- what principles should guide joinder?

Next steps

The Discussion Paper, due for release at the end of September, will:

- provide further examination of connection requirements for the recognition and scope of native title rights and interests, authorisation, joinder, as necessary;
- set out draft proposals in relation to these areas; and
- may request information to clarify legal issues and the operation of the native title system.

The ALRC welcomes further consultation as the Inquiry proceeds and we look forward to hearing from people. Our contact details are on the ALRC website.

[1] See, e.g. Western Australian Government, *Submission 20;* Queensland South Native Title Services.

[2] For a discussion see *Lander v South Australia* [2012] FCA 427 [32]–[34].

[3] See, e.g., North Queensland Land Council, *Submission 17*; National Farmers Federation, *Submission 14.*

[4] Members of the *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

[5] See, e.g. National Native Title Council, *Submission 16*; South Australian Government, *Submission 34*.

[6] *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.

[7] *Western Australia v Ward* (2002) 213 CLR 1, [14].

[8] See for example, North Queensland Land Council, *Submission* 17.

[9] There are a range of views, e.g. Western Australian Government, *Submission 20*; Northern Territory Government, *Submission 31*; Just Us Lawyers, *Submission 2*.

[10] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

[11] See e.g., Australian Human Rights Commission, *Submission 1;* South Australian Government, *Submission 34.*

[12] See e.g., Northern Territory Government, *Submission 31*; NSW Young Lawyers Human Rights Committee, *Submission 29:* National Congress of Australia's First People, *Submission 32.*

[13] National Native Title Council, *Submission 16:* Western Australian Government, *Submission 20.*

[14] Queensland South Native Title Services, *Submission 24*; Association of Mining and Exploration Companies, *Submission 19*; Kimberley Land Council, *Submission 30*; Cape York Land Council, *Submission 7*.

15 *Native Title Act* 1993 s 84(5).

SECTION 47A - A CASE FOR THE REVIVAL OF NATIVE TITLE RIGHTS

By Christine Deng, Project Officer Legal, NTRU

The recent Federal Court case of *Adnyamathanha People No 3 Native Title Claim v State of South Australia [2014] FCA 101* (the *Adnyamathanha No.3* case) was originally filed to test the limits of s47A of the *Native Title Act, 1993* (Cth) (the NTA). This is because the section has in the past been interpreted and applied differently by a number of Federal Court Judges.

Section 47A operates to enliven native title where it was extinguished in the past. It follows that a successful claim under s47A, also gives the native title holders rights in relation to Future Acts. These rights include the right to be notified and negotiate with mining companies and other stakeholders.

In the *Adnyamathanha No.3* case, Mansfield J applied s47A of the NTA, ruling that the extinguishment of native title rights over a substantial area of land to the north of Hawker in South Australia should be disregarded. Although this decision is seen to have clarified some of the outstanding issues in relation to this section, it also led to media backlash against the NTA.[1] This article will specifically explain the reasoning and the implications of the application of s47A of the *Native Title Act* in the *Adnyamathanha No.3* case.

Section 47A of the NTA

1. This section applies if:
   a. a claimant application is made in **relation to an area;** and
   b. When the application is made:
      i. a freehold estate exists, or a lease is in force, over the area or the area is vested in any person, if the grant of the freehold estate or lease or **the vesting took place under legislation** that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders; or
      ii. the area is held **expressly for the benefit** of, or is held on trust, or reserved, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; and
   c. when the application is made, one or more members of the native title claim group **occupy the area.**
2. For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by any of the following acts must be disregarded:
   a. the grant or vesting mentioned in subparagraph (1)(b)(i) or the doing of the thing that resulted in the holding or reservation mentioned in subparagraph (1)(b)(ii);
   b. the creation of any other prior interest in relation to the area, other than, in the case of an area held as mentioned in subparagraph (1)(b)(ii), the grant of a freehold estate for the provision of services (such as health and welfare services).

Section 47A (2) essentially provides that, if all the three requirements in s47A (1) are satisfied, then all prior interests are to be ignored in determining whether native title exists. The type of prior interests would include previous and current freehold grants and leases.

Importantly, the section does not remove the requirement for the applicant to prove the existence of any connection with the land or waters concerned that may be required by the common law concept of native title.

Background

The Adnyamathanha People lodged an application for a native title determination on 18 May 2010. The application was amended on 2 December 2010 and on 11 March 2011, the amended application was registered by the Native Title Registrar. The native title claim related to three categories of land comprising perpetual lease land, freehold land and un-allotted Crown land. The perpetual lease land and the un-allotted Crown land were each comprised of 16 parcels of land, while the freehold land was made up of 9 parcels of land.

The Indigenous Land Corporation

The freehold land and the perpetual lease land were both initially held under perpetual leases by the Crown. In February 2000, the leases were transferred to the Indigenous Land Corporation (ILC) under the *Crown Lands Act 1929* (SA).

