FEDERAL COURT OF AUSTRALIA

CG (Deceased) on behalf of the Badimia People v State of Western Australia [2016] FCAFC 67

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| Appeal from: | *CG (Deceased) on behalf of the Badimia People v State of Western Australia (No 2)* [2015] FCA 507  |
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| File number(s): | WAD 281 of 2015 |
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| Judge(s): | **NORTH, MANSFIELD, REEVES, JAGOT AND MORTIMER JJ** |
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| Date of judgment: | 18 May 2016  |
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| Catchwords: | **NATIVE TITLE -** whether the Court has the power under the *Native Title Act 1993* (Cth) to make a negative determination in the absence of a non-claimant application - nature of determinations and applications **NATIVE TITLE** - whether primary judge erred in exercising the power to make a negative determination in relation to the claim area – whether discretion to make negative determination properly construed and applied |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 13*Aboriginal Land Rights (NT) Act 1976* (Cth)*Federal Court of Australia Act 1976 (Cth)* s 22*Judiciary Act 1903* (Cth) s 39B*Native Title Act 1993* (Cth) preamble, ss 3, 4, 13, 23B, 23F, 24, 24E, 24EBA, 24FA, 24FB, 24FC, 24FD, 24FE, 24GB, 24GD, 24HA, 24ID, 24NA, 24OA, 29, 60A, 61, 61A, 62, 63, 66, 67, 68, 70, 79A, 81, 84, 86A, 86B, 86G, 94A, 184, 185, 186, 190, 190A, 190B, 190C, 190D, 193, 213, 222, 223, 225, 233, 238, 253*Native Title Amendment Act 1998* (Cth)Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) paras 8.1, 8.2, 8.4, 8.6, 8.9  |
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| Cases cited: | *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; (1999) 198 CLR 334*Bodney v Bennell* [2008] FCAFC 63; (2008) 167 FCR 84*CG (Deceased) on behalf of the Badimia People v State of Western Australia* [2015] FCA 204 *CG (Deceased) on behalf of the Badimia People v State of Western Australia (No 2)* [2015] FCA 507*Commonwealth v Clifton* [2007] FCAFC 190; (2007) 164 FCR 355*Dale v State of Western Australia* [2011] FCAFC 46; (2011) 191 FCR 521*Griffiths v Northern Territory* [2006] FCA 903; (2006) 165 FCR 300*Harrington-Smith on behalf of Wongatha People v State of Western Australia (No 9)* [2007] FCA 31; (2007) 238 ALR 1*Jango v Northern Territory of Australia* [2007] FCAFC 101; (2007) 159 FCR 531 *Lardil Peoples v Queensland* [2001] FCA 414; (2001) 108 FCR 453*Lightning Ridge Local Aboriginal Land Council v Premier of New South Wales in his capacity as the State Minister pursuant to the Native Title Act 1993 (Cth)* [2012] FCA 792*Re Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; (1982) 158 CLR 327*Risk v Northern Territory* [2006] FCA 404*Western Australia v Fazeldean on behalf of the Thalanyji People (No 2)* [2013] FCAFC 58; (2013) 211 FCR 150*Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1*Wyman on behalf of the Bidjara People v State of Queensland* [2015] FCAFC 108; (2015) 324 ALR 454 |
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| Date of hearing: | 18 February 2016 |
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| Registry: | Western Australia |
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| Division: | General Division |
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| National Practice Area: | Native Title |
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| Category: | Catchwords |
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| Number of paragraphs: | 116  |
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| Counsel for the Intervener: | Mr J Horton QC with Ms E Longbottom |
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| Solicitor for the Intervener: | Crown Law |

ORDERS

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|  | WAD 281 of 2015 |
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| BETWEEN: | CG (DECEASED) & ORS ON BEHALF OF THE BADIMIA PEOPLEAppellant |
| AND: | STATE OF WESTERN AUSTRALIAFirst RespondentCOMMONWEALTH OF AUSTRALIA & ORSSecond Respondent |
|  | STATE OF QUEENSLANDIntervener |

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| JUDGE: | NORTH, MANSFIELD, REEVES, JAGOT AND MORTIMER JJ  |
| DATE OF ORDER: | 18 May 2016  |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. No order as to costs. Leave for all parties to apply in writing to vary this order within seven (7) days in which event directions will be made in chambers for the issue of costs to be resolved on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

NORTH, MANSFIELD, JAGOT AND MORTIMER JJ:

1. Over many years, from time to time and where considered appropriate, judges of this Court have made orders consequential upon an unsuccessful claimant application under the *Native Title Act 1993* (Cth) (the **Native Title Act** or **the Act**) determining that native title does not exist in relation to land the subject of the application.
2. The appellant contends that this practice is wrong because, properly construed, the Native Title Actonly authorises the making of a determination that native title does not exist in response to a non-claimant application and does not authorise any such determination in response to a claimant application. The same contention was put to, and rejected by, the primary judge in *CG (Deceased) on behalf of the Badimia People v State of Western Australia (No 2)* [2015] FCA 507.
3. Most recently, in *Wyman on behalf of the Bidjara People v State of Queensland* [2015] FCAFC 108; (2015) 324 ALR 454, a Full Court consisting of three judges (North, Barker and White JJ) held that where this Court dismisses or proposes to dismiss an unsuccessful claimant application, it also has a discretion to determine that native title does not exist, and that a range of factors might properly inform the exercise of this discretion.
4. Given the decision of the Full Court in *Wyman*, and the appellant’s contention that this decision of the Full Court is plainly wrong (ground 1 of the appeal), a Full Court consisting of five judges was convened to resolve this issue. In addition to this issue, the appellant also contends that if the primary judge was able to determine that native title did not exist in relation to the land the subject of the claimant application then, in any event, in so doing the primary judge denied the appellant procedural fairness (ground 2(b) of the appeal), and the exercise of his discretion miscarried in the circumstances of the case (ground 2(a) of the appeal).
5. We consider that none of these grounds of appeal can be sustained.

## The power issue

1. To resolve this issue, close consideration of the provisions of the Native Title Act is required.
2. The main objects of the Native Title Act (s 3) include providing for the recognition and protection of native title and establishing a “mechanism for determining claims to native title”. The first of these objects, in particular, is intended to reflect the statement of intention in the Preamble to the Act that the people of Australia intend:

(a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and

(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

1. The overview of the Native Title Act, set out in s 4, explains that the Act “recognises and protects native title” (s 4(1)) and, essentially, “covers two topics” (s 4(2)), being:

(a) acts affecting native title (see subsections (3) to (6));

(b) determining whether native title exists and compensation for acts affecting native title (see subsection (7)).

1. Section 4(7) identifies the “mechanism for determining claims to native title” to which s 3 refers, by stating that the Act:

(a) provides for the Federal Court to make determinations of native title and compensation;

1. Section 13(1) then provides as follows:

An application may be made to the Federal Court under Part 3:

(a) for a determination of native title in relation to an area for which there is no approved determination of native title; or

(b) to revoke or vary an approved determination of native title on the grounds set out in subsection (5).

1. Section 13(3) identifies an approved determination of native title, relevantly, as a determination of native title made on an application under s 13(1)(a) or (2) (which deals with determinations of native title where compensation is sought). Section 13(4) provides for the variation or revocation of an approved determination of native title, a power which, if exercised, results in a varied determination of native title becoming an approved determination of native title and a revoked determination of native title no longer being an approved determination of native title.
2. Part 3 of the Native Title Act, as referred to in s 13(1), deals with applications. According to s 60A(1)(a), Pt 3 “has the rules for making applications to the Federal Court for native title determinations, revised native title determinations and compensation” together with “various other applications to the Federal Court”. According to s 60A(2), Pt 3 contains provisions which “set out who may make the different kinds of application, what they must contain and what is to be done when they are made”. Many of these provisions were inserted in Pt 3 by the *Native Title Amendment Act 1998* (Cth) (the **1998 amendments**). One purpose of the 1998 amendments was to establish a registration process for native title claims: see further at [22] below.
3. Section 61(1) provides that the applications that may be made under Div 1 of Pt 3 and the persons who may make each application are set out in a table, the relevant part of which appears as follows:

| Applications |
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| Kind of application  | Application  | Persons who may make application  |
| Native title determination application  | Application, as mentioned in subsection 13(1), for a determination of native title in relation to an area for which there is no approved determination of native title.  | (1) A person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group; or Note 1:    The person or persons will be the applicant: see subsection (2) of this section. Note 2:    Section 251B states what it means for a person or persons to be *authorised* by all the persons in the native title claim group. (2) A person who holds a non-native title interest in relation to the whole of the area in relation to which the determination is sought; or (3) The Commonwealth Minister; or (4) The State Minister or the Territory Minister, if the determination is sought in relation to an area within the jurisdictional limits of the State or Territory concerned.  |
| Revised native title determination application  | Application, as mentioned in subsection 13(1), for revocation or variation of an approved determination of native title, on the grounds set out in subsection 13(5).  | (1) The registered native title body corporate; or (2) The Commonwealth Minister; or (3) The State Minister or the Territory Minister, if the determination is sought in relation to an area within the jurisdictional limits of the State or Territory concerned; or (4) The Native Title Registrar.  |

