1. A director of Golden Sands gave evidence that Golden Sands would be selling more than 300,000 tonnes of sand per annum.
2. Golden Sands' forensic accountant more conservatively estimated sales of 234,000 tonnes per annum. This amount of sales would almost be enough to meet the minimum monthly royalty payments for a full year.
3. If the judge's decision to grant the injunction should turn out to be wrong, Golden Sands would be able to recover any amounts paid to the defendants.
4. If the judge had decided not to grant the injunction and that decision turned out to be 'wrong', the defendants had little prospect of recovering the royalty payments and would have also lost the sand which had been quarried from the Darra site over that period.

Decision

Whelan J decided to vary his order so that the royalty payments were only due from 28 December 2006 to 28 April 2007. As a preliminary point, the judge was not persuaded by the argument that Golden Sands' financial position had changed in any material manner and that it was unable to meet the minimum monthly payments and pay its legal costs. However his Honour was satisfied that one material circumstance had changed, that Golden Sands had ceased removing sand from the site and was vacating the site. The judge determined this to be significant in two respects:

1. 'It significantly alters the "lower risk of injustice" analysis. The defendants are no longer at risk that they will succeed in the action but "lose" both the royalty payments falling due and the sand extracted and removed from the ... site during the relevant period'.
2. The 2006 Order did not simply order that Golden Sands pay the minimum monthly royalty payments, it ordered that Golden Sands was not to remove any sand or use any equipment on the site without paying the minimum monthly royalty payments. Therefore, by Golden Sands vacating the site, the defendants substantially obtained the relief which they sought in the original application.

As a result, Golden Sands was able to have its interlocutory position changed from an absolute obligation to pay royalties to an interim one, followed by surrender of its access rights.

MORE NATIVE TITLE IN VICTORIA*

Lovett on behalf of the Gunditjmara People v Victoria [2007] FCA 474 (30 March 2007) (North J)

Native Title in Southern Australia – Consent determination – Standard of proof for claim settled by agreement – Mediation process – Rights to use and enjoy land and waters and protect places of significance – Rights to running water

On 30 March 2007 the Gunditjmara people of south western Victoria won recognition of their traditional ownership of that area of the State. The Federal Court, sitting on country beside a volcanic crater at the Mt Eccles National Park, made a consent determination of native title over

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almost 2000 parcels of Crown land covering 133,000 hectares. This marked the disposition of the third native title claim in Victoria, the most successful to date, following the fully litigated claim of the Yorta Yorta[1] and the consent determination in the Wimmera claim,[2] to the north of Gunditjmara country.

The Gunditjmara claim has a number of important features of significance for the resolution of all native title applications. This note draws attention to some of those.

The Claim

The native title claim was lodged in 1996. The claimed area was reduced over time to approximately 140,000 hectares, bordered by the South Australia-Victoria border in the west, following the course of the Glenelg and Wannon Rivers through to Hamilton and Dunkeld as the northern boundary, then south to the coast at Yambuk and along the coast (including to 100 metres offshore) including the town of Portland. The application related to all Crown land and waters within the application area including state forests, national parks, recreational reserves, river frontages and coastal foreshores as well as running water in rivers and streams. The claim also covered the waters of the Glenelg River in South Australia.

The area claimed was one of the earliest parts of Victoria settled by Europeans: the time of engagement with Gunditjmara society is the mid-1830s. As with the Wimmera determination and the Noongar claim in Perth/southern Western Australia,[3] the Gunditjmara determination puts the lie to simplistic notions that native title cannot survive in areas long settled by non-indigenous Australians.

The State of Victoria as the principal respondent had the main carriage of negotiations with the applicants. South Australia was a respondent until it reached a separate agreement with the applicants. The Commonwealth was actively involved and a wide range of affected interest groups, covering 170 parties, were also represented – commercial and recreational fishing interests, petroleum explorers, local government, pastoral, agricultural and apicultural interests, a commercial port operator, forestry interests and telecommunication and electrical utilities, reflecting the rich agricultural land, valuable fishing and forestry resources and the presence of large scale industry (including the Portland aluminium smelter and the Port of Portland) within the claim area.

The Consent Determination

The Gunditjmara consent determination recognises native title in 95 percent of the area claimed, with extinguishment of native title confirmed over 7,600 hectares (principally due to the presence of public works, roads or prior freehold grants).[4]

The native title rights recognised are:

(a) the right to have access to or enter and remain on the land and waters;

(b) the right to camp on the land and waters landward of the high water mark of the sea;

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1 (2002) 214 CLR 422, [2002] HCA 58.

