NATIVE TITLE CLAIMANTS AND THE NEGOTIATION AND AUTHORISATION OF ILUAS: DUTIES OWED TO THE WIDER CLAIM GROUP

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[1] In a recent judgment in the Federal Court, *Weribone on behalf of the Mandandanji People v State of Queensland (No 1)*[1] *("Weribone")*, Rares J expressed a clear view that applicants in a native title claim when negotiating and administering Indigenous Land Use Agreements ("ILUAs"), s 31 agreements and similar contracts, owe fiduciary duties to the native title claim group as a whole.

[2] In order to understand the relationship between the applicant or applicants for a determination of native title and the wider body of persons comprising the claim group as a whole, it is necessary to examine, as Rares J did, several provisions of the *Native Title Act 1993* (Cth) ("the Act") which, by s 13 creates the facility for the making of applications to the Federal Court for "a determination of native title in relation to an area for which there is no approved determination of native title." "Native title" is defined as follows in s 223(1) of the Act;

> "(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
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> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
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> (c) the rights and interests are recognised by the common law of Australia."

[3] The acknowledgement in the definition that the rights and interests making up native title are "communal, group or individual rights and interests" imports the existence of two levels of rights and interests in land not known to the common law as received in Australia – communal and group rights and interests. Although the common law gives effect to shares in land as an undivided whole as held by joint tenants or tenants in common, each such share is still held by an individual legal person and the undivided whole of the title is susceptible to partition or amalgamation by operation of law, by agreement of all the holders of the rights and interests or by order of a court. Thus, in *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)*[2], Lindgren J, after referring to the concept of communal title as explained by Brennan J in

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[1] [2013] FCA 255
[2] [2007] FCA 31

Mabo v Queensland (No 2)[3] and by Beaumont and von Doussa JJ as members of a Full Court of the Federal Court in *Western Australia v Ward*[4], said[5];

> "In my view, s 223(1) reveals a taxonomy of the kinds of native title recognised by the NTA: communal, group and individual. The community, the largest possible native title owning entity, is in fact the society whose laws and customs are in question. The group is smaller, and will ordinarily have a fluctuating membership (so, of course, will the community). The individual is the smallest possible native title owning entity."

[4] An application for a determination of native title may, by force of s 61(1) of the Act, be made, relevantly, by;

> "A person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group."

[5] As that sub-section indicates, "the native title claim group" consists of "all the persons ... who, according to their traditional laws and customs hold **the common or group rights** and interests comprising the particular native title claimed." It is submitted that the words to which I have added emphasis in that passage from s 61(1) intentionally echo the first two elements of the taxonomy "communal, group or individual rights" identified by Lindgren J in s 223(1). The omission from s 61(1) of any reference to "individual rights" is probably not significant because it is difficult to conceive of a holder of individual rights in or over country under the traditional laws acknowledged and the traditional customs observed by indigenous peoples in relation to that country who is not also entitled to share in the communal or group rights in relation to the same country.

[6] Sub-sections (2), (3) and (4) of s 61 provide, so far as is relevant;

> "(2) In the case of:
>
> (a) a native title determination application made by a person or persons authorised to make the application by a native title claim group; or
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> (b) a compensation application made by a person or persons authorised to make the application by a compensation claim group;
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> the following apply:
>
> (c) the person is, or the persons are jointly, the applicant ; and
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> (d) none of the other members of the native title claim group or compensation claim group is the applicant .
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> (3) An application must state the name and address for service of the person who is, or persons who are, the applicant.

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[3] (1992) 175 CLR 1

[4] (2000) 99 FCR 316 at 372 [204]

[5] *Supra* at [1135]

(4) A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must:

(a) name the persons; or

(b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons."

[7] The effect of those sub-sections is to require that the person or persons to make an application for a determination of native title must be authorised to do so by a native title claim group. If more than one person is so authorised, they are jointly "the applicant".[6] Hereafter in this discussion, I shall use the expression "the applicant" to refer, collectively, to the person or persons authorised to make the application and the expressions "member" or "members of the applicant" to refer to one or more of the individuals authorised to make the application and so comprise the applicant.

[8] Once authorised, the applicant may "deal with all matters arising under this Act in relation to the application"; see s 62A of the Act. The mode of authorising the making of an application is prescribed by s 251B which provides;

> "For the purposes of this Act, all the persons in a native title claim group or compensation claim group authorise a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:
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> (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind--the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
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> (b) where there is no such process--the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind."

[9] Each of paragraphs (a) and (b) of s 251B ordains a different method of authorising the making of an application (*Evans v Native Title Registrar*[7]). If s 251B is claimed to be the mode of authorisation adopted it is not necessary for the native title claim group to have followed a pre-existing process:

> ... Section 251B does not require proof of a system of decision-making beyond proof of the process used to arrive at the particular decision in question. The section accommodates a situation where a native title claim group agrees to follow a particular procedure for a particular decision even if other procedures are normally used for other decisions. Nor does s 251B require a formal agreement to the process

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[6] See generally Rangiah and Carter: *The role of the "applicant" in native title disputes"* (2013) 88 ALJ 761.