1. It will be apparent that, insofar as s 61(1) is concerned, and leaving aside applications to vary or revoke an approved determination of native title, there is only one kind of application for a determination of native title that can be made – a native title determination application – but such an application may be made by four categories of applicant (a person authorised by a native title claim group, a person holding a non-native title interest in the land, the Commonwealth Minister, or a State or Territory Minister in relation to land within the relevant State or Territory).
2. What then are “claimant applications” and “non-claimant applications” to which the Act also refers? For this, we must turn to s 253, a definitions provision. According to s 253, unless the contrary intention appears, a “claimant application” means a native title determination application that a native title claim group has authorised to be made, whereas a “non-claimant application” means a native title determination application that is not a claimant application.
3. Certain provisions of the Native Title Act apply exclusively to claimant applications and others apply exclusively to non-claimant applications. In particular, by ss 24FB and 24FC, an area may be “subject to s 24FA protection” if a non-claimant application or a corresponding application under a State or Territory law is made by an appropriate person and, within the required notification period under s 66, there is no “relevant native title claim” covering the same area in whole or in part and certain other conditions are met, one of which is that there is no entry in the National Native Title Register under s 193(1)(a) or (b) that native title exists in the area or a part of the area. If s 24FA protection applies then, by s 24FA, future acts in the area are valid and a right of compensation is provided for the extinguishment of any native title. “Relevant native title claim” is a term defined by s 24FE by reference to the entry of a claimant application on the Register of Native Title Claims. Under s 24FD, an area is also subject to s 24FA protection if there is an entry in the National Native Title Register that no native title exists in an area. All of these provisions are expressed to apply to “a particular time”. While these provisions were inserted by the 1998 amendments, they largely replicated similar provisions in the Act as at 1993: ss 24, 67 and 70.
4. Also, by s 61A(2) and (3), certain claimant applications are prohibited from being made – in effect, claimant applications over land the subject of certain previous exclusive or non-exclusive possession acts as described in ss 23B and 23F relating, among others, to grants of freehold and grants of certain agricultural and pastoral leases.
5. By s 61(5), native title determination applications must be in the prescribed form and contain or be accompanied by the prescribed information. Section 62 imposes further requirements applying only to claimant applications, which must be accompanied by and contain certain specific information.
6. It is apparent from the requirements of s 62 that a claimant application is one which necessarily claims native title rights and interests. Accordingly, by s 62(1)(a) a claimant application must be accompanied by an affidavit, sworn by the applicant, deposing “that the applicant believes that the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application”. By 62(2)(d) and (e) a claimant application must include:

(d) a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law;

(e) a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:

(i) the native title claim group have, and the predecessors of those persons had, an association with the area; and

(ii) there exist traditional laws and customs that give rise to the claimed native title; and

(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs;

1. Section 63 requires native title determination applications to be given to the Native Title Registrar. Sub-sections 66(1) – (2A) then provide that the Native Title Registrar is to give the application to certain other persons. By s 66(3), the Registrar is also to give notice of the application. However, by s 66(6), if the application is a claimant application, notice is not to be given until the Registrar has decided whether or not the “claim made in the application” is to be accepted for registration.
2. One purpose of notification is to ensure, so far as appropriate, that any person who is properly interested in the potential outcome of a native title determination application is given the opportunity to participate in the conduct of that application.
3. Another purpose of notification relates to the Register of Native Title Claims. In the case of a claimant application, the Registrar of Native Title is required by ss 190A – 190D to decide whether to put the claim on the Register of Native Title Claims maintained under s 185 of the Native Title Act. The effect of registration is important. It includes an entitlement that the registered native title claimant (as defined in s 253) is to be notified of certain proposed future acts under s 29(2)(b)(i) and thereby is entitled to the right to negotiate under Subdiv P of Div 3 of Pt 2 of the Act in relation to certain future acts as defined in s 233. In short, a registered native title claimant is entitled to negotiate as if the claimant application had been successful. This is an important pre-determination right, and explains why the issue of registration is prioritised over the issue of notification by s 66(6). A complementary consideration is that the decision of a notified person or entity whether or not to become a party to the claimant application may be informed by whether the claim has been registered.
4. Section 66(10) provides that the contents of the notice to be given under s 66(3)(a) (notice to specified persons) and s 66(3)(d) (notice to the public) must include statements to the effect that:

(a) in the case of a non-claimant application (see section 253) - the area covered by the application may be subject to section 24FA protection unless, at the end of the period of 3 months starting on the notification day (as defined in subsection (8) of this section), the area is covered by a relevant native title claim (as defined in section 24FE); and

(b) in the case of any native title determination application - as there can be only one determination of native title for an area, if a person does not become a party in relation to the application, there may be no other opportunity for the Federal Court, in making its determination, to take into account the person's native title rights and interests in relation to the area concerned; and

(c) in any case - a person who wants to be a party in relation to the application must notify the Federal Court, in writing, within the period of 3 months starting on the notification day (as defined in subsection (8)), or, after that period, get the leave of the Federal Court under subsection 84(5) to become a party.

1. The notice requirement in s 66(10)(a) is directed to the protection given by s 24FA. The notice requirement in s 66(10)(b) reflects s 68 of the Native Title Act. By s 68, the Federal Court must not conduct any proceeding or make any determination of native title in relation to an area if there is an approved determination of native title for that area (except if the application is to revoke or vary that approved determination or to review or appeal that determination).
2. The purpose of s 68 – that there may be only one determination of native title in relation to any area of land – is facilitated by s 67. By s 67, if there are two or more native title determination applications that cover the same area the Court must ensure that, to that extent, the applications “are dealt with in the same proceeding”. The circumstances in which this section will apply include where the notification under s 66(10)(a) of a non-claimant application attracts “a relevant native title claim”, that is, a claimant application.
3. By s 84(3), any person with an interest in relation to the land (including a claimed native title interest) who gives notice to the Court within the period specified in the notice under s 66 is automatically a party to the proceeding in respect of the native title determination application. The Court may also join any person as a party if satisfied that the person’s interests may be affected by a determination in the proceedings and it is in the interests of justice to do so (s 84(5)).
4. Part 7 of the Native Title Act deals with the Register of Native Title Claims, mentioned above. Section 184 provides that a reference in Pt 7 to a claim is a reference to an assertion contained in an application that a person or persons hold native title in relation to a specified area of land or waters. This concept regulates the obligation of the Native Title Registrar set out in s 190. By s 190, the Registrar must include in the Register details of any claims accepted for registration. By s 186(1), the Register must contain certain information including the area of land or waters covered by the claim, a description of the persons who it is claimed hold the native title and a description of the native title rights and interests in the claim that the Registrar considered, prima facie, could be established.
5. Part 8 of the Act deals with the National Native Title Register. Section 193(1)(a) requires that Register to contain certain information in relation to any approved determination of native title made by the Federal Court or the High Court. Whenever such a determination is made, this Register has to include details of:

(d) the matters determined, including:

(i) whether or not native title exists in relation to the land or waters covered by the determination; and

(ii) if it exists – who the common law holders of the native title are and a description of the nature and extent of the native title rights and interests concerned;

1. Part 4 concerns determinations of Native Title. According to s 79A, Pt 4 has the rules for processing applications and making determinations relating to native title. By s 81:

The Federal Court has jurisdiction to hear and determine applications filed in the Federal Court that relate to native title and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court.

1. Section 94A provides that:

An order in which the Federal Court makes a determination of native title must set out details of the matters mentioned in section 225 (which defines determination of native title).

1. According to s 225:

A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land or waters and, if it does exist, a determination of:

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease--whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

1. The words “or not” were inserted as a part of the 1998 amendments to the Act. Section 193(1)(d) (see [28] above), which was also inserted as a part of the 1998 amendments, is the only other provision in the Act containing the same terminology.
2. Part 13 of the Act sets out a number of miscellaneous provisions including s 213 as follows:

(1) If, for the purpose of any matter or proceeding before the Federal Court, it is necessary to make a determination of native title, that determination must be made in accordance with the procedures in this Act.

(2) Subject to this Act, the Federal Court has jurisdiction in relation to matters arising under this Act.