2 *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795, discussed in 'The Turning of the Tide: Native Title in Victoria' (2006) 25 AURELJ 24.

3 *Bennell v Western Australia* (2006) 153 FCR 120, discussed in (2006) 25 AURELJ 334 (appeal pending).

4 A small section of the claim, representing 3.5%, has been adjourned for 18 months or so, to permit further work and negotiation on it: [2007] FCA 474 at [10], [33].

(c) the right to use and enjoy the land and waters;

(d) the right to take the resources of the land and waters; and

(e) the right to protect places and areas of importance on the land and waters.

These rights are non-exclusive and are subject, in accordance with the usual formula, to the traditional laws and customs of the Gunditjmara native title-holders and of laws of the State and Commonwealth, including the common law.

Noteworthy Features of the Determination

There are several innovative or significant points to note. Some relate to the process used by the parties and the Court to manage the case and to reach agreement. Others go to the content of the determination itself.

Rights to fresh water

First, the claim to native title rights to running water has been recognised. In Victoria the rights of any person to take and use water are, and have long been, closely regulated.[5] As a consequence of this history of legislation, the native title right to water is limited to a right to take water from waterways for domestic and ordinary use.

The application as filed claimed a native title right of exclusive possession of 'waters' within the claim area. However it was common ground between the parties that there could be no native title rights of exclusive possession in relation to flowing and subterranean water. This is the position at common law.[6] Rights to subterranean groundwater had been extinguished by legislation prior to 1975. The determination is silent as to rights to surface and near-surface geothermal resources and the recently enacted geothermal legislation[7] (The claim area is a volcanic plain which is prospective for geothermal energy, with existing small scale use of geothermal springs[8]).

The result of detailed analysis of the history of Victorian water legislation led to the conclusion that a native title right to take water from rivers and streams for private and domestic use continued. This does not depend on s 211 of the *Native Title Act 1993*, but on a provision dating from the *Water Act 1905* that preserved from the Crown's assertion of the right to the use and flow and to the control of the water of all rivers and streams in the state 'the exercise of the general right of all persons to take water for domestic and ordinary use and for watering cattle or other stock from any river creek stream or water-course and from any lake lagoon swamp or marsh vested in the Crown and to which there is access by a public road or reserve'.[9]

The right to protect

Another matter of interest was the right to protect places and areas of importance on the land and waters. The submissions filed in support of the consent determination by the State of Victoria revealed (with the parties' agreement) that there were divergent views about what the right to

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5 See in particular *Irrigation Act 1886* (Vic) and *Water Act 1905* (Vic) and successive Water Acts.

6 *Halsbury's Laws of England* (4th ed reissue, vol 49(2), 1997), paras [86], [132].

7 See 'Geothermal Energy Resources' (2006) 25 AURELJ 249 and (2005) 24 AURELJ 20.

8 Victoria *Parliamentary Debates (Legislative Assembly*) (22 Mar 2005) p 297 (Ms Lindell); p 299 (Mr Honeywood); p 301 (Mr Loney).

9 Section 6*, Water Act 1905* (Vic). See now s 8(1)(a), *Water Act 1989* (Vic).

protect places of importance connoted. Some of the Respondents (including the Commonwealth) were concerned that this right needed some express definition and/or qualification. It was apprehended that, absent such definition/qualification, the word 'protect' might (wrongly in the context of rights which were otherwise agreed to be 'non-exclusive') comprehend a right to exclude others from a parcel and to exert physical force for that purpose. It was argued by those of this view that, for the sake of clarity and certainty, there should be express provision that the right to 'protect' should not include the ability to exclude or exert physical force. The contrary view (of Victoria, among others) was that the word 'protect' has been used in an unadorned manner in numerous consent determinations and, it could be inferred, the courts are content to leave the word to have its ordinary meaning and to allow its parameters to be established on a case by case basis.[10] It was thought that the categorical exclusion of a right to employ appropriate physical force (where the right to 'protect' would otherwise be ineffectual and on occasions when it might be lawful) would derogate from the right granted. As a compromise, the determination declared that the right 'does not entail a right to use physical force in a manner that would be unlawful'.

