CASE NOTES

CLARRIE SMITH AND ORS V WESTERN AUSTRALIA AND ORS ("NHARNUWANGGA")[1]

Chris Humphry *

Native title – Western Australia – consent determination of rights – inclusion of Western Australia alternative State provisions – ILUA for future acts – protocol for pastoral lease access

The first settlement of a native title claim in Western Australia was completed on 29 August 2000 when the Federal Court made a consent determination in Clarrie Smith and Ors v Western Australia and Ors. The key to the settlement involved all stakeholders agreeing on an acceptable basis for co-existence. This paper looks at how the settlement was achieved and its main features.

INTRODUCTION

"An achievement of mature and resolute people ... assisted by honourable lawyers."

In making the Federal Court determination in *Clarrie Smith and Ors v Western Australia and Ors* ("Nharnuwangga") on 29 August 2000, Madgwick J was generous in his praise of the parties and their advisors. He described the lead applicant, Mr Clarrie Smith, as

> "an indomitable man .... who impresed everybody concerned with the case with his honesty, charity, dignity and strength."

and also said

> "The settlement in this case shows what mature and resolute people, acting in good faith to reconcile difficult, indeed, potentially inflammatory issues, can do. It shows the positive contribution that honourable lawyers can make."

An important objective of the *Native Title Act* 1993 (Cth) ("the Act") is to promote the settlement of native title claims through mediation. Under s 86B, unless the Federal Court orders otherwise, a claim must be referred to the National Native Title Tribunal for mediation in the early stages of the proceeding. The court may also refer a claim to mediation at any time in a proceeding if the court considers that the parties will be able to reach agreement concerning the claim or aspects of it.

The complexity of native title claims, particularly as they usually involve large numbers of respondents holding a variety of interests in the claim area, has been an obstacle to mediated outcomes. However, following the commencement of the hearing of the Nharnuwangga claim, Madgwick J saw a potential for settlement and initiated and encouraged settlement negotiations.

Native title claims will inevitably involve complicated questions of co-existence between native title and non-native title interests. The significance of the Nharnuwangga settlement is that, for the first time, a

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1 [2000] FCA 1249.

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native title claim group and a large and diverse group of other interest holders were able to agree upon both the existence of native title and a workable framework for co-existence. The case demonstrated the potential for positive and pragmatic outcomes when the principal parties direct resources to working out a basis for co–existence, rather than accepting lengthy adversarial proceedings as inevitable.

The case also showed that negotiated settlements are likely to provide greater scope for innovative arrangements for co-existence and will give the parties a greater sense of ownership of the outcome of the native title claim.

THE NHARNUWANGGA, WAJARRI AND NGARLAWANGGA NATIVE TITLE CLAIM

The Applicants

Representatives of the Nharnuwangga, Wajarri and Ngarlawangga Peoples led by Clarrie Smith claimed to hold native title in relation to an area of approximately 50,000 square kilometres of land in the Upper Murchison and Upper Gascoyne part of Western Australia, south of the Pilbara and north of Meekatharra. The land has a low and variable rainfall and for more than 100 years has been used primarily for pastoral purposes with some mining activity.

The principal application for determination of native title was lodged with the National Native Title Tribunal in December 1995.

The claim area as finally amended included all or part of 19 pastoral leases, areas of unallocated Crown land, national parks and reserves and a large number of mining tenements.

Many of the Nharnuwangga applicants live at a community called Yulga Jinna in the southern part of the claim area.

The Respondents

The Nharnuwangga application involved a large number of respondents who were grouped into categories depending upon the nature of their interests in the claim area. The principal respondents were the State of Western Australia ("the State") and a group of pastoralists, the latter being represented by the Pastoralists and Graziers Association ("PGA").

A considerable number of respondents held mining interests in the claim area, although they did not actively participate in the proceedings. However, one mining company was the owner of two pastoral leases within the claim area and that company became directly involved in the negotiations during the last month of the proceedings.

THE HEARING

The court directed that the hearing of the Nharnuwangga application should proceed in two parts. First, evidence would be taken, and a decision made, concerning the existence of native title within the claim area. Secondly, evidence would be taken, and a decision made, concerning extinguishment by historical and current land and mining tenure.

