# JANGO: NATIVE TITLE COMPENSATION DETERMINATION

## Overview

The case in *Jango v Northern Territory of Australia* [2006] FCA 318 involved a claim for compensation over the tourist town of Yulara near Uluru under s 61(1) of the *Native Title Act 1993* (Cth) (NTA). In order to demonstrate their entitlement to compensation the claimant group were required to establish, as a threshold issue, that they had native title rights and interests over the area at the time the 'compensation acts occurred'. These acts included the granting of freehold leases and the construction of public works which were said to have extinguished native title between 1979 and 1992. Sackville J ultimately found that the applicants failed to establish critical elements of the threshold issue – namely, that the applicants observed and acknowledged the traditional laws and customs of the Western Desert bloc *as pleaded*, and that the laws and customs were *traditional* in the required sense. While Sackville J rejected the applicants' claim on the basis of insufficient evidence to establish the case as pleaded, His Honour made clear that the decision did not mean individual applicants would have been unable to prove native title had the case been conducted differently. Indeed, Sackville J's latest decision leaves the way clear for another native title compensation claim to be formulated in relation to the same application area.

See case note in Native Title Research Unit, '*Jango v Northern Territory of Australia*' *Native Title Newsletter* (3) 06 May-June 2006, pp. 10-11.

See also Williams, K. and Jowett, T. 2006, '*Jango*: Payment of Compensation for the Extinguishment of Native Title' Forthcoming in *Lands, Rights, Laws: Issues of Native Title*

## Cases

Jango v Northern Territory of Australia (No 6) [2006] FCA 465 (3 May 2006)

> Contrary to the Commonwealth's arguments 'that a 'broader' interpretation of s 13(2) of the NT Act would promote the statutory objects of providing certainty as to the status of land and reducing the potential for multiple litigation concerning the same area',[1] Sackville J found that a determination of whether native title existed was not required in the circumstances of a mere dismissal of the compensation claim. This has left the pathway open for the applicant's to re-shape their case and attempt once more to have their rights recognised under the common law.

Jango v Northern Territory of Australia [2006] FCA 318 (31 March 2006)

> Principal decision

Jango v Northern Territory of Australia (No 5) [2005] FCA 281 (21 March 2005)

Jango v Northern Territory of Australia (No 4) [2004] FCA 1539 (26 November 2004)

> The applicants revised the expert evidence in an attempt to comply with provisions of the *Evidence Act 1995* (Cth). This interlocutory case deals with persistent evidentiary issues, such as the overall probative value of the evidence, alleged elements of advocacy in the expert report, whether observations about communication difficulties require expertise and whether the expert is permitted to evaluate specific evidence.

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[1] *Jango v Northern Territory of Australia (No 6)* [2006] FCA 465 per Sackville J [26].

Jango v Northern Territory of Australia (No 3) [2004] FCA 1029 (9 August 2004)

> The applicants sought an adjournment to address the evidentiary problems via additional documents. Sackville J granted the adjournment, since the applicants could not themselves be held responsible for the deficiencies in the reports.

Jango v Northern Territory of Australia (No 2) [2004] FCA 1004 (3 August 2004)

> Sackville J rejected several paragraphs of the anthropological reports which the applicants had tendered into evidence. Pursuant to s 82 of the *Native Title Act 1993* (Cth), the Federal Court is bound by the rules of evidence when making native title determinations. Therefore, any reports submitted by the applicants must comply with the requirements (particularly those relating to expert evidence under section 79) of the *Evidence Act 1995* (Cth).

Jango v Northern Territory of Australia [2003] FCA 1230 (31 October 2003)

**Legislation**

*Native Title Act 1993* (Cth)

*Evidence Act 1995 (Cth)*

*Racial Discrimination Act 1975* (Cth)

**ADMISSIBILITY OF EXPERT EVIDENCE: JANGO (NO 2)**

**Overview**

This case highlighted several critical issues surrounding the provision of expert evidence in native title claims (see research resources page 'Expert Evidence in Native Title Claims'). Sackville J found that *the Sutton Report* submitted by the applicants had not conformed to the rules of evidence, to which the Federal Court is bound by virtue of section 82 of the *Native Title Act 1993*. More specifically, the report failed to clearly distinguish between fact and opinion, or make the reasoning that was adopted in forming opinions transparent to the reader. As a result of these findings, several paragraphs of the initial report were ruled inadmissible. Thus, the applicants sought an adjournment in order to deal with these problems of inadmissibility.

**Resources**

Weiner, J. 2004 July/August, 'Johnny Jango & ors v Northern Territory of Australia & ors: An Anthropologist's Comment' *Native Title Newsletter* Native Title Research Unit AIATSIS Issue 4: 8.

> Weiner argues that the nature of anthropological evidence is not properly understood by the courts adjudicating native title determinations. He highlights the difficulties anthropologists, who are undertaking conventional fieldwork, have in *themselves* distinguishing between specifically anthropological and more general observations of social life. Weiner also compares the operation of legal glosses, such as "argumentative" and "probative" in both the judicial and anthropological contexts. According to Weiner's account of anthropological methodology, argumentation exposes the theoretical underpinnings of any given analysis. However, the native title process allows for only one possible theoretical position – that is, whether native title exists.

