SUPREME COURT OF QUEENSLAND

CITATION:	*Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321
PARTIES:	**NUGA NUGA ABORIGINAL CORPORATION (ICN 8089)** (applicant) **v** **MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER PARTNERSHIPS** (respondent)
FILE NO/S:	Brisbane No 12811 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	20 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	16 November 2017
JUDGE:	Jackson J
ORDER:	**The order of the Court is that:** **1. The decision of the respondent to refuse the applicant's application to be registered as an Aboriginal cultural heritage body made on 24 March 2017 is set aside.** **2. The respondent pay the applicant's costs of the proceeding.**
CATCHWORDS:	ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES – ABORIGINAL AND TORRES STRAIT ISLANDER CORPORATIONS – where the applicant applied for registration as an Aboriginal cultural heritage body under s 36 of the *Aboriginal Cultural Heritage Act* 2003 (Qld) – where the respondent refused the application on the ground that Aboriginal parties, who were native title parties for the area, did not agree to the registration – where s 34 of the *Aboriginal Cultural Heritage Act* 2003 (Qld) provided that a previously registered native title claimant whose claim had failed was a native title party if the person's claim was the last claim registered, there was no other registered native title claimant and there was not, and never had been, a native title holder for the area – where the Federal Court held that an unregistered native title claimant group had native title rights

over the area in the past – where there had never been a registered native title holder for the area – whether a previously registered native title claimant whose claim had failed was a native title party

Aboriginal Cultural Heritage Act 2003 (Qld), s 34, s 35, s 36
Judicial Review Act 1991 (Qld), s 20
Native Title Act 1993 (Cth), s 223, s 225

Adams v Lambert (2006) 228 CLR 409, cited
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27, applied
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, followed
Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd (2012) 250 CLR 503, applied
Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (1981) 147 CLR 297, applied
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, cited
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, distinguished
Thiess v Collector of Customs (2014) 250 CLR 664, applied
Wyman on behalf of the Bidjara People v State of Queensland (No 2) [2013] FCA 1229, discussed

COUNSEL: J Waters for the applicant
G Del Villar for the respondent

SOLICITORS: King & Wood Mallesons for the applicant
Crown Solicitor for the respondent

[1] This proceeding is an application for judicial review of the respondent's decision to refuse to register the applicant as an Aboriginal cultural heritage body for an area under s 36 of the *Aboriginal Cultural Heritage Act* 2003 (Qld) ("ACHA"). The application is made by way of statutory order of review under s 20 of the *Judicial Review Act* 1991 (Qld) ("JRA").

[2] Section 36 of the ACHA provides:

"**36 Registration as Aboriginal cultural heritage body**

(1) The Minister may, on the application of a corporation, register the corporation as an Aboriginal cultural heritage body for an area.

(2) The Minister must not register a corporation as an Aboriginal cultural heritage body for an area if there is currently another corporation

registered as an Aboriginal cultural heritage body for the area or any part of the area.

(3) However, the Minister may register a corporation (the ***new corporation***) as an Aboriginal cultural heritage body for an area even though there is currently another corporation (the ***registered corporation***) registered as an Aboriginal cultural heritage body for the area or any part of the area if-

(a) the new corporation's registration is only for the purposes of a particular project; and

(b) the registered corporation has given written agreement to the new corporation's registration for the purposes of the project; and

(c) the registration provides that the registration is effective only until the project finishes.

(4) The Minister may register a corporation as an Aboriginal cultural heritage body for an area only if the Minister is satisfied that—

(a) the corporation—

(i) is an appropriate body to identify Aboriginal parties for the area; and

(ii) has the capacity to identify Aboriginal parties for the area; and

(b) either—

(i) Aboriginal parties for the area that are native title parties for the area agree the corporation should be registered; or

(ii) if there is no Aboriginal party for the area that is a native title party for the area—there is substantial agreement among the Aboriginal parties for the area that the corporation should be registered.

Examples of corporations that may be appropriate to be registered—

a registered native title body corporate, a representative body that is a corporation, an Aboriginal body incorporated for furthering the interests of Aboriginal people in relation to land or cultural matters

(5) In deciding whether to register a corporation as the Aboriginal cultural heritage body for an area, the Minister may do any of the following—

(a) consult with Aboriginal parties for the area or parts of the area;

(b) advertise for submissions about the proposed registration of the corporation;

(c) anything else the Minister considers necessary to inform himself or herself.

