

ancient, accompanied by Jimmy Wave Hill on the didjeridu. One of Alan Griffiths' songs performed by dancers with spectacularly coloured woven 'boards' related to his picking up his daughter from Broome in Western Australia to where she had been taken by government officials. Women from Kalkaringi, Dagaragu and Lajamanu painted their bodies and danced the stories of their ancestral women. NLC provided wonderful food and a local band, The White Water Band, from the neighbouring Aboriginal community of Yarralin, entertained the crowd.

There were a number of other speakers including the NT Parks and Wildlife Minister Karl Hampton, the Federal Member for Lingiari, Warren Snowden, NLC Chief Executive Officer, Kim Hill, and NLC Chairman, Wali Wunungmurra. David Ross, CEO of CLC commented, 'for years people have had to stand on the sidelines while other people made decisions about their traditional country... Now, with these joint management arrangements, people will be asked – asked about future developments on their land, about the use of it, about access to it – this is the crux of joint management. To be finally recognised as the traditional land owners is an enormous step forward for these peoples.'

Local Indigenous people will be trained as rangers and to set up tourism enterprises and TOs should be more able to fulfill their responsibilities to protect sacred sites. Opportunities should also present themselves for economic development including eco-tourism ventures, for weed and fire management and for the preservation and research of native flora and fauna.

But these activities will only occur with the necessary Northern Territory and Federal Government support for building the foundations of such activities including good governance, office space, transport and salaries and the prioritisation of local people in the park's management and contracting processes. As Sharona Bishop, a young artist, commented: '...the government should provide start-up money for art galleries, accommodation and tour guide operations (*The Australian*, May 14 2010).

So let's hope that TOs, Larry Johns and Jerry Jones, who shared their birthday on the day of the handback have something else to celebrate; that the 13<sup>th</sup> May will be, as Larry predicted: '...the most important day in the lives of my people' (*The Age*, 10 June 2010).

## Case Note: *Aplin on behalf of the Waanyi Peoples v State of Queensland [2010]* FCA 625

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Federal Court of Australia - Brisbane Registry  
Dowsett J  
18 June 2010

### Background

The Waanyi people filed their native title application in 1999. Their claim covered land in both Queensland and the Northern Territory, in the southern Gulf of Carpentaria region. Mr Phillips, who does not form part of the claim group, claimed his ancestor, 'Minnie', was a Waanyi woman, therefore he and Minnie's other descendents should be recognised as members of the claim group. The rest of the claim group, however, rejected this assertion, and do not recognise Mr Phillips as part of the group. They argued that group identity depends substantially, if not entirely, on acceptance from other members of the claimant group that the person in question is of Waanyi descent. Mr Phillips, conversely, submitted that identity depends on biological descent or adoption and the acceptance of that fact by one or more senior Waanyi people [79].

### Is Minnie recognised as a Waanyi person?

Justice Dowsett gave detailed consideration to the evidence relating to Minnie's identity provided by various interviewees in Professor Trigger's report on this matter. He found that, on the balance of probabilities, Minnie identified as a Waanyi person and, at least at certain points in her life, was accepted by Waanyi people at Burketown and Lawn Hill as being Waanyi. He noted however, that crucially, the contemporary Waanyi people have as yet refused to recognise her as a Waanyi person.

He then reiterated that the central question was whether Minnie's descendents are accepted as Waanyi. This would also require a finding as to whether the claim group accept Minnie as a Waanyi person.

## Membership of a claim group

### *Native Title Act 1993 (Cth)*

Justice Dowsett examined s 61(1) of the *Native Title Act 1993* (Cth) (NTA) which defines those who may make an application for a native title determination. He also considered s 251B of NTA which outlines a requirement that if a process under the traditional law and custom of the claim group exists by which the claim group authorises the applicant to make the application and deal with related arising matters on behalf of the claim group, that process must be followed. If no such process exists under traditional law and custom, a process adopted and agreed to by the claim group must then be followed.

He found that these provisions inevitably require that the claim group determine its own composition, and that this decision should be made in line with the processes outlined in s 251B. He reinforced the fact that while all claim group members do not have to be identified in the application, such identification must be possible at a later stage; claim groups do not have the right to arbitrarily determine who is and is not a member. In determining who forms part of the group, the claim group must act in accordance with traditional laws and customs [256].

### *Case law*

Justice Dowsett considered Brennan J's statement in the *Mabo* case that 'as long as people remain an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives' and the *Yorta Yorta* decision supports this. He then outlined the Full Court's statement in the *Sampi* appeal that 'a relevant factor among the constellation of factors to be considered in determining whether a group constitutes a "society" in the *Yorta Yorta* sense is the internal views of the members of the group- the emic view. The unity among members of the group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system'.

From these authorities, Dowsett J drew the conclusion that membership must be based on group acceptance, as that requirement is inherent in the concept of a society. He also relied on these authorities to find that membership of a society cannot be the product of acceptance by one other member; rather, acceptance must be by the community at a more general level [260-261].

## *Self-identification/assertion*

As Dowsett J found that Minnie identified as Waanyi, the question of self-identification did not directly arise in this case, however he considered that it should be resolved nonetheless.

He noted that for many Waanyi, no overt assertion of identity is necessary because they will already be accepted by those with whom they live. However, public assertion may be necessary where a person has not previously been recognised as Waanyi (it is possible to re-establish an affiliation) or where a person must choose between different affiliations of his or her parents. Justice Dowsett was inclined to think that living according to Waanyi custom, or not choosing to abandon Waanyi identity in the case of an individual with parents from different groups, would be sufficient.

## **Guidance provided to the claim group when making a decision**

Although Dowsett J ultimately left the Waanyi claim group to decide whether Mr Phillips was a member, he offered some thoughts on how such a decision ought to be made. It was noted that the politics of the situation may distort the claim group's views of the evidence and may not result in an informed and fair decision. He suggested that the claim group be advised to form a small committee, perhaps made up of those people who form the applicant. This committee could examine the evidence in light of the findings made in the present case and any other legal advice they receive. It should then formulate a recommendation that may be adopted by the claim group. He particularly urged that the views of certain interviewees be considered rather than disregarded based on preconceived notions.

## **The possibility of review**

Although the Waanyi claim group was to make this decision, Dowsett J suggested that given the significance of this issue for the purposes of the NTA, any decision might not necessarily be beyond review. Although he was not aware of any existing precedent in which judicial relief was available to someone who was wrongfully excluded from a claim group, he suggested that relief may be available by analogy to the doctrine of fraud on the power, which has been used in the past to grant relief for the oppression of minority company shareholders.