1. According to the appellant, the procedures in the Native Title Act to which s 213(1) refers operate so that if a claimant application is made, this Court may make a determination that native title exists (in which event the determination must determine the matters set out in s 225(a) – (e)) or, if the claimant application has been unsuccessful, may dismiss the claimant application, but may not make a determination that native title does not exist. According to the appellant, it is only if a non-claimant application is made that this Court may determine that native title does not exist in relation to a particular area. In particular, the appellant said:
2. If a claimant application is made, the only justiciable issue which the application raises is whether the native title rights and interests claimed by the claim group exist. The issue is not whether native title exists at all.
3. If, but only if, a non-claimant application is made, the justiciable issue is whether native title exists at all.
4. Section 225 thus must be understood as identifying the two kinds of determinations the Court may make if an applicant succeeds. In response to a successful claimant application, the Court may make a determination that native title exists, in which event, the matters in s 225(a) – (e) must also be determined. In response to a successful non-claimant application, the Court may make a determination that native title does not exist. The Native Title Act is silent in respect of unsuccessful applications but it is contrary to the scheme of the Act, and in contravention of s 213(1), for the Court to do other than merely dismiss an unsuccessful claimant application.
5. By s 213(1), the power of the Court to make a determination is conditional on compliance with the procedures set out in the Act. The procedures are different for claimant and non-claimant applications because a claimant application is required to contain and be accompanied by certain information, which is then notified, whereas a non-claimant application is not required to be accompanied by this information. Moreover, for a non-claimant application, but not a claimant application, the notice given under s 66 must include a statement that the area may be subject to s 24FA protection unless, by the end of the notice period, the area is covered by a relevant native title claim. Further, it is the particular application as made which is notified. A claimant application necessarily involves a claim by a claim group to native title rights and interests in relation to a particular area. If made, persons required to be notified and the public are given notice of that application under s 66. A non-claimant application necessarily involves a claim that native title does not exist in relation to a particular area. If made, persons required to be notified and the public are given notice of that application under s 66. If a claimant application alone is made, yet the Court could make a determination that native title does not exist in relation to a particular area, the notice procedures in s 66 would miscarry. The procedures with which the Court is required to comply before making a determination of native title as referred to in s 213(1) would not have been satisfied.
6. This is consistent with the adversarial system in which it is the justiciable issues raised by the application which are resolved and the party who asserts a matter bears the onus of proof. The Native Title Act does not authorise a “roving inquiry” (*Jango v Northern Territory of Australia* [2007] FCAFC 101; (2007) 159 FCR 531 at [83] and [84] (***Jango***)). If a claimant application is made, and no non-claimant application is made in respect of the same area, the only justiciable issue is whether the native title rights and interests as claimed by the claim group exist, and the applicant bears the onus of proving that they do. There is a vast difference between that limited justiciable issue and the issue which arises on a non-claimant application, in which the non-claimant applicant will bear the onus of proving that native title does *not* exist in relation to an area.
7. It is also consistent with the objects of the Native Title Act to recognise and protect native title, and the beneficial nature of the Act which is intended to rectify past injustices, that a determination that native title does not exist will only be made if an application to that effect has been notified and the party asserting the negative proposition has discharged the onus of proof. As such, the construction of the Native Title Act which the appellant proposes best accords with the language and purpose of all of the provisions of the Act.
8. In the present case, the only application made and notified was a claimant application. The procedures for a non-claimant application had not been complied with, yet the primary judge made a determination that native title does not exist, which was an exercise of power in contravention of s 213(1).
9. Although these contentions touch upon matters involving procedural fairness and practice and procedure (grounds 2(a) and 2(b) of the appeal), the issue of power (ground 1 of the appeal) is to be resolved by reference to the provisions of the Native Title Act alone. The Act either does or does not permit the Court to determine that native title does not exist in respect of an unsuccessful claimant application. If the Act permits the Court to determine that native title does not exist in respect of an unsuccessful claimant application, then concerns about the onus of proof and procedural fairness are to be resolved through the conduct of particular proceedings, but are not relevant to the existence of the power.
10. The best argument for the appellant is that s 66(3) requires notification of the particular application made. In the case of a claimant application, that application will claim the existence of native title rights and interests in relation to land. In the case of a non-claimant application, that application will claim that native title rights and interests in relation to land do not exist. Notification of a claimant application, the appellant submitted, puts people on notice only of the possibility that the claim that native title exists might be accepted or rejected, not that the Court might determine that there is no native title in relation to the land; only notice of a non-claimant application puts people on notice of the possibility that the Court might determine that native title does not exist in relation to the land the subject of the claim. A notice under s 66(10)(b), according to the appellant, is insufficient to fulfil the latter function.
11. According to the appellant it follows that the relevant “procedure” for the purposes of s 213(1) should be understood as a requirement to notify a claimant application before a positive determination can be made and to notify a non-claimant application before a negative determination can be made. If it were otherwise, it is said, the purpose of notification, fundamental to the operation of the Native Title Act, would be undermined.
12. We accept that while s 61 of the Act provides for one kind of application - a native title determination application - it is apparent from s 253 and s 62 that a claimant application may be made only by an applicant authorised by a native title claim group and not by one of the other three categories of people identified as able to make a native title determination application by s 61. This is because a claimant application is defined as a native title determination application that a native title claim group has authorised to be made (s 253) and must be accompanied by and contain information and details concerning the native title rights and interests claimed by the native title claim group (s 62). It follows that the other three categories of people who may make a native title determination application may make only a non-claimant application. It also follows that a person authorised by a native title claim group cannot make a non-claimant application because, by definition, such a claim is a claimant application.
13. It may be accepted that these matters – namely, (i) that a claimant application necessarily claims native title exists and a non-claimant application necessarily claims that native title does not exist, and (ii) that it is the particular application made which is notified under s 66(3) – appear to provide some support for the appellant’s contention. However, when assessed in the context of the Act as a whole, this appearance is not sustained.
14. **First**, it is apparent from ss 94A and 225 that a determination of native title, if one is to be made at all (which is a separate issue dependent on the facts of the individual case), necessarily involves a determination that native title exists or does not exist to some or other extent in respect of the claim area. Hence, an approved determination of native title as provided for in s 13(3) is a determination of that kind.
15. **Second**, and despite a possible suggestion by the appellant to the contrary, there is no doubt that the Court has jurisdiction to hear and determine native title determination applications (s 81). The constraint imposed by s 213(1) does not relate to the jurisdiction of the Court to hear and determine an application. The constraint is only that, if it is necessary to make a determination of native title, such a determination must be made in accordance with the procedures in the Act. The reasoning of the Full Court in *Commonwealth v Clifton* [2007] FCAFC 190; (2007) 164 FCR 355 (***Clifton***) explains the operation of s 213(1). That reasoning does not support the appellant. The Full Court in *Clifton* recognised that, where there is more than one native title claim group seeking a determination over a particular claim area, each group must follow the procedures prescribed in the Act; that is authorisation, the making of an application, and the provision of appropriate detail in accordance with s 62, before the claim of that group may be eligible for the making of a determination of native title in their favour. The Full Court also recognised that a claimant application which is not accepted may enliven the power of the Court to determine that native title does not exist. This is disclosed in the following paragraphs of the judgment in *Clifton*:

58 We therefore conclude that where more than one native title claim group seeks a determination that it holds common or group rights and interests constituting the whole or part of the native title to an area, each group must authorise a person or persons to make an application as mentioned in s 13(1) under Part 3 of the Act. Where more than one application is made, to the extent that the applications cover the same area, they will be dealt with in the one proceeding (s 67). Consequently a determination of native title in respect of any one or more of the claim groups will be able to be made in accordance with the procedures of the Act (s 213(1)).

59 Alternatively, if following the giving of notice by the Native Title Registrar of the making of an application or applications in respect of the area, only one application is filed in respect of that area, the Court would be entitled to be satisfied that no other claim group or groups asserts a claim to hold native title to the area.

1. **Third**, *Clifton* also explains the relevance, such as it is, of s 22 of the *Federal Court of Australia Act 1976* (Cth) (the **Court Act**) which provide as follows:

The Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.

1. In *Clifton,* the Full Court said:

40 Section 213 of the Act is critical to a determination of the extent of the jurisdiction of the Federal Court under the Act. In providing that the jurisdiction of the Court in relation to matters arising under the Act is subject to the Act, s 213(2) discloses an intention to limit the general jurisdiction conferred on the Federal Court by s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) and the jurisdiction otherwise conferred on the Court by s 81 of the Act. Section 39B(1A)(c) vests in the Federal Court original jurisdiction in any matter arising under a law made by the Parliament other than a criminal matter. The limit placed by s 213(1) on the Court’s jurisdiction in any matter arising under the Native Title Act is that any determination of native title must be made in accordance with the procedures in the Act.