The ILC assists Aboriginal and Torres Strait Islander persons to acquire land, and to manage Indigenous held land, for the economic, environmental, social or cultural benefit of Aboriginal and Torres Strait Islander People. The ILC's functions are set out in s191 of the *Aboriginal and Torres Strait Islander Act 2005* (Cth), (ATSI Act) previously called the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (ATSIC Act). One of the main features of the ILC's land acquisition functions is its function to acquire by agreement interests in land for the purposes of granting interests in land to Aboriginal Corporations.

After acquiring land, the ILC will lease the land to Indigenous organisations, with the intention of transferring the land to the organisation, if the Indigenous organisation demonstrates their capacity to manage and use the land or property to achieve sustainable benefits for Indigenous people.

In the *Adnyamathanha No.3* case, the ILC granted the 16 parcels of perpetual lease land and the nine parcels of the freehold land to the Viliwarinha Yura Aboriginal Corporation (VYAC), a registered Aboriginal and Torres Strait Islander Corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI ACT). It is worth noting that VYAC surrendered nine of the perpetual leases transferred to them by the ILC to the State in exchange for freehold grants.

Previous case law

Prior to the *Adnyamathanha No.3* case, the question of reviving native title was considered mostly under s47A(1)(b)(ii) and s47B of the NTA. For example, in *Hayes v Northern Territory*,[2] Olney J considered whether native title rights and interests had been extinguished with respect to a number of parcels of land near Alice Springs. In that case, before applying s47B of the NTA, Olney J noted that s47A did not apply as the lease in question was not granted under legislation of the type referred to in s47A(1)(b)(i), nor was the land held expressly on any of the bases referred to in s47A(1)(b)(ii). Similarly, in *Risk v Northern Territory,*[3] it was found that s 47A(1)(b)(ii) did not apply in relation to a piece of land over which native title was sought because there was no express prescription under the relevant legislation or in the lease itself that that land was held for the benefit of Aboriginal people.

In *Neowarra v State of Western Australia,*[4] Sundberg J concluded that the particular lease in question, which had been granted under the Land Act 1993 (WA) to the Aboriginal Lands Trust, was held expressly for the benefit of Aboriginal people within the meaning of s 47A(1)(b)(ii) this was because s23 of the 1972 WA Act so provided. Similarly in *Rubibi Community v Western Australia* (No 7).[5] Merkel J reached a similar conclusion in relation to freehold titles held by associations incorporated under the *Aboriginal Councils Associations Act* (1976). Likewise in *Moses v Western Australia*,[6] the Full Federal Court was faced with the question of whether the areas of a particular lease was held expressly for the benefit of Aboriginal people so as to enliven s47A(1)(b)(ii). In adopting the approach to the construction of s47A(1)(b)(ii) taken in *Risk*, the Full Court concluded on the facts that the absence of any legislative or executive indication that the leaseholder was required to hold the particular land under consideration in a particular way, meant that s47A(1)(b)(ii) was not enlivened.

It is relevant to point out that the approach taken by Sundberg J and Merkel J, in the cases noted above, in relation to the application of s47A(1)(b)(ii) was from the perspective of the entity now holding the land. The central question in the construction of the section is whether the land was being held for the benefit of Aboriginal peoples.

This construction of s47A(1)(b)(i) and s47A(1)(b)(ii) adopted by Sundberg J and Merkel J, in the cases mentioned above, arguably has two limitations. Firstly, it limits the revival of native title rights and interests under s47A(1)(b)(i) to grants of freehold or leases or vesting under Commonwealth, State or Territory 'land rights' legislation. This construction ignores the application of other legislation such as the *Crown lands Act* 1929, where the State may have granted land and that grant benefits Aboriginal people. Under this approach, although the grant provides the benefit, if it cannot be established that the grant was made for the benefit of Aboriginal people because the entity is not holding the land in a particular way, the revival of native title rights and interests under s47A(1)(b)(i) will not be applied. Secondly, the cases focus on s47A(1)(b)(ii) in seeking revival of native title rights and interests, which prevents the opportunity to look at the issues raised in s47A(1)(b)(i), as Mansfield J had the opportunity to discuss in the *Adnyamathanha* No.3 case.

The reasoning in the Adnyamathanha case

In the *Adnyamathanha* No.3 case, Mansfield J followed the approach in the cases noted above and adopted a narrow interpretation of the word 'grant'. He found that perpetual leases vested in VYAC at the time of application did not have the quality of being granted under legislation of a particular character, as the word 'grant' is limited to the entity making the original grant, (the Grantor) which is usually the State, under Crown

Lands Legislation. Similarly the grant of the freehold estate by the State to VYAC in 2009 was not made under legislation of the required character. Typically legislation of the character required for the grant to fulfil s47A(1)(b)(i) would include 'land rights legislation' such as the *Aboriginal Lands Trust Act* 1966 (SA).