(6) The Minister may cancel the registration of a corporation as the Aboriginal cultural heritage body for an area if the Minister is no longer satisfied about the matters mentioned in subsection (4) in relation to the corporation.

(7) In this section—

register, a corporation, means record the corporation in the register."

[3] The respondent's decision was made by a delegate. The basis of the decision was that she was not satisfied that Aboriginal parties, who are native title parties for the area, agreed that the applicant should be registered, as required by s 36(4)(b)(i) of the ACHA.

[4] That finding is challenged by the applicant on the ground that there were no Aboriginal parties for the area who were native title parties for the area. That question turns on the proper construction of s 34 of the ACHA.

[5] Section 34 defines who is a "native title party" for an area within the meaning of, inter alia, s 36(4)(b)(i). It provides:

"**34 Native title party for an area**

(1) Each of the following is a *native title party* for an area—

(a) a registered native title claimant for the area;

(b) a person, who, at any time after the commencement of this section, was a registered native title claimant for the area, but only if—

(i) the person's claim has failed and—

(A) the person's claim was the last claim registered under the Register of Native Title Claims for the area; and

(B) there is no other registered native title claimant for the area; and

(C) there is not, and never has been, a native title holder for the area; or

(ii) the person has surrendered the person's native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or

(iii) the person's native title has been compulsorily acquired or has otherwise been extinguished;

(c) a registered native title holder for the area;

(d) a person who was a registered native title holder for the area, but only if—

(i) the person has surrendered the person's native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or

(ii) the person's native title has been compulsorily acquired or has otherwise been extinguished.

(2) If a person would be a native title party under subsection (1)(b) but the person is no longer alive, the native title party is instead taken to be the native title claim group who, under the Commonwealth Native Title Act, authorised the person to make the relevant native title determination application."

[6] The question at issue is confined to whether there were any native title parties for the area within the meaning of s 34(1)(b). It is not in dispute that at a time after the commencement of s 34 there were persons who were registered native title claimants for the area. By the time of the respondent's decision upon the applicant's application for registration under s 36, they were no longer registered native title claimants. That was because of the judgment of the Federal Court of Australia made upon the decision in *Wyman on behalf of the Bidjara People v State of Queensland (No 2)*.[1]

[7] Relevantly, the delegate found that two persons who had been registered native title claimants before that judgment ("relevant persons"), were persons who were native title parties within the meaning of s 34(1)(b) ("par (b)").

[8] The applicant contends that the relevant persons were no native title parties, because those persons did not meet the conditions of par (b). In particular, the applicant contends that "there has been a native title holder for the area", within the meaning of s 34(1)(b)(i)(C) ("sub-sub-par (C)")..

[9] The applicant relies on the finding in *Wyman No 2* that the area presently in question, at sovereignty, was Karingbal country with the Karingbal people having rights and interests in that land arising from their recognition, acknowledgement and observance of traditional laws and customs in connection with that land,[2] as showing that there has been a native title holder, within the meaning of sub-sub-par (C), so that par (b) does not apply to the relevant persons, with the consequence that they are not native title parties under s 34.

[10] The respondent construed sub-sub-par (C) as though "native title holder" in that provision "connot[es] a person or group of persons holding common or group rights comprising native title, as that term is defined in s 223 of the NTA, identified in a positive determination of native title under s 225 of the NTA". The acronym NTA refers to the *Native Title Act* 1993 (Cth).

[11] The sole question for determination is whether that construction is right. In the language of judicial review under s 20 of the JRA, the question is whether by that

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1 [2013] FCA 1229.

2 [2013] FCA 1229, [528] and [620].

construction the delegate's decision involved an error of law, as a ground of review, under s 20(2)(f).

[12] The applicant made extremely wide-ranging submissions in support of the conclusion that "native title holder" within the meaning of sub-sub-par (C) is not limited to a native title holder as positively determined under s 225 of the NTA. However, in my view, there is a simpler process of reasoning that would lead to that result.

[13] Despite the enhanced role of the purpose of a statutory provision in considering its proper construction, as exemplified by s 14A of the *Acts Interpretation Act* 1954 (Qld) and the inclusion in modern statutes of detailed provisions as to the purpose or purposes of the Act in question, such as ss 4 to 6 of the ACHA, and even specific interpretative provisions, such as s 13 of the ACHA, the task of statutory construction is primarily text based.