41 Because of the reliance placed on s 22 of the *Federal Court of Australia Act 1976* (Cth), we interpolate that s 22 is not a provision which expands the Court’s jurisdiction. Section 22 obliges the Court, in every matter before it, to grant all remedies to which any of the parties appears to be entitled in respect of a claim properly brought forward by him or her in the matter so as to avoid multiplicity of proceedings. All jurisdiction of the Federal Court is jurisdiction with respect to matters (s 77(1) of the Constitution). Section 22 is concerned with the way in which the Court is to exercise that jurisdiction.

1. **Fourth**, determinations of native title, be they a determination that native title does not exist (referred to as a negative determination) or a determination that native title exists (referred to as a positive determination), must have the same juridical character. These are both determinations of native title, that is, determinations about the existence, or not, of a relationship with land, namely the rights and interests of a people in relation to land or waters (s 223). Whether positive (the relationship of the required kind exists) or negative (no relationship of the required kind exists), they operate against the world and do not merely bind the parties to the case in which the determination was made. The observations in *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 (***Ward*)**, *Dale v State of Western Australia* [2011] FCAFC 46; (2011) 191 FCR 521 (***Dale*)** and *Western Australia v Fazeldean on behalf of the Thalanyji People (No 2)* [2013] FCAFC 58; (2013) 211 FCR 150 (***Fazeldean*)** on which the appellant relied do not provide the support the appellant appears to have assumed. In particular, it is not the case that the unique character of a native title determination, which those decisions recognise, indicates a statutory intention to enable successive applications by the same or different claimant groups to the one area of land.
2. To the contrary, the point being made in *Ward* at [32] is that native title rights and interests may cease to exist after a determination is made (for example, by loss of continuity of connection with the land), in which event it may be appropriate for a determination to be revoked or varied. This may be contrasted with a declaration which ordinarily involves “a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy” (*Bass v Permanent Trustee Co Ltd* [1999] HCA 9; (1999) 198 CLR 334 at [45] – [48]).
3. The point being made in *Dale* at [90] – [93] is that the doctrine of issue estoppel may have no work to do in respect of a determination of native title which recognises a form of right *in rem* binding the world at large.
4. In *Fazeldean,* the Full Court did no more than observe that:

[34] Thirdly, litigation under the *Native Title Act* is not ordinary private *inter partes* litigation. Sought to be vindicated are rights of a communal nature based on occupation and a physical and spiritual connection between land and people that has endured for possibly millennia. The vindication is not only for the living in the claim group, but for their ancestors and for generations to come. How that context affects the operation of principles such as *res judicata* under or in the context of the *Native Title Act* is a large question, and is one of great importance. Such a question is not apt to be disposed of on a summary application.

[35] Fourthly, and related to the last point, is the possible relationship between the strength of the evidence of the claim group’s connection with the land and the position of the State in the litigation. The State is the polity whose residents make the claim of historical connection with land. If that connection evidence were strong, an issue might arise as to the content of the legal obligation of the State in how it approached a claim for *res judicata*, based as it is on a procedural step that may have been a product of mistake or ignorance. Should the State approach a claim of such historical and future importance by reference to the drastic consequence of *res judicata* in the circumstances of the order having been brought about? The answer to that question might fashion the development of a rule of law qualifying the principle of res judicata in the context of this type of claim between these parties under the *Native Title Act*. The answers to these questions may involve a conclusion of the position of the State informed by notions of trust, good faith, informed recognition of the deep importance of the vindication of proven historical connection affecting generations past, present and future. The exercise of power to terminate proceedings summarily should be attended with caution; in particular, the development of the law should not be stultified by such exercise: cf *Spencer v The Commonwealth* [2010] HCA 28; 241 CLR 118 at 131[24]–132[25].

