SAVE FOR COSTS
IN NATIVE TITLE

by Sunil Sivarjah

During a recent regional Directions Hearing in respect of a Queensland native title matter, His Honour Justice Logan of the Federal Court indicated that an expert who had failed with no reasonable explanation to deliver a report pursuant to Court Orders could be liable for costs, despite that expert not being a party to the proceedings.[1] The Federal Court is understandably frustrated by delays to the resolution of native title matters some of which have been in litigation for more than a decade.

Whilst Justice Logan's comments may have been a warning in that instance, parties to native title matters should carefully consider the manner in which they conduct themselves particularly having regard to the Court's powers – for instance, to dismiss a party from the proceedings or to award costs against a party or even a non party.[2]

Native title litigation is costly for all parties. Whilst commercial litigation is likely to culminate in an order for costs, each party is expected to bear her, his or its own costs in native title matters save for exceptional circumstances.[3]

It is the author's view that where there are costs implications for inappropriate conduct, parties may adopt a considered approach to litigation, which may ultimately expedite the resolution of native title matters, and this paper will consider the practical and legal considerations for costs applications in native title proceedings.

WHAT IS NATIVE TITLE

Native title comprises a bundle of rights and interests on a particular area, and the purpose of native title litigation is to ascertain whether such rights and interests exist pursuant to s 223 of the *Native Title Act 1993* ('NTA'), generally, that the native title group has maintained their connection to their land and waters according to traditional laws and customs from sovereignty to the present time. If native title exists then, pursuant to s 225 of the NTA, the Court must also ascertain:

- the relevant persons who hold the native title rights and interests;
- the nature and extent of the native title rights and interests in the area;
- the nature and extent of other (non native title) interests in the area;
- the relationship between native title and non native title rights and interests in the area; and
- whether the native title rights confer exclusive rights against other persons.

To date, the Federal Court has made numerous native title determinations throughout Australia. Some of these determinations were made with the consent of the parties[4] and others were made after a trial[5]
By way of example, in 2010 His Honour Justice Dowsett of the Federal Court determined that a native title group, known as the Jirrbal People, hold exclusive and non-exclusive native title rights and interests on particular land and waters in the Ravenshoe and Herberton area of North Queensland, including, amongst other things, the right to:

- be present on including by accessing, traversing, and camping on, the area;
- conduct ceremonies on the area, to hunt, fish in or on, and gather from, the water for personal, domestic and non-commercial communal purposes; and
- use the water for personal, domestic and non-commercial communal purposes.[6]

Any native title litigation process is complex and some of the associated statutory requirements under the NTA may, themselves, create situations where parties act in a manner which causes another party to incur costs.[7]

STEPS TO RESOLVE A NATIVE TITLE APPLICATION

The following overview briefly summarises the relevant steps to resolve a native title application.

(***making an application***) the native title claim group will authorise a representative group of individuals known as the applicants to make an application under s 61 of the NTA, specifying who comprises the native title claim group of the application (for instance, how is membership defined), the precise area which is the subject of the application and the asserted native title rights and interests.

(***registration test***) the application undergoes a preliminary test on its merits and other procedural requirements. If the application fails the registration test, then the Court could dismiss the application.[8]

(***procedural rights***) if the application is registered the native title claim group is entitled to procedural rights under the NTA. For instance, a right to negotiate in respect of resource projects proposed on their application area.[9] These procedural rights will continue to apply unless there is a determination that native title does not exist in the area, or there is a basis to conclude that native title has been extinguished over the area or the Federal Court has dismissed, or there has been an agreement to the discontinuance of the application.

(***notification***) shortly after the application is lodged, it will be publicly advertised and any person claiming to have an interest in the application may join as a respondent party to the Court proceedings, providing they do so within the notification period[10] there is no threshold requirement to become a party to the proceedings within the notification period, although the Court can dismiss uninterested respondents from the proceedings at any time.[11]

(***claims resolution***) the parties will then participate in a claims resolution process to resolve the application. This process will vary from State to State, as the approach of the relevant State government will impact on the entire claims resolution process. Other respondent parties typically include local governments, electricity and infrastructure service entities, commercial fisheries, pastoralists, mining and other resource proponents and a range of other interested persons. The parties will attempt to resolve the matter by consent. To this end, the applicant will prepare and provide to the parties its supporting evidence, sometimes known as connection evidence or a connection report. The evidence is often prepared to meet the relevant State guidelines, although this is not a legal requirement and the Court is continually exploring innovative methods to streamline the process.[12] The preparation and consideration of this evidence is often considered to be the 'bottleneck' in the claims resolution process.[13]

STRUCTURAL ISSUES AT LAW

The above is a summary of the complex set of processes which apply to most native title matters. In some instances, parties to native title litigation may be required to participate in confidential mediation for a period of months or even years with little reporting to or management by the Court.[14] Accordingly, there is a risk that some parties to native title proceedings will act inappropriately. The following are some particular areas of concern:

(a) Native title proceedings involve numerous respondent parties with varying capacities and objectives, which may frustrate the claims resolution process. The State and Territory governments are relatively well resourced to prosecute all matters. Some respondents may not be adequately resourced to assess connection evidence and others are not concerned about the adequacy of the connection evidence, focusing instead on extinguishment matters or concluding agreements that clarify the co existence of native title and non native title rights and interests. The applicant must address all of these respondents' concerns despite their funding restrictions.