National Native Title Tribunal, 9 September 2004 'Evidence – Admissibility of Expert Reports' *Native Title Hot Spots* Issue 11: 27

National Native Title Tribunal, 9 September 2004 'Adjournment sought to address evidentiary problems' *Native Title Hot Spots* Issue 11: 30

Australian Indigenous Law Reporter, 2005 'Jango v Northern Territory of Australia (No 4)' 7

## COMPENSATION DETERMINATION: JANGO (31 MARCH 2006)

Although the *Jango* case has not resolved the issue as to how compensation will be calculated in native title applications, it has undoubtedly been useful in terms of clarifying the way the court will approach the issue of compensation.

The applicants must establish that they held native title rights and interests prior to the compensation acts occurring; that those rights and interests were not extinguished prior to the compensation acts occurring, and that the compensation acts themselves did, in fact, extinguish the native title. Only once these issues have been thoroughly determined will the court be willing to consider the quantum of compensation which is to be awarded.

### The Threshold Issue

In any compensation determination the threshold issue of native title remains at the forefront – that is, under section 13(2) of the *Native Title Act 1993* the claimants must establish that they actually possessed native title rights and interests as defined by section 223 (1) of the *Native Title Act 1993* (Cth).

The applicants asserted that they and their predecessors held native title rights and interests over the claim area under the traditional laws and customs of the Western Desert bloc until they were extinguished by the compensation acts. These acts included the development of the town of Yulara, Connellan airport and other public works completed in the area.

*Acknowledged and Observed Laws and Customs*

The claim group did not rely on the fact that they were a 'cohesive or discrete' community, but instead, like the *De Rose*[2] applicants they relied on the Western Desert bloc society. They claimed that the current people of the Western Desert were descended from the Western Desert at sovereignty and that the claimants had similar laws and customs as those acknowledged by the Western Desert people.

In their points of claim, the applicants asserted that the satisfaction of any one of four conditions would establish a person's entitlement under the traditional laws and customs of the society. Despite this assertion however, in their final submissions the applicants argued, by including 'additional factors' under the same umbrella, that eleven factors in total could have the effect of establishing an entitlement.

Sackville J held that the laws and customs governing "the acquisition and holding of rights and interests in country" were "central to the controversy between the parties" in the case[3]. The court said that the main issue was whether there was a continuity of the society until the compensation acts were carried out. Justice Sackville found that the evidence of the Aboriginal witnesses in relation to rights and interests in land did not "correspond to the

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[2] *De Rose v State of South Australia (No 2)* [2005] FCAFC 110.
[3] *Jango v Northern Territory of Australia* [2006] FCA 318 per Sackville J, [208].

case pleaded by the applicants" [4]and that the evidence did not present a "consistent pattern of observance of traditional laws and customs"[5]. As a result, the "evidence falls short of establishing the existence of a body of laws and customs relating to rights and interests in land that was acknowledged and recognised by members of the Western Desert bloc".[6] Thus, having found that the claimants had failed to establish their native title rights prior to the compensation act, the compensation act had no effect on any rights, nor would it entitle compensation.

Sackville J also identified problems with characterisation of the laws and customs as 'normative', as required by the *Yorta Yorta* High Court decision (see research resource page 'Tradition and Authenticity: the Yorta Yorta Case'). He found that the expert's evidence appeared to misunderstand what equated to 'normative' in the legal sense. Furthermore, the anthropologists' reports generally did not conform to the assumptions and criteria underlying the definition of native title in section 223(1) of the *Native Title Act 1993* (Cth), and thus, were of limited usefulness.

*Traditional Laws and Customs*

The claimants relied on the fact that indigenous societies were not static. However, not only did the respondents argue that the applicants failed to establish that members of the claim group acknowledged and observed the traditional laws and customs which they asserted in their points of claim, but they also questioned whether those laws and customs were in fact, the *traditional* laws and customs of the Western Desert bloc. The applicants formulated their claim according to 'the notion of multiple and accretive factors', a notion which, according to the National Native Title Tribunal *Native Title Hot Spots* Issue19, was accepted by the Full Court in *De Rose No 1* – another Western Desert native title case. Nevertheless, Sackville J again found contrary to the applicants' contentions. Upon reviewing the earlier anthropological literature before him, Sackville J found that patrilineal descent and the existence of 'estates' were key elements to the possession of rights and interests in land under the traditional laws and customs observed by the people of the eastern Western Desert. He also found that the laws and customs were not 'unpredictable or subject to contestation' as the applicants had argued, and that if the laws and customs are as the applicants assert, the differences which they reflect from the pre-sovereignty status cannot be accounted for merely on the basis of 'adaptive change'.

**Extinguishment**

Although unnecessary given his prior finding, Sackville J went further to discuss matters of extinguishment assuming native title had been proven by the claimants.