1. The fact that a determination of native title binds the world and does not operate only between the parties applies to both positive and negative determinations. This fact warrants heightened scrutiny by the Court about its state of satisfaction both that the onus of proof has been discharged and that the terms of the determination to be made are supported in all respects by the findings. But the onus remains the civil standard of the balance of probabilities. If the circumstances are such that a native title claimant application has not been established to the requisite standard, the onus of proof to support a negative determination may or may not have been discharged. If not discharged, it necessarily follows that a negative determination may not be made. If discharged, however, it does not necessarily follow that a negative determination should be made. The propriety or otherwise of making of a negative determination in such a case will depend on a wide range of circumstances. As noted, the legal character of a determination, that it will bind the world at large and not just the parties, will necessarily inform the appropriate exercise of the discretion whether or not to make a negative determination.
2. **Fifth**, no provision of the Native Title Act expressly states that the Court may make a determination that native title does or does not exist only in response to a claimant or a non-claimant application. It would not have been difficult for the provisions of the Act to state that a determination that native title exists may be made only in respect of a claimant application and a determination that native title does not exist may be made only in respect of a non-claimant application. Yet the Act does not do so. To the contrary, when the Act deals with native title determination applications in the key provisions of ss 13, 61, 81, 94A and 225, it does so without drawing any distinction between claimant and non-claimant applications. Similarly, s 213(1), which is critical to the appellant’s case, draws no such distinction.
3. **Sixth**, the only procedures involving different requirements for claimant and non-claimant applications to which the appellant pointed are those in s 66 of the Act. While reference was also made to s 24FA and 24FB, they are not procedures which apply to native title determination applications in general. They are specific provisions consequential upon the making of a non-claimant application and a failure to make a claimant application, and have nothing to do with whether a determination is negative or positive.
4. Similarly, the notification requirements for claimant and non-claimant applications prescribed by s 66(3), in common with many other provisions of the Act, draw no relevant distinctions between claimant and non-claimant applications. Section 66(6) contains procedures which apply to the registration of claimant applications and which, it may be inferred, were satisfied in the present case. Otherwise, the notice for a non-claimant application, but not a claimant application, is required to make a statement about the possibility of s 24FA protection (s 66(10)(a)), a consequence of the making of a non-claimant application if a claimant application is not made which, as noted, has nothing to do with the making of a claimant (positive) or a non-claimant (negative) determination. Other than this, the notices for native title determination applications, both claimant and non-claimant applications, are required to make the same statement about the operation of s 68 that there can be only one determination of native title (s 66(10)(b)) and about the time period in which a person may nominate to be a party to the application (s 66(10)(c)). Thus, none of these provisions makes any relevant distinction between a claimant (positive) application or a non-claimant (negative) application.
5. The problem with the appellant’s submission about notice being given only of the application as made (be it claimant or non-claimant) is that it assumes that those persons reading the notice will reason in a manner designed to reach the conclusion for which the appellant contends. However, it must be asked why a person who is notified that a particular claim group has claimed native title in respect of a particular area and that there are proceedings on foot to resolve the claim would assume that the potential outcomes of the proceedings are either that the native title claim group will succeed or fail and that, if they fail, the Court necessarily will do no more than reject the claim and will not, in any circumstance, determine that native title does not exist at all? The notice requirements under s 66(10) do not identify the relief sought by the applicant, whether it be a claimant application or a non-claimant application. Those requirements are directed to the existence of an application and the specific matters mentioned: the possibility of s 24FA protection, the opportunity for only one claim to be made to the same area of land, and the time limit within which one may elect to become a party. Persons notified cannot be assumed to have knowledge of or to be likely to turn their minds to the potential complexities which attend determining the relief which should be granted in respect of any particular application, and thus would have no reason to consider how relief might be framed in that regard. Given this, a natural and obvious corollary of an assertion that native title as claimed exists in relation to an area of land is that native title either as claimed, or at all, may be found not to exist in relation to that area. It follows that the appellant’s contentions to the contrary involve a narrow approach to an application which should not be attributed to those notified.
6. **Seventh**, it is not correct to say that the only “justiciable issue” on a claimant application is whether the claim group has proved the existence of the native title rights and interests claimed. A claimant application is required to be accompanied by an affidavit stating that the applicant believes that the claimed native title rights and interests have not been extinguished in relation to any part of the area covered by the application. It follows that in respect of every claimant application there is potentially a justiciable issue as to whether native title has been extinguished over the whole or part of the area. Further, another party to a proceeding involving a claimant application may put in issue the existence of any native title in relation to the whole or part of the area in a multiplicity of ways. For example, that party might contend that native title has been extinguished over the whole or part of the area, or that the particular claim group has not proved that the claimed native title exists over the whole or part of the area, or that any native title is incapable of continuing to exist over the whole or part of the area for reasons apart from extinguishment.
7. In other words, in respect of every claimant application there is the potential that the Court will be required to determine whether any native title is capable of continuing to exist in relation to a particular area. This does not mean that the Court will be engaging in an unauthorised and inappropriate “roving inquiry” (*Jango* at [83] and [84]). The issues as they arise between the parties will determine the extent of the Court’s consideration in each individual case.
8. Yet the consequence of the appellant’s argument is that, despite having conducted a full hearing on the merits of a claimant application under the Act and having heard the opposition to any and all aspects of that claim, the Court would not in any circumstances be able to determine that there is no native title in relation to the area of land the subject of that claim. This would be so whether or not the Court was satisfied that the opposition had been proved by the asserting party to the relevant standard or proof (on the balance of probabilities). This submission is not attractive.
9. The appellant’s submission is that s 225 resolves these concerns because if, for example, in dealing with a claimant application the Court finds that native title has been extinguished in relation to land, s 225(c) requires the Court to determine the nature and extent of the native title rights and interests in relation to the determination area. Thus, if any extinguishment is found the determination will include a determination that native title rights and interests do not extend to the land affected by extinguishment.
10. This, however, involves a contrived and artificial construction of s 225. It does not recognise that, on the facts of a particular case, the Court might find that native title has been extinguished over the whole of the determination area, in which event s 225(a) to (e) are not engaged (a pre-condition to the engagement of those provisions being that native title “does exist” as set out in the opening words to the provision). It also does not recognise that, apart from extinguishment, a party to proceedings involving a claimant application might be able to prove that native title does not exist in relation to land for reasons other than extinguishment.
11. **Eighth**, the appellant’s reference to the requirements of the Native Title Act to refer each application made under s 61 to mediation under s 86B does not assist. The appellant assumed that if the application referred to mediation is a claimant application, the question whether or not native title exists at all will be outside the scope of the referral. There is no basis for this assumption given that, for every native title determination application other than a compensation application, s 86A identifies the purposes of a mediation to include whether native title exists and, if it exists, to address the matters described in s 86A(1)(b), which essentially replicates the matters set out in s 225.
12. **Ninth**, and most importantly, the appellant’s contention, if accepted, is inimical to one key mechanism by which the Act seeks to achieve its purposes of providing for the recognition and protection of native title. By a variety of provisions (including ss 13(3), 61, 66(3), 66(10)(b), 67, 68, 84(3), 84(5), 213(1) and 225), the Native Title Act encourages all persons with a proper interest in the resolution of the native title rights and interests in relation to any particular area of land to ensure that their interest is able to be taken into account where any application in relation to that area of land is made. This is not to say that the Native Title Act requires a native title determination to be made in response to either a claimant or non-claimant application. Leaving aside the issue of discharge of the onus of proof, as we have said, whether it is appropriate to make a determination of native title may depend on a wide range of circumstances. In some cases, the circumstances may dictate that a determination ought not to be made (as in, for example, the claims made by the claimant group described as the “Ballaruk people”, “Ballaruk and Didjarruk people”, “descendants of Melba Armitage and William Bodney” and “Bodney family group” in *Bodney v Bennell* [2008] FCAFC 63; (2008) 167 FCR 84 and in *Harrington-Smith on behalf of Wongatha People v State of Western Australia (No 9)* [2007] FCA 31; (2007) 238 ALR 1).
13. The appellant’s focus on the alleged inadequacy of s 66(10)(b) to put people on notice that an outcome of a claimant application might be a determination that native title does not exist in relation to land is misplaced. For the reasons given above, the possibility of a negative determination is inherent within every native title determination application, be it a claimant application or a non-claimant application. Section 66(10)(b) fulfils a different purpose. It is giving notice of the effect of s 68 of the Native Title Act that there can be only one approved determination of native title in relation to a particular area. Such a determination, if appropriate to be made having regard to the circumstances of the case, may be positive or negative. Section 66(10)(b) is designed to ensure people are made aware of the “once and for all” nature of any native title determination in relation to land, subject only to the possibility of a revocation or variation of a determination.
14. Section 66, rather than assisting the appellant’s case, must be understood as a procedure to facilitate the making of a “once and for all” determination in relation to the one area of land, if appropriate to be made in the circumstances of the case. The section does so by giving all interested persons notice of an application and a right (s 84(3)) or capacity (s 84(5)) to be joined as party to the proceeding in which the application will be determined. Section 67, which requires all extant applications relating to the same area to be resolved “in the same proceeding”, also facilitates such an outcome.
15. Against this, the appellant appeared to contend that the statutory purpose – that native title be recognised and protected (s 3(a)) – would be promoted by its construction. Yet this overlooks that the only circumstance with which we are dealing is a failed claimant application in which, because of the way in which the hearing was conducted, the Court might be satisfied on a proper basis that native title does not exist at all in relation to the land. In other words, it is a necessary (but by no means sufficient) pre-condition to the exercise of the power to make a negative determination that the Court be satisfied that there is no native title to protect or recognise.
16. **Tenth**,the confined class of persons who may apply to vary or revoke a determination does not assist the appellant. It is true that a person authorised by a native title claim group is not a person who may apply to vary or revoke an approved determination of native title. Relevantly, only a registered native title body corporate may do so, which necessarily means that there has been a positive determination that native title exists in relation to land. However, it would be inconsistent with the scheme of the Native Title Act, which encourages all persons with a proper interest in land the subject of a native title determination application to take steps so that their interest may be taken into account in respect of that application, for a native title claim group to be able to apply to vary or revoke an approved determination of native title. This is because it is an object of the Act to facilitate all such interests being taken into account before any determination, be it positive or negative, is made.
17. **Eleventh**, and for the same reasons, the appellant’s argument about the potential injustice to an individual Aboriginal person or a group of Aboriginal people being content not to apply to be joined as party because of a belief that the claimant group will recognise their interests should not be accepted. The appellant submitted that it is not uncommon for multiple groups to have spiritual responsibility for, or usufructuary rights in respect of, the same area of land (as referred to in *Re Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; (1982) 158 CLR 327 at 358 per Brennan J). However, putting aside the differences in the concepts underpinning the *Aboriginal Land Rights (NT) Act* *1976* (Cth) as compared to those in the Act (see *Griffiths v Northern Territory* [2006] FCA 903; (2006) 165 FCR 300 at [71]–[74] per Weinberg J and *Risk v Northern Territory* [2006] FCA 404 per Mansfield J),this does not mean that it is appropriate to construe the Native Title Act on the assumption that, despite knowing that land is the subject of a claimant application in which the person or group concerned asserts an interest and despite being notified that there can be only one native title determination in relation to an area of land, that person or group would do nothing to protect their interest. While this possibility and the associated risk of injustice can never be excluded, the provisions of the Native Title Act are intended to facilitate a different approach: that all persons with a proper interest in an area of land take steps to ensure that their interest is taken into account when the Court is making a determination of native title with respect to that area of land.
18. In conclusion, the appellant’s arguments do not provide any reasoned or principled basis to support the proposition that where a claimant application has failed because it has been proved on the balance of probabilities, by whatever means, that native title does not exist in relation to an area of land, the Court is precluded by the Native Title Act from making a determination that native title does not exist with respect to that area of land. The appellant’s arguments fail to recognise that a determination of native title is defined as a determination “whether or not native title exists in relation to a particular area” (emphasis added), and that a claimant application might fail in whole or part for a multitude of reasons, one of which in any given case might be that the Court is satisfied that no native title exists in relation to that area of land and that it is otherwise appropriate in all of the circumstances to make a negative determination in order to reflect that state of satisfaction.
19. To confine the powers of the Court as the appellant seeks is inconsistent with the object of the Act of establishing a mechanism for determining claims to native title (s 3(c)), because the mechanism provided would be incomplete, impractical and incompatible with the scheme of the Act as discernible from the provisions identified above. It would also do nothing to promote the object of providing for the protection and recognition of native title (s 3(a)) because, in any case where it is decided that a negative determination should be made, it is a necessary (but not sufficient) pre-condition that the Court is satisfied that there is no native title that can be recognised and thus protected. This satisfaction, it must be said, will not follow simply from the dismissal of a claimant application. Whether it is appropriate to proceed to consider the making of a negative determination will depend in part upon the reasons why a claimant application has failed. It will depend in part also upon the extent to which, if at all, competing claimant applications have been heard at the same time. If the Court is satisfied that all the potentially competing claimants for the recognition of native title in respect of the claim area have participated in the hearing, and all have failed, a negative determination could be made if the Court is satisfied that there is no native title that can be recognised and protected. If that is not the case, the Court will no doubt consider whether, despite the notice of the claimant application given pursuant to s 66, there are reasons for notice of the prospect of a negative determination being given to some other person or persons, or indeed to the native title representative body for the particular area. Given that a negative determination is, as we have pointed out above, a determination *in rem*, it is important that the Court carefully consider such matters before it can be satisfied, on the balance of probabilities, that no native title right or interests exist in relation to a particular area.
20. The decision of the Full Court in *Wyman* to the same effect is not plainly wrong. That decision was correct. For these reasons, ground one of the amended notice of appeal must be dismissed.

