Ashurst Australia
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Native Title Update

Federal Court to receive payments under native title and cultural heritage agreements

WHAT YOU NEED TO KNOW

A recent Federal Court decision has highlighted a willingness by the Court to manage the assets held and acquired by native title applicants, corporations and individuals in their capacity as members of a native title claim group.

Where there is a genuine dispute as to who the correct applicant of a native title claim group may be, the Court has taken the view that the applicant cannot act properly on behalf of the native title claim group. The applicant cannot properly use and receive assets and payments under Indigenous Land Use Agreements ("ILUAs"), right to negotiate ("RTN") agreements and cultural heritage management plans ("CHMPs") or other similar agreements on behalf of the native title claim group.

WHAT YOU NEED TO DO

If the Court's approach in this case is followed in other native title proceedings, it will impact proponents who are parties to native title and cultural heritage agreements involving monetary payments. Proponents may:

- need to take such orders into account, particularly where payments for services under cultural heritage agreements are required for the effective operation of these agreements; and
- be aware of the possibility of such orders when negotiating and finalising agreements with applicant groups.

The key reason for the Federal Court's order was that there was no authorised applicant to act on behalf of the native title claim group. We would expect that a similar factual basis to be present if similar orders were to be made in other native title claims.

Introduction

In *Leslie Weribone & Ors on Behalf of the Mandandanji People v The State of Queensland & Ors* [2013] FCA 255, Justice Rares explained that where there is a "real and live controversy" about who the correct applicant of a native title claim may be, the Court has the power to make orders to ensure the protection of assets, rights and entitlements of the native title claim group.

Justice Rares subsequently made orders requiring monetary benefits received by the native title applicants, corporations and individuals on their behalf (in their capacity as members of a native title claim group) to be paid into the Federal Court. The money received by the Federal Court would be held for the benefit of the native title claim group until determination of the claim.

These orders have potentially large practical implications in the day to day administration of payments made by companies to the native title claim groups under their contractual agreements.

What happened?

There was no authorised applicant

As the claim progressed, a number of authorisation meetings were held to allow for applications to change the claim and the applicant for the claim. The Court found various irregularities in the authorisation

meeting process and the meetings were declared either invalid or contrary to the interests of justice.

As a result, the Court determined that there was no longer an applicant authorised to act for the native title claim group and there was a need to protect the status quo.

The Court could act to protect the status quo

The Court explained that the *Native Title Act 1993* ("NTA") and other legislation, such as the *Aboriginal Cultural Heritage Act 2003* (Qld) ("ACHA"), gives special status to applicants to negotiate and receive payments from third parties.

As there was now no applicant that could properly act on behalf of the claim group in this special status, there was a need to ensure that any monetary benefits and rights received on behalf of the ultimate claim group are protected and only used with the approval of the Court.

The Court noted that it can make orders "to ensure the effective exercise of the jurisdiction invoked." In the native title jurisdiction, this meant that the Court has the power to make orders protecting the assets, rights and entitlements of persons ultimately found to hold native title rights and interest – under both the NTA and common law rights recognised in *Mabo v Queensland [No.2]* (1992) 175 CLR 1.

The Court stressed that to ensure transparency is brought to bear on what is currently being done with the native title rights and interests, and to protect the benefits from being dissipated in a way that is not under the supervision of the Court, it would require all monies owing to the native title claim group to be paid into the Court.

Who do the orders apply to?

The orders were drafted in broad terms and apply to:

(a) applicants of the native title claim;

(b) members of the native title claim group; and

(c) entities acting on behalf of the native title claim group

who received benefits as a result of their status as a native title claim group under the NTA or another Act.

This means that native title parties to ILUAs, RTN agreements, and cultural heritage agreements, where the negotiating party is defined by reference to a native title claim or applicant, would be captured by the orders.

What do the orders require?

The orders require the people or entities the subject of the order to:

- "do all things necessary" to require that monetary benefits paid to them are paid to the Registrar of the Federal Court;
- provide information about all monetary benefits received by individuals or entities; and
- provide directions to third parties paying monetary benefits to the native title claim group to provide information verifying these payments to the Federal Court.

The orders also leave open the possibility that the native title claim group could direct a third party to pay money owing to the group directly into the Federal Court.

Money paid to the claim group as a reimbursement for accommodation, travel and expenses for meetings and negotiations are not required to be paid to the Federal Court.

Native title applicants have fiduciary obligations to their claim group

The Court found that the special status – the roles, obligations and rights – given to applicants under the NTA is likely to give rise to fiduciary obligations owed by the applicants to the actual native title claim group. The Court further noted that the authorisation of applicants to make a native title claim application and to deal with matters arising in relation to it under s 251B of the NTA had hallmarks of a fiduciary relationship.

The Court noted that the "critical feature" of a fiduciary relationship is the obligation not to obtain any unauthorised benefit from the relationship.

Applying this duty to a native title context, it follows that any powers conferred on the applicant by an authorisation under s 251B cannot be used for an ulterior purpose.

Applying this duty to a native title claim where there is a genuine dispute as to who should be the applicant, it follows that an applicant in these circumstances should not be able to use their "interim status" as applicant to take advantage of rights that are intended for the benefit of the eventual native title claim group.

Implications for proponents

In these proceedings, the Federal Court made it clear that third parties affected by the orders may apply for a variation.

As the Court's orders and reasons in this case turned on the fact that there was no authorised applicant for the claim group, it is yet to be seen whether orders of this type will be used more broadly. We are however currently aware of similar orders being sought by a native title applicant in another Queensland claim.

If the Court's approach in this case is followed in other native title proceedings, it may have significant practical implications for proponents who are parties to native title and cultural heritage agreements involving monetary payments.

For cultural heritage agreements in particular, it is common that payments are made to members of the claim group for work done to complete cultural heritage surveys and reports. If these payments are required to be paid to the Federal Court, rather than to the claim group, this may affect the implementation of the agreement.

Proponents may also need to take account of the possibility of such orders when negotiating and drafting agreements.

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