FEDERAL COURT OF AUSTRALIA

PBC support strategy

Department of the Prime Minister and Cabinet October 2016 Consultation Paper

Overview

For a number of reasons, discussed below, the Court supports the views expressed in the consultation paper that strategies to support the evolving needs of Prescribed Bodies Corporate (PBC) are appropriate. This reflects the Court's awareness of issues as noted in a letter from the Court's Chief Justice, The Hon James Allsop, to the Attorney-General dated 19 December 2014, a copy of which is annexed to this response.

Questions in the paper in which the Court has a particular interest given its jurisdiction include:

> *Question 8: Would a system of low cost and final dispute resolution between members of the native title group and the PBC lead to earlier consideration and potentially resolution of disputes?*
>
> *Question 9: How could the accountability of PBCs to native title holding groups for compliance with the PBC Regulations be improved?*
>
> *Question 10: Should the PBC Regulations that relate to the transparency and accountability to native title holders about the use of native title monies also apply to native title monies held outside the PBC?*

Jurisdiction

The Court's jurisdiction to hear and determine native title applications is exclusive of all courts other than the High Court (ss 81 and 213(2) of the *Native Title Act 1993* (Cth)).

Over many years the Court has developed, on a national basis, case management and related strategies to facilitate the resolution of disputes under the Native Title Act.

However, under related legislation, the *Corporations (Aboriginal and Torres Strait Islander Act) 1996* (Cth) (the **CATSI Act**), the Court's civil jurisdiction is not exclusive of the jurisdiction on the Supreme Courts of the states and territories.

As part of the response to question 8, consideration should be given to the potential benefits to be obtained by making the jurisdiction of this Court exclusive in civil matters arising under the CATSI Act. This would ensure that the case management and related strategies which the Court has developed in respect of matters arising under the Native Title Act can be applied to disputes under the CATSI Act and would facilitate the development of a coherent body of jurisprudence in relation to the kind of issues which frequently arise under these statutes including intra-Indigenous disputes.

The Court's experience

The experience of the Court in respect of matters arising under the Native title Act has disclosed numerous examples, directly involving and indirectly affecting the exercise of the Court's jurisdiction, related to lack of transparency and accountability with respect to funding.

The attached letter includes examples of cases in which issues of concern about the use of funds paid to native title claim groups (whether pursuant to an Indigenous land use agreement or otherwise) have arisen but it is the Court's experience that these issues are common-place. The issues are particularly acute in cases where the claim group is divided or there is more than one claim group claiming the same land (which is itself common). In such cases, issues about use of funds are inextricably linked with issues about control of the claim group and, failing control, the making of competing applications by another differently constituted claim group. These issues arise and are determined, in effect, without the input of any PBC because in most cases no PBC has yet been established.

For example, in addition to the matters mentioned in the attached letter (*Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255, *Weribone on behalf of the Mandandanji People v State of Queensland (No 2)* [2013] FCA 485 and *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31), recent experiences of problems of a similar nature have arisen, some examples of which are described below.

In *Wyman on behalf of the Bidjara People v State of Queensland (No 2)* [2013] FCA 1229, where a claim group had split into two (the Karingbal People and the Brown River People), the original claim group, the Karingbal People, held funds paid as part of future act agreements. The break-away group which came into existence subsequently, the Brown River People, was funded by the representative body, Queensland South Native Title Service. The Karingbal People, which controlled the funds, was separately represented. The Karingbal People's legal representation ceased the day before the substantive hearing. The Court was informed that this was because all of the funds had been spent before the hearing. Ultimately, while both claims failed, it was held that the Brown River People would have been the right people for the country claimed (but for lack of substantial continuity of connection)

In QUD 1094 of 2015 (*The Wulli Wulli National Aboriginal Corporation v Auburn Dawson People Limited*), the claims included access to funds and an account of use of funds by the PBC in respect of funds paid to the respondent as part of future act agreements. The funds in dispute were in the order of $3.5 million. The status of the funds, and the right to them, were in issue in the proceedings, but were resolved by a detailed agreement reflected in orders dated 15 April 2016.

Accordingly, at present, although it is common for funds to be paid to a body before the constitution of the PBC, there is no transparency or accountability for funds held outside the PBC context, nor regulation of the transition from the non-PBC to PBC situation. Many claim group members have no experience in first, financial management, or corporate governance and accountability, and, secondly, policy development and planning for dealing with long term substantial income streams. The Court has often seen, in cases where authorisations under s 66B of the Native Title Act are challenged, expenditure of large sums on, for example, shopping vouchers to encourage voting, or favouring members of one faction in the group with employment or heritage work.

Disputes such as these, and their resolution in a timely and cost-effective manner, would be assisted by greater clarity about the rights and duties of bodies paid funds in the context of the existence of a native title claim, as well as the rights and duties of a PBC once it is established.