## Procedural fairness

1. This ground may be disposed of in short order. As discussed, if (as we consider to be the case) it is inherent within every claimant application that a negative native title determination may be made, it is not possible to accept that the appellant did not know of this possibility in respect of the claimant application in the present case.
2. We also note the following matters which put paid to this contention.
3. The primary judge’s principal decision, rejecting the claimant application, was published on 12 March 2015 (*CG (Deceased) on behalf of the Badimia People v State of Western Australia* [2015] FCA 204). On 12 March 2015, the primary judge made the following orders:

1. The Court will hear from the parties as to the terms of the final orders to be made.

2. If the State wishes to submit that any order other than an order dismissing the proceeding should be made, it shall file and serve a draft order and submissions in support on or before 26 March 2015.

3. If any such submission is made by the State, the applicants have leave to file and serve responding submissions on or before 9 April 2015.

4. In that event, the matter be listed for final hearing on 10 April 2015 at 9:15am.

1. On 10 April 2015, the primary judge heard argument about the orders that should be made consequential upon his rejection of the claimant application. The primary judge requested further submissions which were filed on 16 April 2015. He delivered his judgment in relation to the orders on 25 May 2015 (*CG (Deceased) on behalf of the Badimia People v State of Western Australia (No 2)* [2015] FCA 507). In those reasons for judgment, his Honour summarised the appellant’s submissions at [17] to [27]. There is no reference in that summary to the appellant having contended that a negative determination would mean the appellant had been denied procedural fairness. The appellant does not suggest that any such submission was put to the primary judge. Given that this is the very issue which is now being asserted on appeal, the appellant cannot now be heard to complain about a denial of procedural fairness which was not put to the primary judge when the opportunity existed to do so.
2. Further, the assertion that the appellant did not or could not have known that a negative determination might be made and that had the appellant known this different forensic decisions might have been made is inconsistent with the fact, pointed to by the respondents, that the appellant was represented by counsel experienced in native title matters at the principal hearing, and it has been common practice for this Court to make a negative determination consequential upon a failed claimant application.
3. The submission is also inconsistent with both the case the appellant put and the defence of the State to the appellant’s case. The appellant asserted in its statement of facts, issues and contentions that it was the Badimia People (that is, the claim group) that occupied the claim area (para 8) and the Badimia People who held rights in relation to that area “to the exclusion of all others” (para 40). In response, by its statement of facts, issues and contentions dated 15 October 2010 (and thus two weeks before the first tranche of the hearing and more than two years before the last tranche of the hearing) the State asserted as follows:

3. These proceedings are at an early stage and most documents and evidence have not yet been provided by the First and Second Applicants. Accordingly, in this document, the State positively admits or denies as many matters as possible, but there are a number of matters where the State lacks sufficient information to do any more than indicate that it does not admit the relevant fact or accept the relevant contention. The State will seek to further particularise its position as the proceeding progresses.

…

5. The ultimate issue in this proceeding is whether anyone at all holds native title in the area the subject of this proceeding (“Trial Area”).

6. On the basis of the evidence available to it to date, the State considers that native title does not exist in the Trial Area.

…

70. The State denies that any individual, group or community holds native title in any part of the Trial Area.

1. The appellant’s attempt to characterise the State’s defence as ambiguous, and unable at such an early stage of the proceedings to put the appellant on notice that the State contended that there was no native title in relation to the area claimed, is unpersuasive. The qualification in para 3 concerns matters which the State was not in a position to admit or deny. Paragraph 70, however, is a clear denial of the existence of any native title in relation to the claim area. It cannot be the case that it was beyond the contemplation of the appellant, before the hearing, that the State might seek a negative determination if the claimant application failed.
2. The appellant, having asserted and sought to prove an exclusive native title right in the claim area, also now seeks to contend that it is a denial of procedural fairness because a differently constituted claim group or different claim group altogether might be able to prove a native title right over the same area. We do not accept this submission. As the respondents submitted, s 66(3) of the Act deals with notification requirements. If a person or group fails to avail themselves of the opportunity to give notice to the Court and be joined as a party, no procedural fairness obligation can arise in relation to such a person or group. Finally, and as the respondents also submitted, the existence of some other person or group who might wish to make a further claimant application is mere speculation (apart from such an event being fundamentally at odds with the scheme of the Act).
3. For these reasons, ground 2(b) of the amended notice of appeal should also be dismissed.
4. These conclusions, we note, are not to say that there is no benefit to be obtained by any respondent party who may wish to seek a negative determination if a claimant application fails making its position known at an early stage as possible and in as clear terms as possible. While (for the reasons given) we have no doubt that the present appellant was not denied procedural fairness, any respondent to a claimant application who wishes to seek a negative determination if the claimant application fails must recognise that it is for them to persuade the Court that the onus of proving that native title does not exist in relation to the land has been discharged and that it is necessary to give express and early notice of their intention to seek a negative determination if the circumstances ultimately permit such a determination to be made.

## Discretion

1. The appellant’s contentions that the primary judge’s exercise of discretion miscarried are misconceived.
2. **First**, the submission that the primary judge asked himself the wrong question cannot withstand scrutiny. It is not the case that the primary judge asked only whether the appellant had failed to establish this particular claim. The primary judge was manifestly cognisant of the fact that the relevant question was whether it had been proved that native title did not exist in relation to the land. So much is obvious from his summary of the State’s submissions at [59] – [67] which were all directed towards the circumstances which ought to persuade the primary judge that native title did not exist in relation to the land, his summary of the appellant’s submissions which referred to the possibility of some differently constituted group being able to prove native title in relation to the land at [68] – [77], and his Honour’s reasoning in support of making a negative determination at [78] – [85]. In particular, the primary judge concluded at [84] that his findings precluded any possibility that a reformulated claim could succeed. In other words, the primary judge was satisfied that native title did not exist in relation to the land.
3. **Second**, the primary judge considered all of the factors said to be relevant by the parties, a matter which the appellant concedes. What is said is that, despite some matters never having been put to the primary judge, those matters nevertheless should have been considered. Apart from this being unpersuasive at the level of principle, the inescapable fact is that the primary judge must be taken to have known all of the findings he had made in the principal judgment and expressly states at [84] of the judgment relating to the determination to be made that those findings do not comprehend the possibility of any reformulated native title claim being successful. It thus cannot be accepted that the primary judge failed to consider any matter arising from his findings relevant to the exercise of the discretion.
4. **Third**, the submission that it was not reasonably open to the primary judge to conclude that there was no such possibility given his findings is fanciful. The primary judge reasons for this conclusion, expressed at [81] – [82], are cogent and persuasive. His Honour said:

[81] While it is suggested by the claimants that, as a result of the court’s decision, thought might now be given to the identification of a new claim group comprising only the descendants of the Badimia apical ancestors identified by the court, and the prospect of a new claimant application should be considered a possibility, merely to state that proposal is to identify its artificiality. The claim group would then be identified by reference to the finding of the court for the purpose of trying to advance a case that was not advanced at the earlier trial; not by the evidence alleging a society defined by the traditional laws and customs of Badimia people.

[82] All of the difficulties identified by the court and summarised above, as to why the present claim failed, would remain. In particular, the court’s finding that the relevant contemporary laws and customs identified in the evidence, including by claimant witnesses who were descendants of ancestors identified by the court as Badimia people, were not traditional, in the *Yorta Yorta* sense, and that the claimants had failed to show that there had been acknowledgment of and adherence to traditional laws and customs by each generation of Badimia people since sovereignty, would be fatal to any reformulated claim that can be imagined.

1. It is not the case that the primary judge erred in referring to the traditional laws and customs of the Badimia people in [81]. The point his Honour was making is that on the evidence before him a claim group constituted by reference to anything other than the traditional laws and customs of Badimia people would not be a native title claim group the law could recognise. By definition, such a group would not be a result of the application of any traditional law, but rather the result of an attempt to avoid the consequences of his Honour’s findings. As the primary judge said at [81] “merely to state that proposal is to identify its artificiality”.
2. **Fourth**, and as the respondents noted, there was no challenge to any factual finding of the primary judge. Given this, the appellant cannot suggest that it was unreasonable for the primary judge to rely on the same factual findings to justify the exercise of discretion.
3. For these reason ground 2(a) of the amended notice of appeal, and thus the appeal as a whole, must be dismissed.