It is becoming the usual practice in native title claims in Western Australia for hearings to take place both at the Federal Court in Perth and at locations within the claim area ("on country"), depending upon the nature of the evidence to be given.

The Nharnuwangga hearing commenced on 28 September 1999 when the applicants gave evidence over a period of three weeks on country.

The conduct of this part of the proceedings involved significant logistical difficulties. The applicants and their advisors usually camped on the ground and moved amongst the various hearing locations during the course of the three weeks. This involved up to 30 - 40 people at a time together with logistical support.

The court and the lawyers representing the State and the pastoralists stayed overnight at Newman to the north of the claim area, travelling by air at the commencement and conclusion of each day's hearing. This involved the use of three light aircraft which would land at the pastoral airstrip closest to where the day's hearing was to take place. The court and the respondents' representatives were also supported by ground crews.

At the conclusion of the first three weeks of evidence Madgwick J recommended that the parties discuss the possibility of settlement and referred the matter to Mr Graeme Neate, the President of the National Native Title Tribunal, for mediation.

In spite of intensive negotiations and mediation including one week spent in the claim area, the parties were unable to reach agreement. The hearing resumed in Perth between 15 and 23 June 2000 when the applicants' primary evidence was concluded and evidence was given by some pastoralists, the anthropologists on behalf of the applicants and historians on behalf of the applicants and the State. Some of the evidence was heard by video link to Meekatharra.

During this part of the hearing both the applicants and the pastoralists spoke highly of each other and their long standing relationships, prompting Madgwick J again to urge the parties to consider further settlement negotiations.

The hearing was adjourned until 21 August 2000 and intensive settlement negotiations took place. By mid-August the applicants, the State and the PGA were able to agree upon in-principle terms of a settlement. However, the owners of three pastoral leases to the north of the claim area were not prepared to agree to the settlement and the claim boundary was amended to exclude those leases. As a consequence it is open to the applicants to make a fresh native title claim in relation to those leases.

As already mentioned, two of the pastoral leases within the claim area were owned by a mining company which was not represented by the PGA and had not actively participated in the proceedings. Accordingly, it was necessary for that company to be engaged in the negotiations. Because of the lateness of the company's involvement it had not agreed to the terms by the time the in-principle settlement amongst the applicants, the State and the PGA was announced in court at a directions hearing held on 15 August 2000.

The principal parties accordingly proposed that a consent determination should be made in relation to the claim area other than the two pastoral leases in question. The court directed that the hearing of the applicants' claim should continue on 28 August 2000 in relation to the two remaining pastoral leases. However, by that date the applicants and the owner of those leases were also able to agree to the terms of settlement.

THE SETTLEMENT

The settlement involved three elements:

- the Federal Court made a consent determination of native title in favour of the Nharnuwangga, Wajarri and Ngarlawangga People in relation to the claim area;
- the State and the Nharnuwangga, Wajarri and Ngarlawangga People agreed to enter into an indigenous land use agreement under s 24CG(1) of the Act, which provides for a localised procedure for future acts (primarily the grant of mining tenements) within the determination area; and
- each pastoral lessee agreed to enter into an access protocol with the prescribed body corporate which will hold the native title rights in trust for the Nharnuwangga, Wajarri and Ngarlawangga People.

The settlement is conditional upon the indigenous land use agreement being registered under the Act within a period of 12 months.

THE DETERMINED NATIVE TITLE RIGHTS

In accordance with the agreement reached by the principal parties, the Court determined that the Nharnuwangga, Wajarri and Ngarlawangga People are the common law holders of the following native title rights and interests within the determination area:

- the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the land;
- the right to hunt, fish and gather (including to gather ochre), for the purpose of satisfying their personal, domestic or non-commercial communal needs, including observing traditional laws and customs; and
- the right to have access to and to camp on the land in order to exercise their rights as set out above and to travel through and to visit and to care for places which are of cultural or spiritual importance.

