LAND COURT OF QUEENSLAND

CITATION:	*Slater & Ors v Wangan and Jagalingou People & Ors* [2011] QLC 0044
PARTIES:	Sharyn, Ernest and Christopher Slater, Jovan Krco, and Phillip G, Geoffrey D & Regina Starr (applicants) v. Wangan and Jagalingou People (respondent) - and - Victor John Edward & Janet Anne Appleton (landholders) - and – State of Queensland (Amicos Curiae)
FILE NOS:	MRA980-10, MRA981-10, MRA982-10, MRA983-10, MRA984-10, MRA985-10, MRA986-10, MRA987-10, MRA988-10
DIVISION:	Land Court of Queensland
PROCEEDING:	Jurisdiction of the Court to determine Native Title Compensation Referral.
DELIVERED ON:	21 July 2011
DELIVERED AT:	Brisbane
HEARD AT:	Brisbane
MEMBER:	His Honour PA Smith
ORDERS:	**1. The Court lacks jurisdiction to determine compensation payable to the Wangan and Jagalingou People with respect to each matter referred relating to the Wangan and Jagalingou People by the Mining Registrar, Emerald on 8 and 9 December 2010 relating to MLA 70390, MLA 70391, MLA 70406, MLA 70397, MLA 70348, MLA 70407, MLA 70408, MLA 70409, and MLA 70388.** **2. The Registrar of the Land Court is directed to return each referral referred to in Order 1 hereof**

to the Mining Registrar, Emerald and to then close each Land Court file with respect thereto.

CATCHWORDS:	Practice and Procedure – Jurisdiction of Land Court – Expanded powers of Land Court – Jurisdiction by way of specific statutory reference – Land Court not Superior Court of Record with inherent jurisdiction. Native Title – Compensation – rights of Registered Native Title Claimants – Right to negotiate – question outside of jurisdiction of Land Court. Mining – *MRA* – Definition of owner of land.
APPEARANCES:	Sharyn, Ernest and Christopher Slater, (self represented) Denise Krco for Jovan Krco Phillip G, Geoffrey D & Regina Starr, (self represented) Mr C Reiach for the Wangan and Jagalingou People Mr G Houen, agent for Mr and Mrs Appleton Mr G Del Villar of counsel for the State of Queensland
SOLICITORS:	Crown Solicitor for the State of Queensland Principal Legal Officer, Queensland South Native Title Services, for the Wangan and Jagalingou People

Background

[1] **HIS HONOUR:** On 14 December 2010 the Land Court Registrar received nine referrals from the Mining Registrar, Emerald District. Each referral was dated either 8 or 9 December 2010, and related, individually, to mining lease application (MLA) 70391, MLA 70390, MLA 70406, MLA 70397, MLA 70348, MLA 70407, MLA 70408, MLA 70409, and MLA 70388.

[2] Each referral by the Mining Registrar had a number of important issues in common. Firstly, each referral related only to the determination of compensation with respect to access to the relevant MLA. Secondly, such access in each case was over part of GHPL 12/2560 owned by Mr and Mrs Appleton ("the landowners"). Thirdly, the access for each traverses through part of GHPL 12/2560 which was previously OL 12/681. OL 12/681 is subject to a Native Title Claim lodged by the Wangan and Jagalingou People. Fourthly, each referral was made by the mining registrar pursuant to s.279/281 of the *Mineral Resources Act 1989* ("the *MRA*") for the determination of compensation payable to the Wangan and Jagalingou People. Finally, although the applicant for each MLA is not identical, each MLA has been lodged by either Sharyn, Ernest and Christopher Slater; Jovan Krco; or Phillip G, Geoffrey D and Regina Starr (collectively referred to as "the miners").

[3] It should also be noted that many of the MLA's are currently listed for a hearing of the determination of compensation payable by the miners to the landholders commencing in Clermont on 3 August 2011.

[4] At the suggestion of a number of the parties, and with the consent of all parties, the issue currently for determination by the Court in each of the Wangan and Jagalingou compensation referral matters relates to the question of the jurisdiction of the Land Court to hear and determine Native Title Compensation matters relating to grants under the *MRA* in the current circumstances.

Jurisdiction v Power

[5] Issues relating to the jurisdiction and power of the Land Court, and previously the Land and Resources Tribunal, have been the subject of a number of decisions over the past decade. Questions have arisen primarily due to the proper interpretation to be given to s.32J of the *Land Court Act 2000*. It is to be noted that s.32J(2) and following is in essentially the same terms as that provided for in s.65 of the *Land and Resources Tribunal Act 1999* ("the *LRT Act*").