In relation to extinguishment prior to the 'compensation acts' occurring, Sackville J found that even though pastoral leases had been granted over the claim area in 1882 and 1896, some native title rights and interests would have survived in the claim area since both leases contained a broad reservation in favour of Aboriginal people.

The timing of extinguishment was determinative of the amount of compensation, if any, which may have been recovered. Thus, both parties sought to advance alternative, and more favourable, views on this matter.

His Honour rejected an argument submitted by the respondents to the effect that native title rights and interests had been validly extinguished through operation of the indefeasibility provisions of the relevant *Real Property Law Act* which would have implied no

[4] *Jango v Northern Territory of Australia* [2006] FCA 318 per Sackville J, 405] – [406].
[5] *Jango v Northern Territory of Australia* [2006] FCA 318 per Sackville J, [446].
[6] *Jango v Northern Territory of Australia* [2006] FCA 318 per Sackville J, [446].

compensation was payable. His Honour found that this contention could not withstand the provisions of the *Racial Discrimination Act 1975* (Cth) and that the acts were therefore invalid, and did not cause extinguishment.

Similarly, Sackville J also rejected an argument made by the applicants that native title was extinguished upon operation of the *Validation Act*, at the time of its commencement in 1994. This would have altered the assessment of the applicants' compensation to one including the value of improvements since construction in the area began. Instead, Sackville J found that if native title were established, an entitlement to compensation would have arisen at the time of the 'compensation acts' and construction of the public works in 1979, in accordance with the provisions for 'previous exclusive possession acts' under s 23J of the *Native Title Act 1993* (Cth).

**Implications of the Decision**

The *Jango* decision was a much anticipated case on compensation under the NTA and it was hoped that it would resolve the question of compensation over the extinguishment of native title. Various compensation models have been proposed and considered in the absence of a definitive case on this issue. (See research resource page 'Compensation and Native Title') However, since this claim failed many issues remain unresolved such as the quantum of compensation that can be received by claimants. At the same time however, the case does highlight the preliminary hurdles faced by claimants in making a successful claim. As succinctly stated by Gregory (see below), claimants need to prove:

- that they held native title rights and interests prior to the 'compensation acts' complained of
- that those native title rights and interests had not been extinguished (by non-compensable acts) before the compensation acts occurred
- that the compensation acts extinguished, or otherwise diminished, the native title rights
- the amount of compensation that should be awarded as a result of the compensation acts.

A failure to establish any of these elements will indeed defeat a claim. These elements reflect how native title is conceptualised and calculated.

According to the National Native Title Tribunal, June 2006 *Talking Native Title Newsletter* (see below), the applicants' intend to mount an appeal to this decision.

**Annotated Bibliography**

**Media**

31 March 2006 "Court rejects native title compensation claim" ABC Online

31 March 2006 "Yankunytjatjara Compensation Application over Yulara Township" Central Land Council

29 October 2003 "Rock claim will set native title agenda for Australia" Erwin Chlanda, Alice Springs News

**Case Notes**

Kelly, J. 2006 'Yulara': the ashes of a test case *Native Title News* 7(8): 118

> Kelly provides quite an impartial, clear and comprehensive critique of the case. She discusses the strengths and weaknesses of arguments, mistakes made on the

behalf of the applicants in presenting their claim, and the questions which remain lingering.

Burton, T. & Ritter, D. 2006 The test case that wasn't : Jango v Northern Territory of Australia (2006) FCA 318 (31 March 2006) *Native Title News* 7(8): 125

Burton and Ritter emphasise the need to address the threshold issue in compensation claims in accordance with section 13 of the *Native Title Act 1993* (Cth). Even though the case failed to provide clarity on the way in which compensation may be calculated, the authors note the importance of the decision, in terms of capturing the attention of future litigants to the issues they must address and the problems they may encounter.

National Native Title Tribunal, 10 May 2006 'Compensation application over Yulara – Jango case' *Native Title Hot Spots* Issue 19: 15.

Provides a comprehensive, yet abridged, summary of the arguments put forward by all parties involved and the reasoning and ultimate decision of Sackville J.

**Other Sources**

Glindemann, Robyn, Creswell, Penny and Jasper, Melanie, May 2006 'Determining Compensation on Extinguishment – Jango v Northern Territory of Australia' *Focus Native Title* Allens Arthur Robinson

Brief commentary on the outcome of the case and particular issues considered in relation to a positive finding with regard to an entitlement to compensation.

Gregory, M. 2006 'Native Title Act unclear on approach to compensation' Minter Ellison Lawyers

Brief commentary of the decision highlighting how although the decision did not resolve the question of compensation quantum, at least it assists in explaining elements of the approach the court will take in dealing with compensation claims.

National Native Title Tribunal, June 2006 'Uluru decision to be appealed' *Talking Native Title Newsletter* Issue 19: 6.

**Online Resources**

- For full judgment see <http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/318.html>
- For further NNTT case details see <http://www.nntt.gov.au/newsletter/hotspots/issues/19.html>

Information collated by Juliet Badics and Tran Tran