[7] [2004] FCA 1070

adopted for the making of a particular decision. Agreement within the contemplation of s 251B may be proved by the conduct of the parties.

(*Noble v Mundraby*[8]).

[10] A central operative provision of the Act is s 55 which stipulates that the Federal Court, if it proposes to make a determination that native title exists "must, at the same time as, or as soon as practicable after, it makes the determination, make such determinations as are required by sections 56 (which deals with holding the native title on trust) and 57 (which deals with non-trust functions of prescribed bodies corporate)." Section 56 relevantly provides:

> "(1) One of the determinations that the Federal Court must make is whether the native title is to be held in trust, and, if so, by whom.
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> (2) The Federal Court is to take the following steps in making the determination:
>
> (a) first, it must request a representative of the persons it proposes to include in the determination of native title as the native title holders (the common law holders) to indicate whether the common law holders intend to have the native title held in trust by:
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> (i) nominating, in writing given to the Federal Court within a specified period, a prescribed body corporate to be trustee of the native title; and
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> (ii) including with the nomination the written consent of the body corporate; and
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> (b) secondly, if the common law holders give the nomination within the period, the Federal Court must determine that the prescribed body corporate is to hold the rights and interests from time to time comprising the native title in trust for the common law holders; and
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> (c) thirdly, if the common law holders do not give the nomination within the period, the Federal Court must determine that the rights and interests are to be held by the common law holders.
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> (3) On the making of a determination under paragraph (2)(b), the prescribed body corporate holds, in accordance with the regulations, the rights and interests from time to time comprising the native title in trust for the common law holders.
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> (4) The regulations may also make provision in respect of:
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> (a) the following matters relating to the holding in trust of the native title rights and interests:
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> (i) the functions to be performed by the body corporate;
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> (ii) the nature of any consultation with, or other role for, the common law holders;
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> (iii) the circumstances in which the rights and interests may be surrendered, transferred or otherwise dealt with;
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> (iv) the determination of any other matter by the Federal Court;
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> (v) any other matter; and

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[8] [2005] FCAFC 212, at [18].

(b) the replacement of the trustee where the common law holders wish the trustee to be replaced; and

(c) the determination by the Federal Court of a prescribed body corporate to replace the trustee, and any other matter in relation to the replacement of the trustee; and

(d) the termination of the trust where:

(i) the common law holders wish the trust to be terminated; or

(ii) a liquidator is appointed for the body corporate; and

(e) the determination by the Federal Court of a prescribed body corporate to perform the functions mentioned in subsection 57(3) once the trust is terminated; and

(f) any matter in relation to the termination of the trust, the performance of those functions and the transition from the trust arrangement to the new arrangement, including the determination of those matters by the Federal Court."

[11] By s 253 of the Act "common law holders" has the meaning given by s 56 which, it will be noted, is a reference back to the internal definition in s 56 of "common law holders" as "the persons [the Federal Court] proposes to include in the determination as the native title holders". It is therefore clear that by using the expression "common law holders" the legislature did not intend to refer to persons holding common law proprietary rights or interests in the land in question. Rather, the reference is to persons determined by the Court to be the holders of the native title rights and interests in the land recognised by the common law of Australia as contemplated by s 223(1) of the Act set out at [2] above.

[12] This analysis makes it difficult to adapt the traditional equitable concept of a trust so that it effectively governs the relationship in respect of the relevant land between the prescribed body corporate and the native title holders determined by the Court. It may have been a recognition of this difficulty which led Parliament to give, by s 56(1), the Federal Court the option of determining that the native title is not to be held on trust.

[13] Of course, the question of whether or not a trust is to be created or recognised in relation to native title only arises upon the Court's deciding to make a determination that native title exists. Before that point is reached in processing an application, the operative relationship in respect of the presumptive or inchoate native title rights and interests is between the authorised applicant on the one hand and the members of the wider claim group on the other. That relationship may be productive of an area agreement ILUA pursuant to ss 24CA *et seq* of the Act. An ILUA of that kind must be about one or more of the matters specified in s 24CB and, where there is a registered native title claimant in relation to the area, all persons in the native title group must be parties to the agreement. Where there is a registered native title applicant in relation to any of the land or waters in the area, the native title group consists of all registered native title claimants in relation to land or waters in the area[9]. Presumably, "native title group" is the same as "native title claim group" which, it will be recalled, is relevantly defined in s 253 as meaning;

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[9] s 24CD

> "in relation to a claim in an application for a determination of native title made to the Federal Court – the native title claim group mentioned in relation to the application in the table in [s 61(1)]."