(b) The NTA encourages interested parties to join as respondents early on in the claims resolution process (i.e. within the notification period). Parties that respond within the notification period are not required to substantiate their interests and the Court is understandably frustrated by parties seeking to join native title proceedings during the last steps (i.e. after most of the substantive matters have been resolved)[15] It is the author's view that encouraging parties to join the proceedings early on may have the following consequences:
   - Parties who may not be sufficiently or relevantly interested in the native title matter may join as respondents and then frustrate or delay the timeframes for the resolution of the application.
   - Uninterested parties may use their standing as a respondent party to focus (solely) on achieving non native title outcomes.[16]
   - Conversely, some respondents are required to inactively participate in the proceedings until the application has sufficiently progressed, often after a number of years. Native title litigation typically involves the preparation of connection evidence (and therefore formulation of the application) well after the application was first made. It is presumed that an application will be amended sometime during the course of the claims resolution process (e.g. amendments to the boundaries of the application, the composition of the native title claim group and the asserted rights and interests). Therefore, it is prudent for most respondent parties to wait until the native title matter has progressed sufficiently, before actively attempting to resolve their interests.

(c) The NTA provides few incentives for applicants to expedite the resolution of the application, particularly as

the native title claim group is entitled to the procedural rights under the NTA before a determination that native title does or does not exist.

PARTIES/NON PARTIES SHOULD BE ACCOUNTABLE

The implications mentioned above are generally unavoidable, it may not be reasonable to deny applicants procedural rights under the NTA if their application has passed a merits test (i.e. registration) and respondents must participate in the native title proceedings from the onset, to avoid the Court having to revisit substantive matters each time a new party joins the proceedings.

A practical solution may be to expand the scope of costs applications in native title matters, as parties (and some non parties) are likely to take a more considered approach where there are cost implications to their actions, particularly having regard to the following statutory framework.

STATUTORY FRAMEWORK

Parties to Federal Court proceedings are entitled to make a costs application under s 43 of the *Federal Court Act 1976*, which effectively provides the Court or a Judge with an unfettered discretion to award costs at any stage in the proceedings.

However costs applications in native title proceedings which are also made in the Federal Court are subject to the limitations imposed by s 85A of the NTA. For instance:

(a) In *Akiba on Behalf of the Torres Strait Regional Sea Claim Group v South Australia*[17], His Honour Justice Greenwood provided that s 85A of the NTA operates to remove any expectation that costs will usually follow the event. The starting point is that each party must bear their own costs unless the Court determines that it is otherwise appropriate particularly owing to unreasonable acts or omissions.

(b) Section 85A applies specifically to native title matters. For instance, an erroneous appeal against the decision in a native title matter may not by caught by s 85A of the NTA, as was the case in *Murray v Registrar of the National Native Title Tribunal*[18], and a similar legal outcome occurred in *Cheedy v State of Western Australia.*[19]

In some instances, a non party to the proceedings could be ordered to pay costs in a native title matter as was held in *Citrus Queensland v Sunstate Orchids*[20]. In that instance, Her Honour Justice Collier provided that "although as a general rule costs are not awarded against a stranger to litigation "…the Court has the discretion and power to award costs against a non-party in appropriate circumstances, for instance where there is a real link between the non party and the proceedings (which is material to the issue of costs), where it is in the interests of justice to do so, where a non party has been previously warned, where the non party could have joined as a party, where a non-party causes a party to bring or defend proceedings for his or her own financial benefit and where a non-party has maintained or financed an action.[21]

BROADER CONSIDERATION FOR MAKING A COSTS APPLICATION

Whilst it is apparent that parties and sometimes non parties could be liable for costs in some native title matters, any party seeking to recover costs should consider the above statutory framework with the following broader non legal considerations.

(a) A costs application may negatively impact on the long term relationship of the disputing parties which are embroiled in a costs application, noting that one of the objectives of any native title determination is to resolve the relationship between the native title and non native title rights.

(b) Even where an award for costs is warranted, the quantum of costs will be quarantined to particular factual circumstances (i.e. directly attributable to the wasted costs).

(c) The Court has the discretion to make an Order for costs at any stage of the native title proceedings. However, some of the Federal Court Judges such as His Honour Justice Mansfield have indicated a preference to consider costs applications at the end of the litigation process.[22] This may be problematic in the context of native title proceedings owing to the time to resolve the native title claim (i.e. the time between the 'cost event' and the making of the costs application/ native title determination). Further, this delayed costs application could mean that the delayed costs application may ultimately need to be revisited during the euphoria of a consent determination.

(d) Any party making a costs application must provide sufficient detail with any costs application. An affidavit should accompany the costs application, setting out the basis for an order for costs.[23] It may be necessary to, amongst other things, provide itemised accounts and bills. Legal representatives that do not 'time record', which is a method used to record time spent on a matter for billing purposes, may encounter difficulties in substantiating the actual costs wasted in any costs application.