[6] Section 32J of the *Land Court Act* is to be found in Division 6 which is titled "Additional Power of Land Court when exercising particular jurisdiction". Importantly, s.32J applies when the Land Court is exercising jurisdiction under the *MRA*[1].

[7] Relevantly, s.32J of the *Land Court Act* then goes on to provide as follows:

> "(2) The Land Court has, for exercising jurisdiction conferred under an Act, all the powers of the Supreme Court, and may in a proceeding before the Land Court, in the same way and to the same extent as may be done by the Supreme Court in a similar proceeding—
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> (a) grant any relief or remedy; and
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> (b) make any order, including an order for attachment or committal because of disobedience to an order; and
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> (c) give effect to every ground of defence or matter of set-off, whether equitable or legal.
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> (3) Without limiting subsection (2), the Land Court has, in a proceeding before it, power to grant relief—
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> (a) under a declaration of rights of the parties; or
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> (b) under an injunction, whether interim, interlocutory or final, in the proceeding; or
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> (c) by staying the proceeding or a part of the proceeding; or
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> (d) by appointing a receiver including an interim receiver.
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> (4) The Land Court may order that a record of, or information about, a proceeding before the Land Court must not be made available to the public.

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[1] See s.32J(1)(b) *Land Court Act*.

> (5) Without limiting the things the Land Court may have regard to in deciding whether to make an order under subsection (4), the Land Court may have regard to Aboriginal tradition and Island custom. …"

[8] It is of assistance to understand the recent history of the exercise of jurisdiction under the *MRA*. Prior to September 2000, jurisdiction with respect to applications for mining leases and objections thereto, and for the determination of compensation relating to such applications, were determined by the Wardens Court of Queensland. In September 2000, that jurisdiction moved to the Land and Resources Tribunal, established pursuant to the *LRT Act*. As set out above, the *LRT Act* contains s.65 which grants the tribunal the powers of the Supreme Court when exercising its jurisdiction with respect to a matter. In September 2007 the bulk of the jurisdiction of the Land and Resources Tribunal under the *MRA* was removed from the Tribunal and placed in the Land Court of Queensland. As part of the legislative package that gave effect to that change, s.32J was introduced into the *Land Court Act*. In simple terms, this means that when the Land Court is exercising jurisdiction that was once exercised by the Land and Resources Tribunal, the Land Court has all the powers of the Supreme Court. In other words, there was a clear legislative intent that the broad powers exercised by the Land and Resources Tribunal in determining matters over which it had jurisdiction would also apply to those areas of jurisdiction which translated to the Land Court.

[9] On a number of occasions, the Land and Resources Tribunal fell into error when it sought to exercise power in circumstances where it did not have specific jurisdiction.[2] The source of such error has clearly been s.65 of the *LRT Act*.

[10] Justice Gerard JA, with whom Justices Wilson and Douglas agreed as to this point, set out a useful summary of the issues arising as to the powers and jurisdictions of the Land and Resources Tribunal in light of s.65 of the *LRT Act* in the case of *Lee v Kokstad Mining Pty Ltd*[3] where he relevantly had this to say:

> "[12] … President Koppenol made orders setting aside the mining referee's decision, and giving Mr Lee until 23 December 2005 to lodge an objection to the application. In making those orders the President – as the President made apparent during discussions with counsel – was satisfied that he was appropriately exercising a power given by *Uniform Civil Procedure Rules 1999* (Qld) r 667(2)(a), to wit setting aside an order made in the absence of a party, namely Mr Lee.
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> …
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> [14] The powers granted by s 65 of the LRT Act are available when it is exercising jurisdiction conferred on it by an Act. Mr Windridge had exercised the jurisdiction conferred by the MRA on the LRT on 7 February 2005, when he considered Kokstad's application for a mining lease. An appeal on a question of law lay from the Mining Referee to the President of the Tribunal, with the President's leave,

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2 See, for example, *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation* [2000] QLRT 14; *De Lacey v Juunjuwarra People* [2004] QLRT 20 and *Lee v Kokstad Mining Pty Ltd* [2005] QLRT 160.

3 [2007] QCA 248.