It was also agreed, and determined by the Court that:

- there is no native title right or interest in minerals and petroleum in the claim area;
- the native title rights and interests are not exclusive of the rights of others and to the extent of any inconsistency they must yield to the rights conferred by other specified interests in the land (including the rights of miners and pastoralists);
- the native title rights and interests are subject to regulation by State laws of general application and by Federal laws; and
- native title has been extinguished in those parts of the claim area described in the second schedule to the determination of native title including:
    - those parts of pastoral leases granted prior to 1933 and which were, prior to 1994, enclosed and improved;

- those parts of pastoral leases granted under the *Land Act 1933* (WA) which were, prior to 1994, enclosed or improved;

- mining leases and general purpose leases granted prior to 1994 under the *Mining Act 1978* (WA) and gold mining leases, mining leases and coal mining leases granted under the *Mining Act 1904 (WA)*;

- any interests set out in the *Titles (Validation) and Native Title (Effect of Past Acts) Act* 1995 (WA) as extinguishing native title; and

- any interests that are wholly inconsistent with native title rights and interests.

The determination in relation to extinguishing tenure reflected the majority decision of the Full Federal Court in *Western Australia v Ward (Miriuwung Gajerrong)*[2]. Although this decision is under appeal to the High Court, the extinguishing effect of land tenure as described above will by agreement apply within the Nharnuwangga determination area irrespective of the outcome of the appeal.

The determination did not identify any particular area of land within the claim area where native title has actually been extinguished. If any dispute arises in the future as to whether native title continues to exist or has been extinguished in a specific area it will be necessary to have the matter determined in other proceedings, in accordance with the terms of the Nharnuwangga determination.

Although this leaves an element of uncertainty, the settlement reflects a pragmatic approach to co-existence. There is no need to prescribe and rank competing interests in land unless a real conflict of use arises in a particular situation. The parties should be left to attempt to work out their own relationship on the ground, applying the principles determined by the Court.

THE INDIGENOUS LAND USE AGREEMENT

The indigenous land use agreement ("ILUA") is an Area Agreement entered into under s 24CG(1) of the Act. The only essential party to the ILUA was the Nharnuwangga, Wajarri and Ngarlawangga claim group[3]. The State is also a party.

The ILUA applies only to that part of the claim area where native title has been determined to exist[4]. It does not apply to those areas where native title has been extinguished. For instance, the ILUA will not operate in an area which, prior to 1994, was subject to an enclosed or improved pastoral lease granted under the *Land Act* 1933 (WA).

Under the ILUA:

- the right to negotiate provisions (Part 2, Division 3, Subdivision P) of the Act will not apply to any future acts, including the grant of mining tenements. However, productive mining, the compulsory acquisition of native title rights and interests and the grant of general purpose leases, are to be subject

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2 (2000) 170 ALR 159.
3 Section 24CD.
4 Clause 4, ILUA.

to the consultation and determination provisions of Part 2 of the *Native Title (State Provisions) Act* 1999 (WA) or, if that Act is not in operation, equivalent procedures will be followed[5];

- the Nharnuwangga, Wajarri and Ngarlawangga native title holders will not object to the grant of any form of mining tenement within the determination area on grounds relating to native title or Aboriginal heritage[6];

- the State must ensure that mining tenements contain conditions in respect of those areas where native title exists to the effect that:

  - the rights under a tenement may not be exercised until an Aboriginal heritage agreement in the form annexed to the ILUA has been entered into by the tenement holder[7]; and

  - in the case of a mining lease, if any work other than exploration is to be carried out the consultation and determination provisions of Part 2 of the *Native Title (State Provisions) Act* 1999 (WA) will apply or, if that Act is not in operation, equivalent procedures are to be followed[8]; and

- there is no right of compensation for a future act, unless it consists of productive mining, the compulsory acquisition of native title rights and interests, or the grant of a general purpose lease[9]. In those circumstances compensation is payable in accordance with Part 5 of the *Native Title (State Provisions) Act* 1999 (WA). If that Act is not in operation, compensation is payable under the Native Title Act.

The ILUA also provides for the establishment of a heritage register in relation to the determination area to record details of Aboriginal heritage surveys and a summary of identified Aboriginal sites. This register is to be available for public inspection.