Relationship of native title rights and public access rights

A third matter of interest to the cognoscenti arose in the declaration of the relationship between the native title rights and the other interests of respondents. As noted, the native title rights are non-exclusive. They are also subject to other valid interests and usually other interests prevail over the exercise of native title rights where the two are inconsistent. However, in respect of any common law public rights to fish and to navigate and public rights of access to and enjoyment of public places,[11] the consent determination declares that the common law rights and native title rights co-exist and goes on to provide that 'both the rights held under the other interests and the native title rights must be exercised reasonably'. One school of thought had it that these particular public rights 'out ranked' the native title rights and accordingly the Consent Determinations should acknowledge their relevant status. The Commonwealth argued for this outcome. The contrary view was that public rights simply co-exist with native title rights and that any conflict must essentially be resolved by a pragmatic first come, first served approach. It was pointed out that whilst the *Native Title Act* expressly recognised the superiority of non-exclusive possession acts (s 23G) and the prevalence of leases, licences, permits or authorities (s 44H), it was silent about the question of 'ranking' of public rights vis-à-vis the native title rights. Hence, it was argued, the Parliament did not intend that one prevail over the other. Cases like *Neowarra v WA*[12] and the form of the determination made by Weinberg J in *Griffiths v NT (No 2)*[13] were cited as supporting this understanding of the *Native Title Act*. This view prevailed, in part because there was doubt whether any public right to fish continued in Victoria, in view of the comprehensive provisions of the *Fisheries Act 1995* (Vic), and is supported by the admittedly tenuous nature of the common law public rights.[14]

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10 For example: *Congoo v Queensland* [2001] FCA 868 (Hely J); *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [136]-[140].

11 As validated by s 15 of the *Land Titles Validation Act 1994* (Vic) (cf s 212(2), NTA).

12 [2004] FCA 1092.

13 [2006] FCA 1155.

14 Compare *Harper v Minister of Sea Fisheries* (1989) 168 CLR 314 at 329; *Gumana v Northern Territory* (2005) 141 FCR 457 at [69] and *Gumana v Northern Territory* [2007] FCAFC 23 at [89].

Innovations in Mediation and Consent Determinations

A distinctive aspect of the Gunditjmara claim was the active involvement of the Federal Court in case management and mediation. As a claim of long-standing the apparently slow progress in resolution was a cause of frustration to the judge (North J) in whose list the case nominally sat. In order to generate progress, the court of its own motion ordered a number of steps.

Early evidence hearing

In 2005 the applicant was required to present preliminary evidence in which a number of witnesses gave viva voce evidence on country about their personal connection to the claim area and their knowledge of traditional laws and customs. The respondents cross-examined and at the conclusion of three days the State was asked by the court to give its initial reaction to the material. At the same time North J gave his preliminary assessment which, while provisional, recorded that the evidence was 'impressive' and was duly noted by the parties.

Conference of experts

From that point his Honour used regular direction hearings to keep the parties focused on negotiations (both internal and inter-partes). The next critical step was the convening of a panel of expert anthropologists (two for the applicant and two for the State) to consider the connection issues – including whether the *Yorta Yorta* test of a traditional society which continued substantially unbroken from the time of the first assertion of sovereignty by the Crown was established. Convened by the Court Registrars, the anthropologists met intensively several times between July and October 2005 and produced a report dealing with 36 questions which had been framed by the parties. After receiving the report of the experts conference, the State had its legal and anthropological advisers undertake a comprehensive review of the material marshalled in support of the application. The submissions to the court describe what happened next: 'At the end of that process, the State was satisfied that it was *conscientiously able to propose* an offer of settlement involving a consent determination of native title to the Applicant' (emphasis added). This offer of settlement (its third) was accepted by the Applicants in principle and was in due course translated, with the active assistance of the court registrars and the participation of all parties, into the consent determination and accompanying agreements. In his making the consent determination, North J lauded the role of the registrars: 'The process developed by the registrars of the Court in this case stands as a beacon for agreement making in native title cases. The Court has now accumulated considerable experience in the jurisdiction and in this case used innovative procedures including early evidence hearing and conferences of experts to break through critical roadblocks.'[15]

Founded on a cohesive and determined Applicant group and a state respondent willing and also determined to resolve claims by compromise and agreement, the outcome created a goodwill and a lasting relationship of respect which may be as salutary as the undoubtedly important recognition of native title.

Standard of proof for consent determinations

Whether or not the Court Registrars will have such a role in future native title claims, the Gunditjmara case is authority for, and an invitation to, State and other respondents to adopt a less

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15 [2007] FCA 474 at [49].

exacting standard of satisfaction on the elements of the claim than would be involved in a full-blown contested trial. The State of Victoria expressly adopted the position that for it to consent to the proposed determination the Applicant should establish a *reasonably arguable* case and not something more.