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| I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices North, Mansfield, Jagot and Mortimer. |

Associate:

Dated: 18 May 2016

REASONS FOR JUDGMENT

REEVES J:

# Introduction

1. There are two issues in this appeal upon which I wish to express my own reasons. Both relate to ground one. Neither affects the outcome of the appeal expressed in the joint judgment. If anything, I think they strengthen the grounds for rejecting the appellant’s arguments on ground one. Otherwise, except to the extent that they are inconsistent with the views I have expressed below, I generally agree with the joint judgment on ground one and I agree entirely on ground two. I also agree with the orders proposed in the joint judgment.
2. The first issue – the true character and purpose of a non-claimant application – is one upon which, I regret to say, I take a different view to that expressed in the joint judgment. I should also record that while, in my view, this first issue flows from the other issues raised in this appeal, it was not the subject of argument at the hearing of the appeal. The views I have expressed below on this issue must therefore be considered in that light. The second issue relates to the relevance of s 213(1) of the *Native Title Act 1993* (Cth) (the **Native Title Act**) in this appeal. My views on this issue do not differ markedly from those stated in the joint judgment, nonetheless I consider it is important to express them. This second issue was the subject of full argument at the hearing of the appeal.
3. The factual background to this appeal and the apposite provisions of the Native Title Act are described in such detail in the joint judgment that I can simply adopt that description for the purpose of these reasons.

# The true character and purpose of a non-claimant application

1. Contrary to what is said at [39] of the joint judgment, in my view, a non-claimant application is not an application which “necessarily claims” that native title does not exist. Instead, for the following reasons, I consider it is an application which is directed to meeting the procedural requirements in Part 2, Division 3, Subdivision F of the Native Title Act in order to gain s 24FA protection for an area of land. Put differently, it is an application of which the primary purpose is to claim s 24FA protection.
2. It is convenient to begin by noting that the expression “non-claimant application” is only used in three parts of the Native Title Act: in the definition sections (ss 222 and 253); in the notice provisions of s 66(10)(a); and in Subdivision F itself.
3. As to the first of these usages, that expression is unhelpfully defined in s 253 to mean: “a native title determination application that is not a claimant application”. As unhelpful as that definition is, it is at least noteworthy that the expression is not defined to mean a native title determination application that claims native title does not exist.
4. The second of these usages is also noteworthy for what it does not provide. Under s 66(10)(a), the notice that must be published for a non-claimant application must include a statement that the area covered by the application may be subject to s 24FA protection if a claimant application is not lodged by the end of the notice period. Notably, that provision does not require that the non-claimant application must be described as an application claiming that native title does not exist over the area covered by the application.
5. However, the text of Subdivision F (that part of the Native Title Act where the expression “non-claimant application” is used most extensively) is more revealing about the character and purpose of a non-claimant application.
6. It is worth beginning a consideration of the text of Subdivision F at its title. It is headed: “Future acts: if procedures indicate absence of native title”. This heading (which can be used as a guide to construction: s 13 of the *Acts Interpretation Act 1901* (Cth)) provides an indication that the absence of native title is based upon procedural, not substantive, considerations and that the Subdivision is directed to a particular kind of conduct: future acts.
7. This is confirmed by the major purpose of Subdivision F as described in the Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) for the 1998 amendments to the Native Title Act (**1998 Explanatory Memorandum**). In the Overview section of that document, Subdivision F is said to: “... [ensure] the validity of future acts which are done over areas where steps taken under the NTA indicate that native title does not exist in those areas” (para 8.1). The major purpose of the Subdivision is then described as: “… to ensure the validity of future acts done before a determination as to whether or not native title exists has been made, but only where certain conditions apply” (para 8.2).
8. Next, it is convenient to consider the particular procedures that must be followed in order to gain s 24FA protection for an area. The salient features of those procedures, for present purposes, are as follows. For both a government non-claimant application (s 24FB(1)(a) to (f)) and a non-government non-claimant application (24FC(a) to (g)), the non-claimant application must have been made (a non-government non-claimant application may, however, not be made if a government non-claimant application has already been made), the application must cover the whole of the area (a non-government non-claimant application may, however, cover only a part of the area), the period specified in the notice under s 66 must have ended and, at the end of that period, no “relevant native title claim” (for present purposes a registered claimant application: see s 24FE) has been filed with the Court. For completeness, it should be noted that an area cannot be subject to s 24FA protection if there is an entry in the National Native Title Register under s 193(1)(a) or (b) that native title exists in relation to that area, or a part of it.
9. If these procedures have been followed, the non-claimant application will then result in s 24FA protection for the area “at a particular time” (s 24FA(1)) provided that, at that time, the non-claimant application has not been withdrawn, dismissed or finalised (s 24FB(e) and 24FC(f)).
10. While I am identifying these procedural requirements of Subdivision F, it is worth mentioning its remaining section: s 24FD. It provides that s 24FA protection will also apply to an area where there is an entry in the National Native Title Register under s 193(1)(a) or (b) that no native title exists on that area. I will return to this provision later in these reasons.
11. I turn then from these procedural features of the text of Subdivision F to the effect of s 24FA protection. Where an area becomes subject to that kind of protection, any future act that is done on that area is valid (s 24FA(1)(a)). The permanency of this protection was emphasised in the 1998 Explanatory Memorandum as follows (para 8.6):

When section 24FA protection applies to an area at a particular time, any future act done by a person at that time in relation to the area is valid and remains valid for all time, even if a determination that native title exists in relation to the area is made at a later time. …

1. This form of validation stands out as an exception to the usual position with respect to future acts affecting native title as stated in s 24OA of the Native Title Act. That section provides that: “Unless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title.” As is explained in the 1998 Explanatory Memorandum (para 8.4), certainty is the central purpose of these provisions:

Subdivision F is included to allow people with interests in land to ascertain whether native title exists in order to give them certainty when doing acts in relation to that land. This will encourage potential native title holders to make native title claims. However, the mere fact that a future act gains section 24FA protection does *not* prevent a native title claim being made or determined in the future.

(Emphasis in original)

1. In this respect, two paragraphs of the Preamble to the Native Title Act are worth quoting. They are:

The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts.

Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.

1. Given the sentiments expressed in the latter paragraph above, it is unexceptional to find that, if the future act that is validated by s 24FA(1)(a) extinguishes native title to any extent, the native title holders are entitled to compensation for that extinguishment (s 24FA(1)(b)). The particular purpose of this provision is explained in the 1998 Explanatory Memorandum in the following terms (para 8.9):

… In general terms, the compensation is an entitlement on ‘just terms’ to compensate the native title holder for any loss, diminution, impairment or other effect of the on their native title …