CONCLUSION

Given the resources required to resolve native title matters and the associated possibility of parties incurring costs unreasonably, all parties should be made accountable for unreasonable actions or omissions and, in the author's view, costs implications will focus all parties towards resolving matters expeditiously.

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1 Per His Honour Justice Logan during a regional Directions Hearing of the Federal Court of Australia on 30 September 2011 in respect of Native Title Determination Application of Federal Court Number (QUD372/2006).

2 Costs may be awarded pursuant to s85A of the NTA; See ss37M, 37N and 37P of the Federal Court Act 1976; *Citrus Queensland v Sunstate Orchids* (10) [2009] FCA 498 at [20].

3 *Murray v Registrar of the National Native Title Tribunal* ([2003]) FCA220 (24 September 2003).

4 For instance *Lovett on behalf of the Gunditjmara People v State of Victoria* (No 5) [2011] FCA 932; *Thudgari People v State of Western Australia* [2009] FCA 1334; *Hart on behalf of the Djiru People No.2 v State of Queensland* [2011] FCA 1056.

5 For instance *Akiba on behalf of the Torres Strait Islanders of the Regional Sea Claim Group v State of Queensland* (unreported, FCA, 23 August 2010.

6 Cashmere on behalf of the Jirrbal People #1 v State of Queensland [2010] FCA 1090; Cashmere on behalf of the Jirrbal People #2 v State of Queensland [2010] FCA 1090; and Cashmere on behalf of the Jirrbal People #3 v State of Queensland [2010] FCA 1090.

7 This is based on statements made under the paragraph titled Structure Issues at Law in this paper; (for instance, the NTA provides procedural rights to an applicant before a determination that native title does or does not exist. In this regard, see section 29(2)(b)(i) of the NTA specifies that registered native title claimant must be provided with the notice.

8 Section 190F(6) of the NTA; note that some applications may be determined despite not passing the registration test. For instance, the Single Noongar Claim (Area 2) (WAD6012/03) is an unregistered active application.

9 Section 29(2)(b)(i) and section 30 of the NTA.

10 Section 84(3) of the NTA.

11 Section 84(9) of the NTA.

12 By way of example only:

1. During a Directions Hearing on 1 April 2010 in respect of GANGALIDDA AND GARAWA PEOPLE #2 (Federal Court Number QUD66/2005) His Honour Justice Spender made programming Orders (i.e. towards a trial) to focus parties towards an outcome for resolving this matter.
2. During a Directions Hearing of the Colin McLennan & Ors on behalf of the Jangga People (Federal Court No QUD6230/1998) on 31 May 2010 his Honour Justice Rares of the Federal Court made Orders including as follows: pressure parties to work collaborately towards a resolution of the native title determination application. In particular, His Honour Ordered (amongst other things) that "If the matter is not proposed to proceed to a consent determination:

(a) the Applicant file and serve draft orders to prepare the matter for final hearing, submissions and affidavits by each of the Chief Executive Officer of the North Queensland Land Council and at least one Applicant deposing as to the matters bona fide in dispute in the proceeding on or before 5 July 2010;

(b) the State file and serve its response to the draft orders, an affidavit by John Bradley, Director-General of the Department of Environment and Resource Management, deposing as to the matters bona fide in dispute after he has consulted the archival and other records of the State on those questions, together with its submissions on or before 15 July 2010"

13 Speech by His Honor Justice Dowsett Beyond Mabo: Understanding Native Title Litigation through the decisions of the Federal Court Justice J.A. Dowsett (15 July 2009)Brisbane (*LexisNexis National Native Title Law Summit)*.

14 Under s94K of the NTA conferences are to be held in private unless otherwise directed with the consent of parties. s94L of the NTA a mediator may require parties not to disclose information raised during mediation; note however the NTA provides for the mediator such as the National Native Title Tribunal to provide a report to the Court under section 94N of the NTA – what can and cannot be disclosed will typically be agreed during the context of mediation.

15 His Honour Justice Dowsett expressed reservations about granting leave to a person seeking to join the proceedings William Doyle & Ors on behalf of the Kalkadoon People #4 and State of Queensland (QUD579/2005) late in the claims resolution process, by way of an application to join filed in November 2010. The matter has been in litigation for a number of years and is listed for a consent determination in December 2011.

16 See *Brown v South Australia* [2010] FCA 875.

17 [2010] FCA321.

18 ([2003]) FCA220 (24 September 2003).

19 [2010] FCA1305.

20 (10) [2009] FCA 498 at [20].

21 *Citrus Queensland v Sunstate Orchids* (10) [2009] FCA 498 at [20].

22 Per comments made by His Honor Justice Mansfield on 3 November 2010 and on 20 MAY 2011 in respect of a Notice of Motion (i.e. under the subsequently amended Federal Court Rules) in respect of the MAX SULLIVAN & ORS ON BEHALF OF THE BUDJITI PEOPLE (Federal Court Number QUD53/07).

23 Federal Court Rules 17.01.