[14] Thus in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*[3] the plurality said:

> "This court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."[4] (footnotes omitted)

[15] In *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd*,[5] the court said:

> "'This court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself."[6] (footnote omitted)

[16] And again in *Thiess v Collector of Customs*,[7] the court said:

> "Statutory construction involves attribution of meaning to statutory text. As recently reiterated:

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3 (2009) 239 CLR 27.
4 (2009) 239 CLR 27, 46-47 [47].
5 (2012) 250 CLR 503.
6 (2012) 250 CLR 503, 519 [39].
7 (2014) 250 CLR 664.

> 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.'"[8]

[17] There is no reference in the text of sub-sub-para (C) to a native title holder whose native title group's native title has been positively established by a determination made under s 225 of the NTA, but who is not a holder at the time of the determination.

[18] However, the modern law of statutory interpretation requires that in the construction of the text of a provision, context is considered in the first instance.[9]

[19] The immediate context of sub-sub-par (C) in par (b) does not otherwise refer to native title, or indicate that the condition in sub-sub-par (C) is concerned with native title that has been determined under s 225 of the NTA. The further context in paras (c) and (d) expressly refers to a "registered native title holder". That expression is defined in Schedule 2 of the ACHA, in part, as follows:

> "an entity, other than a registered native title body corporate, that is the subject of a determination of native title under the Commonwealth Native Title Act and is registered on the National Native Title Register as holding native title rights and interests."[10]

[20] A determination that native title exists, made under s 225 of the NTA, constitutes an approved determination of native title under s 13 of the NTA. It must be included in the Native Title Register kept under s 192 and the person who is entitled to the native title thereupon becomes a registered native title holder.

[21] Accordingly, when paras (c) and (d), as the nearby context to sub-sub-par (C), refer to a "registered native title holder" they mean a person who is a native title holder whose title has been positively established by a determination under s 225 of the NTA. The absence of the word "registered" before the words "native title holder" in sub-sub-par (C) suggests that a different meaning is intended from "registered native title holder".

[22] Looking next at the function and purpose of s 34 as a whole, it is a definitional provision. Its function is to define who is a "native title party" as an expression. That defined expression, "native title party" is, in turn, used to define the expression "Aboriginal party", in s 35.

[23] The defined expression, "Aboriginal party," is then used in the ACHA for a number of purposes, including to identify those whose agreement is required under s 36(4)(b) before a corporation may be registered as an "Aboriginal cultural heritage body".

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8 (2014) 250 CLR 664, 671 [22].

9 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

10 *Aboriginal Cultural Heritage Act* 2003 (Qld), Schedule 2, definition "registered native title holder'.

[24] The function of an Aboriginal cultural heritage body is to identify the Aboriginal parties for the area or for a particular part of the area.[11] Registration as an Aboriginal cultural heritage body has the consequence that sponsors of cultural heritage studies or heritage management plans for the area are required to give notice to the Aboriginal cultural heritage body, who may then respond and provide the names and contact details of Aboriginal parties for the area.[12] Additionally, the Aboriginal cultural heritage body may be given financial or other help by the Minister to fulfil its function.[13]

[25] The context just described must be taken into account in approaching the text of sub-sub-paragraph (C) in s 34.

[26] Analysing the operation of s 34 further, in defining who is a native title party for an area, s 34 identifies four categories of persons, in paras (a) to (d). They emanate from two classes of person, namely a "registered native title claimant" and a "registered native title holder". Each of those classes is a defined expression by reference to their corresponding meaning in the relevant sections of the NTA.[14]

[27] There is an hierarchy as between paras (a) and (b) of persons who might be native title parties for a particular area, because par (b) does not apply to a person if there is another registered native title claimant. Similarly, there is a hierarchy between paras (b) and (c) because par (b) does not apply to a person if there is a native title holder or has been a native title holder. Otherwise, each of the persons for the area who meets the requirements of paras (a), (c) and (d) is a native title party.

[28] A contextually relevant circumstance is that once there is an approved native title determination, a further native title determination application must not be made,[15] although there is a limited right to make an application for a revised native title determination.[16]

[29] Returning to par (b), the width of the category of former native title claimants whose claims have failed is narrowed by the imposition of additional requirements. There are three alternative sets of requirements set out in sub-paras (i), (ii) and (iii). Thus, under sub-par (ii), a person who was a registered native title claimant for an area who surrendered their native title under an ILUA, that is registered, is a native title party and, under sub-para (iii), a person who was a registered native title claimant whose native title was compulsorily acquired or otherwise was extinguished is a native title party.