> under s 67 of the LRT Act, but the application made by Mr Lee to the President was not an appeal from the Mining Referee. No provision of the MRA or the LRT Act, or any other Act, gave the LRT as constituted by the President the jurisdiction to review a decision of the LRT constituted by the Mining Referee, other than as an appeal. In hearing the application to set aside the Mining Referee's recommendation, President Koppenol was not exercising a jurisdiction conferred under any Act.
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> …
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> [16] This Court in held in *De Lacey v Juunyjuwarra People and Anor* [2004] QCA 297 that the LRT was a statutory tribunal having only the jurisdiction conferred on it by statute; and that it had fallen into error in that particular case in likening itself to a superior court of general jurisdiction. While s 54 of the LRT Act provides that the LRT is a court of record, it is not established as a superior court of record. In *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 618, Wilson and Dawson JJ wrote that:
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> > "Ordinarily, a superior court of record is a court of general jurisdiction which means that, even if there are limits to its jurisdiction, it will be presumed to have acted within it. That is a presumption which is denied to inferior courts and is denied to a federal court such as the Federal Court."
>
> [17] The orders the President made on 6 December 2005 were made in excess of the jurisdiction conferred on the LRT, and pronounced orders having an effect contrary to s 268(3) of the MRA, and to the construction of that section settled upon by this Court in ACI Operations v Quandamooka Lands Council. …"

[11] Justice Douglas in *Lee v Kokstad Mining Pty Ltd* emphasised the points raised by Gerard JA when he said at paragraph 46 of the decision:

> "[46] The Tribunal is a statutory tribunal with limited jurisdiction. By s 54(1) of the LRTA –
>
> **"54. (1)** The tribunal is a court of record."
>
> It is not a court: its function is to make recommendations to the Executive, not to adjudicate upon disputes. Section 54(1) means only that its proceedings can be proved simply by producing its record.37 If it acts without jurisdiction, its orders are of no effect. A superior court of record, by contrast, is a court of general jurisdiction whose orders must be obeyed unless they are overturned on appeal, because it will be presumed to have acted within its jurisdiction."

[12] The authorities referred to above make the operation of s.32J of the *Land Court Act* abundantly clear. The Land Court, like the Land and Resources Tribunal, only has such jurisdiction as is specifically conferred upon it by statute. Section 32J of the *Land Court Act* does not operate in any way to extend the jurisdiction of the Land Court. What it does, is clearly state that the Land Court when it is exercising a matter over which it has jurisdiction, has, in the specific circumstances as set out in s.32J, all of the powers of the Supreme Court available to it in order for it to exercise that jurisdiction.

Does the Land Court have jurisdiction to consider the referrals made by the Mining Registrar, Emerald on 8 and 9 December 2010?

[13] The critical question for the Court to consider in the matters currently before it is this: Does the *MRA* or any other *Act* give to the Land Court specific jurisdiction to determine

compensation payable to the Wangan and Jagalingou People with respect to access of certain mining lease applications insofar as that access passes over land which was previously subject to OL 12/681?

[14] The *MRA* is littered with numerous provisions which give the Land Court jurisdiction in a host of circumstances. One such provision is to be found in s.281 of the *MRA* which is one of the provisions that the mining registrar relied upon in referring these matters to the Land Court for determination of compensation. The scheme of the *MRA* is that, when an entity applies for the grant of a mining lease, prior to that grant occurring, various steps must be complied with including, relevantly, determination of compensation payable as a consequence of the MLA. Pursuant to ss.279 and 281, the compensation is to be determined as between the mining lease applicant and the "owner of land" over which the mining lease or its access is to exist. In circumstances where the owner of such land and the miners are unable to come to their own agreement as to the compensation payable, it is a matter which falls within the jurisdiction of the Land Court to determine that compensation.

[15] At first instance, accordingly, it would appear that the mining registrar has properly referred the issue of compensation with respect to access over OL 12/681 to the Land Court and that the Land Court has jurisdiction to determine the compensation payable to the Wangan and Jagalingou People with respect to that access. The actual situation, however, is quite different to that simple assertion.

[16] Clearly, pursuant to s.281 of the *MRA*, the Land Court only has jurisdiction to determine compensation as between a miner and an "owner of land". The term "owner of land" is specifically defined in Schedule 2 of the *MRA* in the following terms:

> "***owner***, of land, means—
> (a) for a reserve (other than land that is a reserve merely because it is in the wet tropics area and land that is rail corridor land)—
>
> (i) if the reserve is a road—the entity having control of the road; or
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> (ii) if the reserve is a resources reserve under the *Nature Conservation Act 1992* for which there are trustees—the trustees for the reserve; or
>
> (iii) if the reserve is DOGIT land under the *Aboriginal Land Act 1991* or the *Torres Strait Islander Land Act 1991* - the trustees for the land; or
>
> (iv) if the reserve is land held under a lease under the *Local Government (Aboriginal Lands) Act 1978*, section 6—the relevant local government; or
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> (v) if Aboriginal land under the *Aboriginal Land Act 1991* is taken to be a reserve because of section 87(2) or 87(4)(b) of that Act - the grantees of the land; or
>
> (vi) if Torres Strait Islander land under the *Torres Strait Islander Land Act 1991* is taken to be a reserve because of section 84(2) or 84(4)(b) of that Act - the grantees of the land; or
>
> (vii) if subparagraphs (i) to (vi) do not apply - the Minister responsible for administering the Act under which it is a reserve; or