A natural corollary of improving the accountability of non-PBC bodies which are paid funds to both native title claim groups and to PBCs is also to ensure greater accountability of PBCs themselves.

It will also be apparent that all of the examples result from the fact that in most cases agreements that result in the payment of money to native title claimants or a body on their behalf are completed before any determination of native title and thus before a PBC is established. Further, that these kinds of disputes are one particular manifestation of the processes in the Native Title Act, with respect to the identification and authorisation of an applicant, often give rise to substantial intra-Indigenous disputes and have the potential to exhaust any resources that are available before any PBC is established.

With this in mind, consideration could also be given to the relationship between the concept of the applicant under the Native Title Act and the PBC. At present, disputes about control of a native title claim and funds which have been paid as a result of the claim are fought out through the identity of the relevant applicant. There may be benefit in shifting the focus to the PBC by requiring a PBC to exist from the outset of a claim, the PBC being the body responsible for the claim. Disputes about control of the application and funds paid as a result of the claim would then be resolved though the governance of the PBC.

Measures to address these matters are likely reduce or ameliorate the frequency and intensity of intra-Indigenous disputes before the Court which either require substantive resolution or adversely affect the substantive resolution of other matters (such as native title determination applications) which these disputes directly and indirectly affect.

Conclusion

The Court supports:

1. Consolidation of jurisdiction for matters related to, although not arising under, the Native Title Act by vesting exclusive jurisdiction for civil matters under the CATSI Act in the Court.

2. Measures to ensure:
    - clarity about the status of money paid to or on behalf of native title claim groups before the establishment of a PBC vis-à-vis native title claim groups, non-PBC bodies, holders of native title, and PBCs;
    - transparency and accountability relating to such funds, particularly where non-representative bodies are providing legal services to native title claim groups;
    - more effective resolution of intra-Indigenous disputes about such funds, including an appropriate framework which provides for access to information about the uses made and proposed to be made of such money;
    - an effective transition from the status of claim group to native title holder including the establishment of a PBC.

    This may involve expansion of the current *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), as well as amendments to the Native Title Act.
3. As a corollary of 2 above, greater transparency and accountability of PBCs to native title claim groups and native title holders.
4. Consideration of an expanded role of PBCs in respect of native title claimant applications.

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19 December 2014

The Hon George Brandis QC
Attorney-General and Minister for the Arts
Parliament House
CANBERRA ACT 2600

Re: *Native Title Act 1993* and money payments being for "Future Acts".

Dear George Attorney

A number of judges of the Native Title Practice Committee are concerned about what might be seen to be the lack of adequate provisions in the *Native Title Act 1993* to provide a structure for the proper application of funds made available to a native title group, either through moneys paid to a prescribed body corporate, or otherwise paid pursuant to determination, or pursuant to an indigenous land use agreement.

The Court presently has no direct power to make orders in relation to those matters, after a determination of native title has been made.

In *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255, and *Weribone on behalf of the Mandandanji People v State of Queensland (No 2)* [2013] FCA 485, Justice Rares made orders relating to the pre-determination preservation and application of funds held by a native title claim group pending the determination, because of his concerns about the appropriate application and disbursement of funds otherwise available to the claim group. The Commonwealth appealed on the basis that there was no power to make the orders. The issue in that matter was resolved before that appeal was heard, and ultimately the appeal was not pressed.

In the course of dealing with the Kalgoorlie claims (*Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 2)* [2007] FCA 31), Justice Lindgren had some concerns of a similar nature, although no judgment was given dealing with those concerns.

In some instances, there are very considerable sums of money involved. The issue is potentially a systemic one, and having regard to the amounts involved, of some urgency and very important.

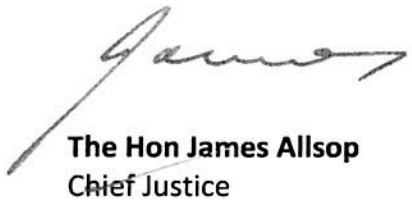
The Committee does not have a view as to the appropriate way the issue should be addressed. Some of the judges on the Committee feel that it is appropriate for the Court (through me) to bring to the attention of the Executive Government (through you) the present state of affairs.

In a report dated 1 July 2013 to the Government entitled "Taxation of Native Title and Traditional Owner Benefits and Governance Working Group" similar issues were raised in Chapter 3 entitled "Governance Concerns and Current Arrangements", and Chapter 4 "Protecting Indigenous Community Benefits".

I have discussed the issue with the President of the Native Title Tribunal and she has the same concerns.

If I may suggest, to the extent that you wish any further consultation with the Court on this matter, I may ask a member of the Committee (perhaps Justice Dowsett) to brief you directly, if you think that is appropriate.

Yours sincerely



The Hon James Allsop
Chief Justice