration of the point.

It should also be noted that the same issue has been appealed by the State of Western Australia in the Rubibi matter in respect of the Town of Broome.

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10 [2005] FCAFC 135.

7. 'STATUTORY AUTHORITY' UNDER THE ACT

7.1 Larrakia native title claim

Justice Mansfield concluded that the Darwin City Council ('DCC') was not a 'statutory authority' for the purposes of the *Native Title Act*. A statutory authority is relevantly defined under section 253 of the *Native Title Act* to include 'any authority or body established by a law of the Territory other than a general law allowing incorporation as a company or body corporate'.

Justice Mansfield found that as the DCC was constituted *under* section 30 of the *Local Government Ordinance 1954* (which was not a general law allowing incorporation as a company or body corporate, i.e. the Corporations Act etc)', rather than *by* that Ordinance, the DCC did not fall within the definition of a statutory authority. The Ordinance (and the replacement *Local Government Act 1993* (NT)) provided 'merely for the creation of certain entities in respect of municipalities constituted by the Minister in the exercise of powers under that legislation' (at [925]).That is, Justice Mansfield reasoned that an entity needed to be *established* by the legislation itself, rather than by means of a process under it, to be a 'statutory authority'.

Consistent with this reasoning, many local government bodies within the Northern Territory (and possibly elsewhere in Australia) will not be statutory authorities for the purposes of the *Native Title Act*.

This finding is of some significance, as the *Native Title Act* provides that any freehold title or certain leases granted to statutory authorities (before 23 December 1996) are not to be regarded as having extinguished native title. Accordingly, on the basis of the finding of Justice Mansfield, freehold land and certain leasehold lands granted on or before 23 December 1996 to local government bodies in the Northern Territory should now be regarded as having extinguished native title.

Justice Mansfield noted that his finding that the DCC was not a statutory authority did not detract from the asserted extinguishing effect of the DCC's public works, as the definition of 'public works' under section 253 of the Native Title Act extended to certain works carried out 'on behalf of the Crown, or a local government body'.

8. OTHER EXTINGUISHMENT ISSUES IN THE YULARA COMPENSATION CLAIM

Because of the conclusions reached by Justice Sackville as to the non-existence of native title at the relevant times, his Honour was not required to make findings as to the effect of extinguishing acts on native title. Nonetheless, as submission had been made on extinguishment issues, his Honour dealt with the following issues.

8.1 The effect of Northern Territory Pastoral Leases on native title

Assuming native title existed at the relevant time, his Honour applied the principles established by *Ward HC* as summarised in *De Rose v South Australia (No 2)*[11] with two additional propositions from *Ward HC*, as set out in *Jango* at [560].

Justice Sackville concluded, at [565] that, generally speaking, the grant of pastoral leases in the Northern Territory would not have extinguished the following rights:

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[11] (2005) 145 FCR 290 at [145].

- to enter and travel over all parts of the application Area;
- to live on the land, camp and erect shelters;
- to hunt for and gather food and to take traditional resources of the land as may be used for sustenance and shelter;
- to gain access to and use water on the land;
- to visit, maintain and protect places of importance on the land;
- to share and exchange (but not trade) traditional resources obtained from the land; and
- to conduct ceremonies and undertake other traditional practices on the land.

As to whether there remained a residual right to control the use of and access to the land by Aboriginal people, his Honour concluded (at [571]) that native title rights to make decisions about the use or enjoyment of the application area by Aboriginal people who are governed by the traditional laws and customs of the Western Desert bloc were not extinguished by the pastoral leases.

In so doing, his Honour relied upon the Full Court decision in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Group*[12] ("*Alyawarr*") where their Honours commented (at [151]) that such a right was 'not without difficulty', but said that there did not appear in that case to be persons other than the native title holders who are bound by their traditional laws and customs. The Full Court distinguished that situation from one where the native title holding group is a subset of a wider society incorporating other groups bound by the same traditional laws and customs, such as a claim involving a subset of the Western Desert Bloc.