[30] The operation and construction of sub-par (i) is to be approached in that context. Under it, a person who was a registered native title claimant for the area whose claim has failed may be a native title party only if three conditions are all met:

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11 *Aboriginal Cultural Heritage Act* 2003 (Qld), s 37(a).
12 *Aboriginal Cultural Heritage Act* 2003 (Qld), ss 56, 58, 62, 91, and 97.
13 *Aboriginal Cultural Heritage Act* 2003 (Qld), s 37(b).
14 *Aboriginal Cultural Heritage Act* 2003 (Qld), Schedule 2, definitions "registered native title claimant' and "registered native title holder".
15 *Native Title Act* 1993 (Cth), s 61A.
16 *Native Title Act* 1993 (Cth), ss 13(1), 13(5) and 61.

(a) first, that the person's claim was the last claim registered;

(b) second, that there is no other registered native title claimant; and

(c) third, that there is not and never has been a native title holder for the area.

[31] These conditions operate to cut down or limit the scope of the persons to be accorded the status of a native title party who were (but are no longer) registered native title claimants. By excluding a person from that status, s 34 fulfils the function and purpose of limiting the range of persons whose agreement must be obtained under s 36 before a corporation may be registered as an Aboriginal cultural heritage body for an area.

[32] On its ordinary meaning, sub-sub-par (C) asks two questions. First, is there a native title holder for the area? Second, has there ever been a native title holder for the area? Looking at the text in the context described above, nothing expressly requires that the native title for either question must have been determined under s 225 of the NTA.

[33] If native title has been determined to exist under s 225 of the NTA, the holder will fall within the categories of a registered native title holder or a former registered native title holder under paras (c) or (d). Accordingly, to the extent that sub-sub-par (C) is concerned with a native title holder identified in a positive determination of native title under s 225, it would operate to exclude a relevant registered native title claimant whose claim has failed from the category of native title party in circumstances where another person qualifies as a native title party under either par (c) or par (d).

[34] Consistently with the delegate's basis of decision, the respondent submits that the only questions that sub-sub-para (C) asks are whether there is or ever has been a "determined" native title holder. In other words as if it read:

"(C) there is not, and never has been, a **determined** native title holder for the area;"

[35] By this, the respondent means a person who has been determined to be a native title holder under s 225 of the NTA. For a reason which I did not understand, the respondent did not contend that the sub-sub-para should be read as if it provided;

"(C) there is not, and never has been, a **registered** native title holder for the area;"

[36] The respondent submits that such a construction is available and is to be preferred having regard to the well-known passage in *Project Blue Sky Inc v Australian Broadcasting Authority*,[17] that:

"However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily,

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17 (1998) 194 CLR 355.

that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In *Statutory Interpretation*, Mr Francis Bennion points out:

> 'The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with.'"[18] (footnotes omitted)

[37] This statement has been repeated and referred to so many times that it has received almost canonical status. Sometimes it is not remembered that the specific context in *Project Blue Sky* was the construction of a statute where one provision appeared to conflict with another. The respondent relied on the case for the reference to the relevance of the "consequences of a literal or grammatical construction" referred to in the passage set out above. But the questions at issue in *Project Blue Sky* were not of that kind.

[38] There are very many cases in which the consequences of a particular construction have been considered in the process of construing the provision in question. But it is not legitimate for a court to prefer another meaning over the ordinary meaning of the words in their context because in the court's view the consequence of another meaning is to be preferred as more convenient. The point was considered in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation*.[19] Gibbs CJ said:

> "It is an elementary and fundamental principle that the object of the court, in interpreting a statute, "is to see what is the intention expressed by the words used". It is only by considering the meaning of the words used by the legislature that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that words mean what they say. Of course, no part of a statute

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18 (1998) 194 CLR 355, 384 [78].
19 (1981) 147 CLR 297.

> can be considered in isolation from its context — the whole must be considered. If, when the section in question is read as part of the whole instrument, its meaning is clear and unambiguous, generally speaking "nothing remains but to give effect to the unqualified words"…. There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case….. However, if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. To say this is not to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature. The danger that lies in departing from the ordinary meaning of unambiguous provisions is that "it may degrade into mere judicial criticism of the propriety of the acts of the Legislature"…; it may lead judges to put their own ideas of justice or social policy in place of the words of the statute. On the other hand, if two constructions are open, the court will obviously prefer that which will avoid what it considers to be inconvenience or injustice. Since language, read in its context, very often proves to be ambiguous, this last mentioned rule is one that not infrequently falls to be applied."[20] (footnotes omitted)

[39] Mason and Wilson JJ added:

> "On the other hand, when the judge labels the operation of the statute as "absurd", "extraordinary", "capricious", "irrational" or "obscure" he assigns a ground for concluding that the Legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.
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> Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended."[21]

[40] The continuing vitality of *Cooper Brookes* is proclaimed by the number of occasions upon which it is cited, and was recognised in *Adams v Lambert*,[22] where the High Court said:

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20 (1981) 147 CLR 297, 304-305.
21 (1981) 147 CLR 297, 321.
22 (2006) 228 CLR 409.