The ILUA includes provisions relating to registration, a review of its terms, its duration (99 years), dispute resolution and assignment.

The heritage agreement annexed to the ILUA is comprehensive and provides detailed procedures to be followed to ensure that any areas which are to be the subject of exploration, mining or ancillary activities may be surveyed by the Nharnuwangga, Wajarri and Ngarlawangga People to protect areas of cultural significance.

The Native Title (State Provisions) Act 1999 (WA) has not yet been proclaimed. Most of it's provisions may only be implemented if the Act is approved by the Federal Attorney-General and Parliament under the *Native Title Act*[10]. Federal Parliament is expected to consider the Western Australian Act in the near future. However, by using the vehicle of the ILUA, the State and the Nharnuwangga, Wajarri and

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5 Clauses 6.2 and 6.3, ILUA.
6 Clause 8.2, ILUA.
7 Clause 9.1, ILUA.
8 Clause 9.2, ILUA.
9 Clause 7, ILUA.
10 Sections 43, 43A and 214..

Ngarlawangga People will, by agreement, be able to implement a key part of the Western Australian Act in the Nharnuwangga claim area, irrespective of whether it is approved by the Federal Parliament.

Significantly, the ILUA shifts the focus of the native title future act procedure away from the grant of mining tenements and towards any ground disturbing activities which will be carried out on the tenements. Generally, the formal grant of mining tenements may have little practical impact upon native title holders. They are likely to be more concerned about the physical impact of mining on the land. Mining may not in practice take place for several years after grant, if at all, and often will affect only a small part of a mining tenement. The ILUA ensures that any physical activities on the land are subject to appropriate heritage surveys and that more intrusive mining activities will be subject to consultation and arbitration when an actual mining proposal is made and the likely impact is known.

THE PASTORAL ACCESS PROTOCOLS

Under the pastoral access protocols the Nharnuwangga, Wajarri and Ngarlawangga People are entitled to enter each pastoral lease to exercise their determined native title rights. Unlike the ILUA, each pastoral access protocol will operate irrespective of whether native title rights exist within a particular pastoral lease. If in any particular area, native title has been extinguished (such as by an enclosed paddock), the Nharnuwangga, Wajarri and Ngarlawangga People are entitled to exercise equivalent rights (defined as "access rights").

Under the protocol, notice must be given to the pastoralist before a lease is entered. The pastoralist has 72 hours to make an objection on reasonable grounds. The protocol includes various requirements which must be observed by the Nharnuwangga, Wajarri and Ngarlawangga People when they enter a pastoral lease. A pastoralist may specify excluded areas and give reasonable directions concerning the activities of the Nharnuwangga, Wajarri and Ngarlawangga People when they enter a pastoral lease.

The parties are required to discuss in good faith any issue concerning objections, directions or excluded areas and there is provision for arbitration if the matter cannot be resolved.

If a pastoral lease is to be assigned the transferee must be required to enter into a deed of assumption in relation to the obligations of the pastoralist under the protocol. Each protocol is to be lodged as a memorial on the pastoral lease register, to operate as a record of the interest of the Nharnuwangga, Wajarri and Ngarlawangga People.

The consent determination and the access protocols represent a careful balancing of interests. The Nharnuwangga, Wajarri and Ngarlawangga People retain their right to access, use and carry out traditional activities on all pastoral land, thereby satisfying their traditional requirements. However, as a matter of law, the extinguishment of native title is recognised in appropriate areas, with the consequence that the future act procedures of the ILUA will operate only in those areas where native title has not been extinguished.

THE FEDERAL COURT DETERMINATION

The parties to a native title determination application do not have the power to determine the existence of native title rights and interests within a claim area. Only the Federal Court may make a determination of native title and the Court's determination will operate against all the world. However, under s 87 of the

Act, if an agreement is reached amongst the parties the Court may, if it appears to be appropriate to do so, make a determination in accordance with the agreement.