(b) for freehold land—the registered owner of the land; or

(c) if a person is, or will on performing conditions, be entitled to a deed of grant in fee simple for the land—the person; or

(d) if an estate in fee simple of the land is being purchased from the State—the purchaser; or

(e) for a State forest or timber reserve under the *Forestry Act 1959*—the chief executive of the department responsible for the administration of the *Forestry Act 1959*; or

(f) for a person who holds land under a lease from the State under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* for land excised from land granted in trust for Aboriginal or Torres Strait Islander purposes under the *Land Act 1994*—the trustees of the land; or

(g) for a person who holds land from the State under an Act (other than an *Act* about mining or petroleum) under another kind of lease or occupancy (other than occupation rights under a permit under the *Land Act 1994*) of the land—the person;

and includes, in addition to an owner mentioned in paragraphs (a) to (g)—

(h) for a forest entitlement area under the *Forestry Act 1959*—the chief executive of the department responsible for the administration of the *Forestry Act 1959*; and

(ha) for a licence area under the *Forestry Act 1959*—the plantation licensee for the licence area under that *Act*; and

(i) for land in the wet tropics area—the Wet Tropics Management Authority;

(j) for rail corridor land—the Minister administering chapter 7 of the *Transport Infrastructure Act 1994*."

[17] Importantly, there is no reference in the definition of "owner" to either Registered Native Title Claimants or Registered Native Title Holders.

[18] As Mr Del Villar of counsel says in his submissions on behalf of the State of Queensland filed in the Court on 4 June 2011[4], the Wangan and Jagalingou People filed a Native Title Determination Application in the Federal Court on 27 May 2004 claiming Native Title Rights and Interests to various areas of land including land formally covered by OL 12/681. I understand that the Native Title Determination Application is still awaiting determination by the Federal Court of Australia and that, at this time, the status of the Wangan and Jagalingou People remains that of Registered Native Title Claimant. As a matter of simple construction, it must follow that, in applying the definition of "owner" as set out in the *MRA*, the Wangan and Jagalingou People are not an "owner" for the purposes of s.281 of the *MRA*.

[19] Of course, Native Title as a concept known to the common law was found to exist in Australia in the High Court decision of *Mabo No 2 v State of Queensland*[5]. As a consequence of the High Court's decision in *Mabo*, Federal Parliament enacted the *Native Title Act 1993 (Cwth)*, which came into operation on 1 January 1994. The scheme of the *Native Title Act*, including

4 At paragraph 29.

5 (1992) 175 CLR1.

the major amendments which occurred in 1998, is that important statutory safeguards are given to Native Title holders and, in certain circumstances, to registered Native Title Claimants. In this respect, I refer in particular to the important "right to negotiate" provisions of the *Native Title Act* which apply to the creation of a right to mine.

[20] It is unnecessary in my view, for the purposes of this decision, to go into great detail regarding the various rights of Native Title Parties as conferred by the *Native Title Act*, particularly insofar as those rights related to the creation of a right to mine. This much though should be said. Sections 279 and 281 of the *MRA* relate to the payment of compensation to Non-Native Title Holders who fall within the definition of "owners of land". As regards any issue of compensation with respect to the creation of a right to mine which impacts on the rights and interests of Native Title Holders and Registered Native Title Claimants, then the right to negotiate procedures of the *Native Title Act* must be followed. Put simply, ordinary landholders receive compensation through the State system by agreement between the parties or by way of determination by the Land Court pursuant to s.281 of the *MRA*, whilst Registered Native Title Claimants and Native Title Holders have their rights and interests protected, and where relevant with determinations of compensation agreed or made, pursuant to the provisions of the *Native Title Act*.

[21] For a short period of time, the Land and Resources Tribunal exercised jurisdiction under an alternative State regime approved under the *Native Title Act* and in accordance with the provisions of Parts 12 to 18 of the *MRA*, but such jurisdiction only applies to MLA's applied for on or before 31 March 2003. As all the MLA's currently before me were applied for many years after this date, the Native Title Provisions as found in Parts 12 to 18 of the *MRA* are not relevant.