> "In *Wright v Australia & New Zealand Banking Group Ltd*, Beaumont J pointed out that it is a well settled principle of construction that a written instrument must be construed as a whole, and that, as Dixon CJ and Fullagar J said in *Fitzgerald v Masters*, '[w]ords may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency'. A striking example of the application of a cognate principle of statutory construction is to be found in *Cooper Brookes (Wollongong) Pty Ltd v FCT*."[23] (footnotes omitted)

[41] The respondent does not submit that the operation of sub-sub-par (C) would be absurd unless either of the suggested interpolations to the text are made. Nor does the respondent submit that the omission of either "determined" or "registered" was an obvious mistake in the drafting.

[42] Instead, the respondent submits that s 34 is designed to establish a simple and certain means of classifying a person as a native title party, because paras (a), (c) and (d) draw bright line rules for doing so, by referring to registered or former registered native title claimants and registered native title holders.

[43] In my view, it is difficult to reason as to the proper construction of sub-sub-par (C) and its effect on par (b) from an assumption that the design is to establish bright line rules. First, as previously mentioned, a "native title party" under s 34 is one category of "Aboriginal party" under s 35. The other category of Aboriginal party under s 35 is that under s 35(7), as follows:

> "(7) If there is no native title party for an area, a person is an ***Aboriginal party*** for the area if—
>
> (a) the person is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area; and
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> (b) the person—
>
> (i) has responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area; or
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> (ii) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area."

[44] It cannot be said that both categories of persons who may be Aboriginal parties turn on a bright line rule, apart from sub-sub-par (C), for the purpose of determining whose agreement may have to be obtained to the registration of an Aboriginal Cultural Body under s 36.

[45] Second, the suggestion that s 34 exhibits an overall structure of bright line rules as shown in the other categories of native title party under pars (a), (c) and (d) tends to assume that each category is equal or the same in some relevant sense. However, paras

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[23] (2006) 228 CLR 409, 417 [21].

(c) and (d) confer the status of a native title party on a person who has or has had a favourable native title determination and been registered as a native title holder. That is, a determination that native title exists and that the person holds it. Paragraph (a) confers the status on someone who has an unresolved claim for native title and who has satisfied the requirements for registration.

[46] On the other hand, para (b) starts from the position that the person does not have an unresolved registered claim for native title and has not been found on a determination to be the person entitled to native title that exists. There is no obvious reason why a person in that category should be treated equally as qualifying for the status of a native title party as for the other categories.

[47] The present case illustrates the point. Those who have promoted the applicant are the people who were found on a determination of native title to belong to a native title group that had native title, but ceased to do so during the 20th century.[24] For reasons that do not matter now, they were not registered native title claimants, so theirs was an unregistered claim. The putative native title parties under par (b), as found by the delegate, were registered native title claimants the subject of the same determination. They were held never to have had native title to the relevant area.[25] On the respondent's construction of par (b), they are the native title parties who, as Aboriginal parties, can veto the present application under s 36. The consequence of the respondent's construction is that the persons whose forbears were found to have had native title to the relevant area are excluded from being Aboriginal parties entirely under s 35 of the ACHA, because s 35(7) only applies if there is no native title party for the area under s 34.

[48] Another argument deployed by the respondent is that if sub-sub-par (C) is given its ordinary meaning, so as to include native title at common law that has not been registered, the respondent's task of deciding whether there is and never has been a native title holder for the area is impossible or too difficult. The respondent submits that cannot have been the intention of the legislature.

[49] The respondent submits that this argument is strengthened by the circumstance that the status of native title party turns on whether the relevant facts exist or do not exist, not on whether the respondent is satisfied or of the opinion in good faith that they exist. The respondent submits that makes the task more onerous than it might otherwise be.

[50] The respondent submits that the operation of the statutory scheme that depends on identifying native title parties and Aboriginal parties with certainty would thereby be frustrated.