1. However, the extinguishment effected by s 24FA(1)(b) is exceptional in at least one respect. Contrary to the expectation expressed in the Preamble above, and unlike most of the other similar extinguishment provisions in Division 3, the non-extinguishment principle is not expressed to apply to that extinguishment. This exception essentially means that the native title so extinguished will not ever be able to resume its full effect in the future if the future act, or its effects, are later wholly or partly removed, or otherwise cease to operate (see s 238).
2. By comparison, some examples of the non-extinguishment principle applying to other future acts that effect similar extinguishments in Division 3 include: ss 24EB(3) and 24EBA(4) re Indigenous Land Use Agreements (with the qualifications expressed therein); s 24GB(6) re primary production; s 24GD(3) re primary production activities; s 24HA(4) re the management or regulation of water and airspace; s 24ID(1)(c) re renewals and extensions (unless the act consists of the grant of freehold, or the conferral of a right of exclusive possession) and s 24NA(4) re acts affecting offshore places.
3. It follows from the combined effect of these provisions of Division 3, and particularly Subdivision F, that once an area has gained s 24FA protection it will have achieved the fullest protection available under that Division of the Native Title Act.
4. That being so, where an area gains s 24FA protection, it is not easy to identify what is to be gained by the applicant thereafter moving the Court to make a determination that no native title exists in that area. Indeed, because of the necessity for a non-claimant application to remain extant (see at [96] above), such a determination would have the paradoxical effect of finalising the non-claimant application and thereby removing the s 24FA protection. Moreover, given that one of the main effects of s 24FA protection is that any native title that exists in the area concerned is extinguished and replaced by a right to compensation, at least in the case of a non-government non-claimant application, a determination that no native title exists in that area will be pointless. Whether a State government could take such a step either directly by its own government non-claimant application, or through the agency of a non-government non-claimant application, in order to rid itself of the obligation to pay compensation for the extinguishment effected by s 24FA(1)(b) is a difficult question (see below at [109]). Putting that question aside, in my view, these two factors strongly reinforce the conclusion that a non-claimant application cannot be characterised as an application that seeks a determination that native title does not exist on an area.
5. It is true that a possible consequence of the procedures prescribed in Subdivision F of Division 3 is that a claimant application may be filed which, if it is registered as a claim, may ultimately lead to a contested hearing and, at that contested hearing, one of the issues (that raised by the initiating non-claimant application) will be that native title does not exist in all, or a part, of the claim area. That is so because, in the event a claimant application is filed, s 67 will require that both the initiating non-claimant application and that claimant application are to be dealt with in the same proceeding. Then, assuming that proceeding is not resolved and proceeds to a contested hearing, because of the existence of the non-claimant application, one possible outcome of that hearing is a determination that native title does not exist in that part of the claim area to which it relates. Of course, the other possible outcome is a determination that native title does exist in all, or a part, of the claim area.
6. The words “whether or not” in s 225 clearly anticipate both these outcomes. The same words in s 193(2)(d)(i) do likewise. And, if either determination is made and duly registered on the National Native Title Register, as it must be (s 193(1)(a) and (b)), it will either result in s 24FA protection for that area in accordance with s 24FD, or result in the recognition and protection of the native title that exists in that area in accordance with the provisions of the Native Title Act. I have already mentioned this provision above (at [97]). Thus, by this alternative course, if the non-claimant application is successful, it will have achieved its primary purpose described above of obtaining s 24FA protection for that area.
7. Once an area gains s 24FA protection by virtue of s 24FD, the provisions of s 24FA(1)(a) will then operate to validate all future acts on that area thereafter. Self-evidently, no right to compensation will arise with respect to those acts. However, in the interim period, while the claimant application is being determined, s 24FA protection will not apply; no extinguishment will occur under s 24FA(1)(b) and no right to compensation will arise. Instead, the opportunity for, and validity of, any future acts on the area will fall to be determined in accordance with the other provisions of Division 3. In this respect, the protective provisions of s 24OA bear reiterating (see at [99] above).
8. If, however, no claimant application is filed and the area does gain s 24FA protection, there is a difficult question as to whether the correlated right to compensation granted by s 24FA(1)(b) for any future acts which extinguished native title in the area could be removed other than following a contested hearing on the question whether or not native title exists. In this respect, it is worth reiterating that the absence of native title that leads to s 24FA protection is established by following the procedures described above and those procedures are not directed to the substantive question whether or not native title exists. This is further borne out by the fact that the right to compensation under s 24FA(1)(b) is granted to “the native title holders” thus anticipating the possibility of a future substantive determination that native title exists in the area in question. Furthermore, this right to compensation is of a particularly significant kind, namely “just terms” compensation (see at [101] above). As well as the difficulty associated with removing such a right by a procedural process, there are the potential difficulties identified by Perram J in *Lightning Ridge Local Aboriginal Land Council v Premier of New South Wales in his capacity as the State Minister pursuant to the Native Title Act 1993 (Cth)* (***Lightning Ridge***) [2012] FCA 792 at [23].
9. Having mentioned the judgment in *Lightning Ridge*, it is appropriate that I should acknowledge that there is a long line of similar determinations of this Court over the past 15 years or more to the effect that no native title exists in particular areas. This long line of determinations may be thought to demonstrate that the views I have expressed in these reasons have been swamped by a countering jurisprudential tide. It is not my intention, in these reasons, to analyse those judgments and attempt to rationalise them with the views I have expressed above. However, I would make the following general observations about them. Putting aside those cases where such determinations were made following a contested claimant application, most (if not all) of them proceeded as unopposed non-claimant application applications under s 86G of the Native Title Act. Further, most (if not all) were non-government non-claimant applications similar to *Lightning Ridge*, which appear to have been generated by the provisions of State legislation, requiring the non-government applicant concerned to obtain such a determination before the State government would make a grant or similar decision in relation to the area in question. Some of the potential difficulties associated with this course have already been adverted to above (see at [109]). More significantly, for present purposes, while the provisions in Subdivision F of Division 3 of the Native Title Act were mentioned in passing in a small number of those decisions, apart from *Lightning Ridge*, I have been unable to locate a decision where the provisions of that Subdivision were examined closely in this particular context. That is undoubtedly explained by the fact, noted above, that most (if not all) proceeded as unopposed applications.
10. I return to the true character and purpose of a non-claimant application. Merely because a non-claimant application may attract a claimant application and thereby set off the course of events outlined above (at [106]–[107]), which could lead to a determination that no native title exists in the area in question, I do not consider that alters the primary purpose of a non-claimant application as described above. That is so because, if a non-claimant application does result in that outcome, that area will then gain s 24FA protection via s 24FD. Thus, properly analysed, I consider the determination that no native title exists in the area will simply be an incident of the means to achieving that end.
11. Finally, it may be asked: what of the scenario that occurred in this matter where there was no s 24FA application before the claimant application was lodged? In my view, the answer to that is this: if a claimant application is filed before any non-claimant application is filed, it will be futile for any applicant, including a State government, to then file a non-claimant application. That is so because if, in that circumstance, an applicant were to file a non-claimant application and cause the notice to be given under s 66, at the end of the notice period there will be a “relevant native title claim covering the area” contrary to the conditions prescribed in s 24FB(d) and s 24FC(e)(i), namely the pre-existing claimant application (assuming it is registered). That will, in turn, mean that s 24FA protection cannot be gained for the area in question pending the determination of the claimant application. However, just as if it had been filed in response to an initiating non-claimant application, the claimant application that is filed will thereafter be available to be used as the vehicle for determining the issue whether or not native title exists in the claim area, or any area within the claim area. It will then be open to any party to that proceeding to raise, as an issue, that native title does not exist in all, or a part, of that area and, if successful, to gain s 24FA protection for that area by the same process as is described above. Whether such determination is made in a particular case will depend on the sorts of considerations discussed in the joint judgment with respect to ground two.
12. For all these reasons, I therefore consider the appellant is incorrect in its contentions that the State had to follow the procedures in the Native Title Act and file a non-claimant application seeking a determination that native title did not exist in the claim area before the primary judge could make such a determination. In my view, a non-claimant application is not such an application; it is an application which seeks to follow the specific procedures in Subdivision F to demonstrate the absence of native title such that the area the subject of it will gain s 24FA protection. Further, and perhaps more significantly, in the circumstances of this matter, where the appellant had already filed a claimant application over the claim area, there were, in my view, no relevant procedures in the Native Title Act open to be followed by the State.

# Section 213(1) is not relevant in this appeal

1. I turn now to the second issue mentioned above. First, I agree with the views expressed in the joint judgment (at [41]) about there being no doubt that the Court had jurisdiction to determine this matter. However, I wish to add the following observations about the relevance of s 213(1) in this appeal.
2. Under s 81 of the Native Title Act, the Federal Court has exclusive jurisdiction to hear and determine “applications filed in [it] that relate to native title”. In *Lardil Peoples v Queensland* [2001] FCA 414; (2001) 108 FCR 453 (***Lardil***), the Full Court observed that, following the 1998 amendments to the Act, those words referred to the applications, including native title determination applications, that were filed with the Court under s 61 of the Native Title Act (at [41] per French J (dissenting, but not on this aspect) and at [150]–[153] per Dowsett J). Such applications obviously included both claimant and non-claimant native title determination applications. Plainly the appellant’s application in this matter was a claimant application. The Court therefore had exclusive jurisdiction to determine the issues raised by that application. As French J also observed in *Lardil* (at [41]), s 213(1) does not restrict the generality of the Court’s jurisdiction to hear and determine such applications. Instead, it places a restriction of a “procedural character” to the effect that if, for the purpose of “any matter or proceeding before the Federal Court”, it is necessary to make a determination of native title that determination must be made in accordance with the procedures in the Native Title Act.
3. However, in my view, in this matter, s 213(1) does not even have that effect. That is so because that section operates with respect to the non-exclusive jurisdiction under s 213(2) of the Native Title Act and 39B(1A)(c) of the *Judiciary Act 1903* (Cth) in relation to matters arising under the Native Title Act. If, in the course of exercising that jurisdiction, a person attempts to obtain what is, in effect, a determination of native title as provided for under the exclusive jurisdiction conferred by s 81, s 213(1) operates to require that person to follow the procedures in Part 3 of the Native Title Act. Section 213(1) therefore protects the exclusive jurisdiction conferred under s 81 by preventing s 213(2) of the Native Title Act, or s 39B(1A)(c) of the Judiciary Act, being used as an alternative means of exercising that exclusive jurisdiction. That situation did not arise in *Lardil* because the applicant was not seeking to obtain a determination of native title (see French J at [43]). It did, however, arise in *Commonwealth v Clifton* [2007] FCAFC 190; (2007) 164 FCR 355 (***Clifton***) because there a rival group was ostensibly using s 213(2) as a means to obtain a determination of native title without filing its own application under s 61 and therefore exercising the exclusive jurisdiction under s 81. Accordingly, the Full Court in *Clifton* held that s 213(1) operated to require that rival group to follow the procedures in Part 3 (see *Clifton* at [40] and [57]). As is already noted above, in this matter the appellant has at all times sought to exercise the exclusive jurisdiction of the Court under s 81 and has therefore followed the procedures in Part 3 of the Native Title Act. In those circumstances, s 213(1) does not apply. The appellant is therefore incorrect in claiming that s 213(1) had any relevant effect in this appeal.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves. |

Associate:

Dated: 18 May 2016