[22] It follows that I am in no doubt that the Land Court has no jurisdiction to determine the compensation payable to the Wangan and Jagalingou People under s.281 of the *MRA* as regards the area of access which passes over that land formally part of OL 12/681.

Extension of Term "Owner of Land"

[23] It would remiss of me not to make specific reference to s.10A of the *MRA* which is titled "Extension of Certain Entitlements to Registered Native Title Bodies Corporate and Registered Native Title Claimants". Section 10A(1) and (2) are limited in their application to certain prospecting permits. Section 10A(3) is however of wider application. It provides as follows:

> "(3) In sections 34, 96(11), 125, 198(10), 231(6), 300(13) and 317 and part 10, division 1B a reference to the owner of land is taken to include a reference to any registered native title body corporate or registered native title claimant under the *Commonwealth Native Title Act* in relation to any of the land."

[24] I note in particular that s.317 relates to the variation of access to mining lease land, and in circumstances where there is an application

by the holder of the mining lease for a variation of access, the Land Court has jurisdiction to determine whether consent for the proposed variation should or should not be given and, if such consent should be given, to determine the compensation payable for such variation[6]. Accordingly, in accordance with the expanded definition as contained within s.10A of the *MRA*, the Land Court has jurisdiction under s.317 of the *MRA* to determine compensation payable to Native Title Holders or Registered Native Title Claimants with respect to variations of access, but it does not have jurisdiction to determine the compensation payable to Native Title Holders or Registered Native Title Claimants with respect to the original access to a mining lease application pursuant to s.281 of the *MRA*. As all of the matters currently before me relating to the Wangan and Jagalingou People relate to the determination of compensation with respect to the original access to a mining lease application area, the provisions of s.317 do not apply.

[25] It may indeed appear curious that the Land Court has jurisdiction to determine compensation payable to Native Title Parties arising from a variation of access but not as regards the original creation of such access to a mining lease application. For the purposes of my determination of this matter, it is not necessary for me to consider why the Land Court has jurisdiction in some circumstances and not in others. My role is to simply exercise jurisdiction when such jurisdiction is conferred upon the Land Court, and not to waiver outside of my jurisdiction in any circumstances.

[26] Of course, it may well be the case that there are issues as between the State, the miners, and the Registered Native Title Claimants, as to whether or not the right to negotiate process should have been triggered in light of the access to each MLA passing over an area of land subject to a Registered Native Title Claim. That is not a matter on which it would be appropriate that I make any further comment.

Secondary Issues

[27] There are a number of secondary issues that have been raised in submissions by a number of the parties. Those secondary issues relate to whether or not Native Title in fact exists over so much of GHPL 12/2560 as was previously contained within OL 12/681, and whether or not the access to each MLA is wholly, or partially, over historic roads which have the status of dedicated roads under the *Land Act 1992* and therefore, following the decision in *Fourmile v Selpam*[7], Native Title is extinguished.

[28] Due to my determination that the Court has no jurisdiction to consider the referral by the mining registrar of each matter relating to the Wangan and Jagalingou People, it is neither necessary nor appropriate for me to consider any of these issues in any detail.

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6 See s.317(5) *MRA*.

7 (1998) 80 FCR 151.

Dedication of Roads

[29] For the benefit of the parties, and in particular the miners and the landholders, I have read extensively all of the facts and submissions relating to the question as to how much of the access to each MLA is over land that is, or has been a dedicated road. Insofar as such issues remain relevant to the determination of compensation as between the miners and the landholders pursuant to s.281 of the *MRA* in the matters to be determined before me in Clermont commencing 3 August 2011, then I invite the parties to present their evidence and submissions to the Court for proper determination in those other matters.

Determination

[30] In the circumstances, I have no option but to determine that the Land Court has no jurisdiction to determine the compensation payable to the Wangan and Jagalingou People as referred to the Court by the Mining Registrar, Emerald on 8 and 9 December 2010. As regards access to each relevant MLA over land formerly within OL 12/681 each such file held by the Land Court must now be closed, and the referrals returned to the Mining Registrar, Emerald.

Orders

1. The Court lacks jurisdiction to determine compensation payable to the Wangan and Jagalingou People with respect to each matter referred relating to the Wangan and Jagalingou People by the Mining Registrar, Emerald on 8 and 9 December 2010 relating to MLA 70390, MLA 70391, MLA 70406, MLA 70397, MLA 70348, MLA 70407, MLA 70408, MLA 70409, and MLA 70388.
2. The Registrar of the Land Court is directed to return each referral referred to in Order 1 hereof to the Mining Registrar, Emerald and to then close each Land Court file with respect thereto.

P A SMITH
MEMBER OF THE LAND COURT