Madgwick J held that:

> "There was evidence of the survival ... of a community observing so far as is possible, in modern circumstances, traditionally based laws and customs ... and in the actual circumstances of the surviving members of the claimant groups, a continuing connection with the land in question. There were, however, live issues about all these matters.
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> The evidence could support a conclusion that native title was, at least over considerable areas, non-exclusive. On the material before me, the extent of extinguishment of native title by past acts was uncertain ...." [11]

The Judge noted:

> "Where the orders sought can reasonably be related to the evidentiary materials before the Court and the parties have had legal representation, it is not for the Court to exercise any paternalistic role as to the merits or demerits of the proposed settlement. However, it is to be borne in mind that, although it is the parties to this case who have arrived at the agreement, determinations of native title have effect as against all the world, and that there can be only one native title determination in relation in any particular area of land or waters (s. 68)".[12]

Madgwick J concluded that the settlement appeared to be justified by the evidence bearing in mind that the decision of the Full Federal Court in *Miriuwung Gajerrong*[13] did not appear to be helpful to the applicants in relation to extinguishment issues. Further the Judge considered that the terms of settlement appeared to be consistent with the objectives and purposes of the Act, namely:

> "to provide for the recognition and protection of native title and to establish ways in which future dealings affecting native title may proceed and to set standards for these dealings."[14]

Accordingly, the Court formally ordered that the proposed determination of native title should stand as an order of the Court, subject to the registration of the ILUA within 12 months.

THE OUTCOME

As Madgwick J stated, the Federal Court faces an enormous workload in determining native title cases and, without a great many more settlements, there will be unacceptable delays in resolving them. Moreover, negotiated settlements give the parties the opportunity to work out innovative co-existence packages which would not be available through a judicial determination and which may determine the interaction of respective rights and interests with more precision than a general determination.

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11 paras 15, 16.
12 para 26.
13 (2000) 170 ALR 159.
14 para 24.

While negotiated settlements should obviously be encouraged and the Federal Court may become increasingly active in referring claims to mediation, the Court and, particularly, the principal parties will need to ensure that any negotiated settlement is achieved through an inclusive process. The conduct of native title claims involve unique difficulties, primarily because of the large number of parties and interests involved, the complexity, and potentially emotive nature, of the issues and the logistics of ensuring that all interested parties are informed of and included in the claims process.

The applicants, the State and some industry bodies play by far the major role in native title claims in Western Australia. Most respondents do not actively participate. For this reason the principal parties will have a very significant influence in any negotiated outcome. Nevertheless, all stakeholders need to be properly included in the process, otherwise there will be resistance to settlement and less satisfaction with the outcome.

The Nharnuwangga settlement also showed that, apart from the effect of a settlement on existing interest holders, native title applicants and the State may agree upon significant changes to native title procedures relating to future land dealings and development within the determination area. This may affect the grant of mining tenements and the conduct of mining operations. The mining industry will need to consider the extent to which it should collectively become involved in native title claims and settlement negotiations.

While a negotiated settlement may not be a realistic possibility in many native title claims, and the process of negotiation and mediation needs to be carefully managed, the Nharnuwangga settlement is an important step forward in the resolution of native title issues in Western Australia.

FLETCHER CHALLENGE ENERGY LIMITED V ELECTRICITY CORPORATION OF NEW ZEALAND LIMITED[1]

James Willis*

Gas contract - Heads of agreement – Enforceability - Intention of parties – whether complete and certain – "all reasonable endeavours" clause

BACKGROUND

The case concerned the enforceability of a "Gas Contract Heads of Agreement" ("the HoA") entered into on 28 February 1997 between New Zealand's largest oil and gas producer, Fletcher Challenge Energy Limited ("FCE") and New Zealand's then largest electricity utility, Electricity Corporation of New Zealand Limited ("ECNZ"). FCE contended that the HoA was a binding and enforceable contract. ECNZ argued that FCE was seeking to turn an incomplete and unsuccessful negotiation into a binding contract for the supply of gas worth between NZ$1.2 and 1.8 billion over a seventeen year term.

There were three main issues in the case:

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1 High Court, Wellington, unreported 9 June 2000, CP 412/98.

* Bell Gully, Wellington, New Zealand.