[51] The applicant responds by submitting that answering the questions whether there has never been, and is not, a native title holder is a process that starts with whether there was native title at sovereignty and ends with whether the native title continues.

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24 *Wyman on behalf of the Bidjara People v State of Queensland (No 2)* [2013] FCA 1229, [620].

25 *Wyman on behalf of the Bidjara People v State of Queensland (No 2)* [2013] FCA 1229, [528], [533], [672].

[52] I accept that the question whether there never has been native title logically starts from sovereignty. Native title at common law is the basis of native title under the NTA[26] and the basis of native title in an Act of this jurisdiction, including the ACHA.[27] Whether there was or is native title at common law, impliedly poses a question as to the relevant rights at the point of intersection between the relevant legal systems at sovereignty.[28]

[53] It is by no means impossible, as the facts of the present case show, that a person's native title at common law may be established without registration as a registered native title holder. However, the present case does illustrate that such a question may not be finally resolved until a determination is made under s 225 of the NTA, after a contested hearing among rival groups of length and complexity, where judicial determination is required.

[54] In my view, while there is some force in the respondent's arguments, the difficulties are overstated. First, there will be no difficulty in the operation of the scheme of the provisions for identifying the relevant Aboriginal parties in most cases, irrespective of whether the gloss upon the operation of para (b) which the respondent urges is accepted. Paragraph (b) has no role to play, generally speaking, when there has been or is a registered native title holder or there is a registered native title claimant.

[55] Second, administrative decision makers must sometimes make complex factual findings as to a jurisdictional fact for the exercise of power. If the respondent decides that he cannot find that there has never been and there is not a native title holder that is a fact found as an administrative decision maker. In that case, a person who otherwise satisfies the requirements of par (b) (where there is no person under par (a), (c) or (d)) will be a native title party. There is no suggestion that these circumstances were ever likely to have applied to many cases.

[56] Third, although the operation of sub-sub-par (C) turns on whether there has never been and there is not a native title holder, as opposed to the respondent's satisfaction of those matters, that is not reason to construe sub-sub-par (C) as being concerned only with native title holders whose title has been positively determined under s 225 of the NTA. The effect of making a power operate upon a Minister's satisfaction of a matter may be to immunise the finding from judicial review, practically speaking.[29] However, in my view, that is not a reason to construe sub-sub-par (C) one way or the other. In any event, I note that the respondent's power to determine an Aboriginal party under s 35(7) also does not turn on the respondent's satisfaction that the relevant facts exist.

[57] Lastly, the respondent relied on part of the Minister's second reading speech for the Bill that became the ACHA, in relation to s 34, as follows:

> "Importantly, a person whose native title claim fails will be the Aboriginal party for the area and until another person becomes a registered native title claimant, ensuring certainty and consistency when dealing with cultural heritage concerns."

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26 *Native Title Act* 1993 (Cth), s 223(1).
27 *Acts Interpretation Act* 1954 (Qld), s 36 and Schedule 1, definition "native title".
28 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 453-454 [77].
29 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 653-654 [136]-[137].

[58] A Minister's second reading speech is admissible, as extrinsic material,[30] in aid of the interpretation of a provision of an Act, inter alia, if the provision is ambiguous or obscure or to avoid a manifestly absurd or unreasonable result.[31] The respondent does not submit that the problem in the present case is one of ambiguity or obscurity. And the respondent also did not urge that it was one of manifest absurdity.

[59] However, assuming that the part of the speech relied upon is admissible, I am unable to give it much weight. It does not deal with the problem raised by the present case. The ACHA resolves the problem of identifying the appropriate Aboriginal party in a specific area about cultural heritage by the sections under consideration. The question, however, is how they go about doing it in the circumstances of the present case. The part of the speech relied upon does not speak to those circumstances.

[60] For these reasons, accepting that there will be administrative inconvenience and difficulty for the respondent in having to decide whether there has ever been or is native title for a particular area in some cases, I am persuaded that the construction urged by the respondent and adopted by the delegate in making the decision is incorrect in law.

Conclusion

[61] The better conclusion, in my view, is that the native title holder referred to in sub-sub-par (C) is not only a native title holder whose title has been positively determined under s 225 of the NTA.

[62] It follows that the decision involved an error of law and must be set aside.[32]

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30 *Acts Interpretation Act* 1954 (Qld), s 14B(3)(f).
31 *Acts Interpretation Act* 1954 (Qld), s 14B(1).
32 *Judicial Review Act* 1991 (Qld), s 30(1)(a).