However, His Honour adopted a wider interpretation of the term 'vested' or 'vesting' in s47A(1)(b)(i) to signify the existence of three states of affairs that must exist at the time of application to fulfil the section:

1. the existence of a freehold estate, or
2. the existence of a lease, or
3. the existence of the area being vested in a person.

Then, the subsection requires that the event by which the state of affairs exists be:

1. the grant of the freehold estate, or
2. the grant of the lease, or
3. the taking place of the vesting.

The use of the word 'vesting' shifts the focus to the time at which the state of affairs arose. This means that, when the event took place, it must have had the particular characteristic of being undertaken pursuant to legislation that makes provisions for such grants or vesting only for the benefit of Aboriginal People. Hence, if the term vesting is used in the present case, it would mean that the perpetual leases had been vested by the ILC in VYAC under the (Cth)(ATSI Act) which he treated as legislation satisfying s47A(1)(b)(ii). In other words, the transfer of the perpetual leases in the present case took place under the ATSI Act because it was the ILC exercising its powers under the ATSI Act which enabled it to transfer the perpetual leases to VYAC. It is clear that such a vesting under the ATSI Act, meets the further requirement of s 47A(1)(b)(ii).

However, the freehold grants made by the State in exchange for 9 of the perpetual leases had not been granted under legislation of the character required under s47A(1)(b)(i). It follows that although VYAC held the leasehold interest in circumstances where the vesting of that interest from the ILC satisfied s47A (1)(b)(i) the interest was surrendered to the State.

Mansfield J supports the conclusion that while s47A(1)(b)(i) addresses the process by which the person holding the interest came to acquire it, s47A (1)(b)(ii) addresses the basis of the current tenancy or the right to tenancy of the area. This is relevant to s47A(1)(c), which addresses the status of existing prior interests and Crown interests and the applicability of the non-extinguishment principle, contained in s238 of the NTA. Mansfield J in his reasoning stated that the ILC being a statutory entity established under Commonwealth legislation, and acting within its powers, had transferred to VYAC both the perpetual lease land and the freehold land within the scope of 47A(1)(b)(ii). He explained that s47A(1)(b)(ii) applies to the freehold land because the covenants between ILC and VYAC, preclude VYAC from using the freehold land for any other purpose but for the benefit of Aboriginal people. He states that the purpose of s47A(1)(b)(ii) is to prevent private entities who have structured their corporations in such a way so as to attract certain land within s47A(1)(b)(i) for their own benefit, s47A(1)(b)(i) applies to make sure the arrangement between the private entities is made for the benefit of Aboriginal people.

The implications of Mansfield J's approach to the interpretation of s 47A of the NTA in the *Adnyamathanha* No.3 case has expanded the scope of s 47A(1)(b)(i) in relation to the wide interpretation of the term 'vesting'. Mansfield J explained that the word 'vesting' would have little to offer if it is was simply a mirror image of the word 'grant', as used in its conventional conveyancing sense. Also following the decision in *Moses*, it was likely that a s47A claim relying for success solely on the view of s47A(1)(b)(ii), which considered the issue from the perspective of the entity now holding the area for the benefit of Aboriginal people was unlikely to succeed. Mansfield J's approach provides better chances of success for claimants if the issue is approached from the perspective of the grantor.

It follows Mansfield J's approach arguably offers a better interpretation of what s47A actually says. His interpretation of the section appears to restrict the issue to the perspective of the entity making the original grant (that is, the grantor of the land, e.g. the State). This approach is more consistent with the Explanatory Memorandum relating to the s47A addition to the NTA in 1998, which provides that the evident purpose of s47A is to create a statutory exception to provisions which preclude native title being claimed over land that had been the subject of past extinguishment. It follows that s47A provides two broad categories of land grant capable of enlivening statutory exception. Similarly the section's general purpose is to enable Aboriginal people in occupation of an area where there are no longer competing third party interests to have the court disregard the earlier tenure history of an area in determining whether native title rights and interests exist.

Although Mansfield J arguably provides a more correct interpretation of s47A, the application of s47A(1)(b)(ii) is still limited to where the interest is held under binding restrictions to ensure the long term benefits to Aboriginal and Torres Strait Islander people. Nevertheless, the broad application of s47A(b)(1)(i) is a step in the right direction in relation to testing the full capacity of the provision.

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[1] Mark Schleibs, New Native title claims to exploit loopholes, 30/04/2014, viewed 10/07/2014.

[2] Hayes v Northern Territory [1999] FCA 1248.

[3] Risk v Northern Territory [2006] FCA 404.

[4] Neowarra v State of Western Australia [2003] FCA 1402.

[5] Rubibi Community v Western Australia (No 7) [2006] FCA 459.

[6] Moses v Western Australia [2007] FCAFC 78.

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Richard Bradshaw, Reviving native title through section 47A, at the National Native Title Conference Coffs Harbour NSW, 3-4 June 2013.