The judge addressed at some length the standards which justify the court in making, and the parties in submitting, a consent determination under s 87 of the *Native Title Act*:

> 'In the present case the Court has heard some evidence, but not a comprehensive case sufficient to establish the facts which would support a determination. Section 87(1) obviously contemplates that the Court can make orders in such circumstances because it applies when there is no hearing or no full hearing of the case.' [16]

In comparison with the consent determinations in Miriuwung/Gajerrong[17] or Wimmera, the parties did not present the court with an epitome of the evidence of connection and other matters in support of the claim which they had reviewed. Instead they described, in quite some detail, the process and stages of their evaluation of the material. They submitted that the authorities justified the court in trusting that the parties had reached an appropriate agreement. The judge endorsed this approach. He stated:

> 'The focus of the section is on the making of an agreement by the parties[18]. This reflects the importance placed by the Act on mediation as the primary means of resolving native title applications. …. The Act is designed to encourage parties to take responsibility for resolving proceedings without the need for litigation. Section 87 must be construed in this context. The power must be exercised flexibly and with regard to the purpose for which the section is designed.
>
> In this context, when the Court is examining the appropriateness of an agreement, it is not required to examine whether the agreement is grounded on a factual basis which would satisfy the Court at a hearing of the application. The primary consideration of the Court is to determine whether there is an agreement and whether it was freely entered into on an informed basis[19]. Insofar as this latter consideration applies to a State party, it will require the court to be satisfied that the State party has taken steps to satisfy itself that there is a credible basis for an application.[20] There is a question as to how far a State party is required to investigate in order to satisfy itself of a credible basis for an application. One reason for the often inordinate time taken to resolve some of these cases is the overly demanding nature of the investigation conducted by State parties. The scope of these investigations demanded by some States is reflected in the complex connection guidelines published by some States.
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> The power conferred by the Act on the Court to approve agreements is given in order to avoid lengthy hearings before the Court. *The Act does not intend to substitute a trial, in*

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16 [2007] FCA 474 at [35].

17 *Ward v Western Australia* [2006] FCA 1848 (per North J).

18 Section 87, NTA, relevantly provides: 'If ... agreement is reached between the parties on the terms of an order …and the Court is satisfied that an order in … those terms would be within the power of the Court, the Court may, if it appears to it to be appropriate to do so, …make an order … without holding a hearing…'

19 *Nangkiriny v Western Australia* (2002) 117 FCR 6, *Ward v Western Australia* [2006] FCA 1848.

20 *Munn v Queensland* (2001) 115 FCR 109.

> *effect, conducted by State parties for a trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application.* The Act contemplates a more flexible process than is often undertaken in some cases. These comments relate to the requirements of s 87, and are not intended to reflect on the conduct of the State in this case.' (emphasis added).[21]

Conclusion

Native title is part of an on-going process of reconciling communities and building a relationship based on respect and acknowledgment. The Gunditjmara consent determination – long in the making and less, no doubt, than the applicants' original aspirations – provides a good example of the process.

ABORIGINAL HERITAGE ACT 2006 (VIC) – A PROTECTION SCHEME FOR THE NATIVE TITLE ERA*

The Need for Change

Less than 30 years ago, in *Onus v Alcoa of Australia,*[1] the High Court was asked to consider whether the acknowledged cultural and spiritual interests of two representatives of the Gunditjmara People would give them standing to seek an injunction under the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) (Relics Act) to prevent interference with Aboriginal relics. The High Court found in favour of the Gunditjmara women and it is now generally acknowledged that Indigenous people have the right to make decisions regarding Indigenous heritage. Most project proponents expect to engage with Indigenous groups in relation to activities with the potential to harm Indigenous heritage. However, until recently, this was not necessarily required by State legislative schemes.

Until Queensland introduced the *Aboriginal Cultural Heritage Act 2003* (Qld), Victoria's heritage protection scheme was the most progressive of any State.[2] In 1987, the Relics Act was supplemented by Pt IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (Commonwealth Act), which applied exclusively in Victoria. Under Pt IIA, the State was divided into regions and for each region a 'local Aboriginal community' was nominated as the heritage decision-maker. Their most important responsibility was approving (or rejecting) requests to disturb Aboriginal heritage.

Though current for 20 years, the old scheme had significant deficiencies. Decision making by 'local Aboriginal communities' lacked accountability and the system was poorly integrated into the State's planning processes. With the recognition of native title, the inadequacies became more acute. The rigid system of 'local Aboriginal communities' could not accommodate native claimants, nor Victoria's two groups of determined native title-holders.

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21 [2007] FCA 474 at [36]-[38].

* Clare Lawrence BA (Hons), LLB, Senior Associate, Blake Dawson Waldron.

1 (1981) 149 CLR 27.

2 *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) probably provides the most extensive protection of Indigenous heritage.