It should also be noted that the High Court has recently refused special leave to appeal from the decision in *Alyawarr* that a right to live on the land included a right to live permanently on the land and erect permanent shelters is not inconsistent with the rights of pastoral lessees, on the basis that the existence of a permanent structure 'does not preclude a pastoralist's right to require its removal in the event that it conflicts with a proposed exercise by the pastoralist of a right under the lease': see *Alyawarr* at [131]

8.2 The effect of registration of Crown grants under the Torrens system

In the Yulara proceedings, it was argued by the Commonwealth that the registration of a grant in fee simple under the *Real Property Act* extinguished any surviving native title, even though the original grants of freehold were invalid when made. If this argument was correct, native title would have been extinguished before the *Native Title Act* or the *Validation (Native Title) Act* came into force and had the effect of validating any invalid past acts subject to an entitlement to the payment of compensation.

Justice Sackville concluded, at [705], that the indefeasibility provisions of the *Real Property Act*, if they had the effect contended for by the Commonwealth, would have had a discriminatory impact on unregistered native title rights and interests (compared with unregistered interests acquired in accordance with the general law) and would thus have been inconsistent with section 10(1) of the *Racial Discrimination Act*. It would then follow that the registration of the original fee simple grants, if invalid when made, did not extinguish any surviving native title rights.

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12 (2005) 145 FCR 442.

8.3 Invalidity of construction of public works

It was argued by the Yulara applicants that the executive power of the Northern Territory under the *Northern Territory (Self-Government) Act* 1978 (Cth) and the Northern Territory (Self-Government) Regulations did not include the construction of public works that would extinguish native title.

His Honour held, at [733], that the *Self-Government Act* and Regulations would not be construed as authorising the construction of public works in circumstances that extinguish native title, without adequate compensation. As compensation had not been paid, it would follow that if native title existed, the construction of each of the public works attributable to the Territory on the application area was an invalid act when done, which has since been validated under section 4 of the *Validation (Native Title) Act,* and would be compensable under the *Native Title Act* (at [734]).

8.4 Time when entitlement to compensation would have arisen

As to the time when extinguishment was taken to have occurred, it was argued by the Yulara applicants that Parts 2 and 3 of *Validation (Native Title) Act* and Division 2 of Part 2 of the *Native Title Act* (validation of past acts) governed issues of extinguishment and compensation. The respondents contended that the relevant provisions were in Part 3 of *Validation (Native Title) Act* and Division 2B of Part 2 of the *Native Title Act* (confirmation of past extinguishment by valid or validated acts).

His Honour held (at [766]-[768]) that compensation for a past act, that is also by definition a 'previous exclusive possession act' arises under section 23J of the *Native Title Act* (or the relevant provision under the *Validation (Native Title) Act*) and not under section 17 (or the relevant Territory provision) because the effect of the extinguishment was determined by section 23C (confirmation of extinguishment by previous exclusive possession acts) rather than by section 15 (effect of validation of past acts).

The result was that any compensation for extinguishment of native title was to be determined as at the date the extinguishing act took place, not at the date of 'statutory extinguishment'. In Justice Sackville's view, it was not the intention of the compensation regime established by the *Native Title Act* that there would be a statutory entitlement to compensation which included the added value of public works and improvements done after the extinguishing acts took place. His Honour doubted that the compensation regime was intended to provide 'windfall benefits' to claimants (at [772]).

9. APPEALS

Each of the Larrakia Applicants and the Quall Applicants have since filed appeals from the decision of Justice Mansfield in the Larrakia proceedings. The Yulara applicants have also filed an appeal in *Jango.*

These appeals are to be heard by the Full Court of the Federal Court commencing on 30 October 2006. The appeal in the *Rubibi* matter is likely to be heard soon after.

Consideration of these appeals by the Full Court, and perhaps ultimately by the High Court, will clarify a number of important issues, in particular the proper approach to be taken to section 223 of the *Native Title Act* and the application of section 47B to proclaimed towns.