[14] The unique character of an ILUA registered under the Act was recognised by Reeves J in *QGC Pty Ltd v Bygrave (No 2)*[10] where his Honour observed;

> "Given this complex and unique cultural and legal environment, it is hardly surprising that the Act has had to resort to some original and unusual processes to deal with the peculiar difficulties that arise in, among others, the ILUA provisions in the Act. One such difficulty is how a large unincorporated group of persons, fluctuating in membership and with diverse rights and interests, some of which may not have been determined, is able to make a binding agreement that is to operate for a long period."

[15] Although s 24CD of the Act provides that all persons comprised in a "registered native title claimant" must be parties to an ILUA, Reeves J in *Bygrave (No 2)*[11] held that it is not necessary for all of those persons, or any of them, to sign the ILUA. The effect of his Honour's decision[12] is that members of the registered native title applicant "act as representative parties for the native title contracting group to allow that group to enter into the ILUA." However, he went on to observe[13] that "for the reasons I have explained in more detail below, I consider the role of these persons as representative parties is limited to them being named as such." The main reason which compelled his Honour to that limited view of the representative role of members of the applicant group was the process ordained by the Act for an ILUA to become registered. His Honour said[14];

> "Moreover, the ILUA provisions of the Act contain a specific process which, among other things, provides evidence independently of an ILUA that the native title contracting group has assented to it. This arises by a combination of ss 24CG(3) and 203BE. Under s 24CG(3)(a), any application to register an agreement as an ILUA must be certified by the recognised representative body for the area in accordance with s 203BE(1)(b), (5) or (6). This certificate must certify that all reasonable efforts have been made to ensure that all persons who hold, or may hold, native title in relation to the land concerned have been identified and all the persons so identified have authorised the making of the agreement under s 251A. Alternatively, under s 24CG(3)(b), the application must include a statement to the same effect. The obvious purpose of these provisions is to ensure that everyone who holds, or may hold, native title in the land concerned is identified and is involved in the process of authorising the ILUA under s 251A: see the observations of the Full Court to this effect in Murray at [25] above. This then links with the provisions of ss 24EA and 24EB which, among other things, provide that once an agreement is entered on the Register of ILUAs, it binds everyone who holds, or claims to hold, native title in the land concerned and it allows for the validation of the identified future acts affecting native title on that land."

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[10] (2010) 189 FCR 412, at [65]

[11] *Ibid* at [101]-[102]

[12] *Ibid* at [84]

[13] *Ibid* at [84]

[14] *Ibid* at [102]

[16] The identification in this way of the representative role of members of the native title applicant raises the question of how such members, in negotiating formulating and registering an ILUA, are to discharge the fiduciary obligations they have to the native title claim group as a whole.

[17] As a general rule, a fiduciary obligation is negative in effect; that is, it casts on the person under the obligation a duty **not** to pursue his or her personal interests where they conflict with the interests of those whom he or she is bound to protect. By corollary, the fiduciary is bound to account for any benefit or gain derived from the pursuit of personal interests conflicting with the interests of those to whom the fiduciary duty is owed; see *Chan v Zacharia*[15].

[18] The possibility that members of a native title applicant may be under contractual obligations to the wider claim group which are laid over the fiduciary obligations owed to the same group is important because it is open for the authorisation contemplated by s 251B of the Act to be conditioned upon the authorised applicants binding themselves to act in specified ways in "dealing with all matters arising under this Act in relation to the application" [s 62A] or in negotiating an ILUA if that activity is undertaken by one or members of a native title applicant. (See *Murray v Registrar of the National Native Title Tribunal*[16], where Marshall J accepted that s 24CD(3) of the Act enables any person claiming to hold native title to initiate and carry forward the negotiation of an ILUA.) His Honour's construction of s 24CD(3) was upheld on appeal by a Full Court of the Federal Court (Spender, Branson and North JJ)[17].

[19] In this context there is a significant observation by Rares J in *Weribone (No 1)*[18] that;

> "... the right to negotiate ILUAs, s 31 agreements or other similar contracts, ordinarily, could not be used to enrich the applicant or its members at the expense or to the detriment of the native title claim group as a whole."

[20] The obligation which his Honour there recognised as being assumed by members of an applicant for a native title determination is essentially negative or proscriptive. As Gaudron and McHugh JJ indicated in *Breen v Williams*[19];

> "In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations - not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed (132). If there was a general fiduciary duty to act in the best interests of the patient, it would necessarily follow that a doctor has a duty to inform the patient that he or she has

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[15] (1984) 154 CLR 178 per Deane J, at 198

[16] (2002) 77 ALD 96; [2002] FCA 1598, at [44]-[45]

[17] See 132 FCR 402 esp. at [2] and [18].

[18] Supra at [61]

[19] (1996) 186 CLR 7 at 113, [41]

> breached their contract or has been guilty of negligence in dealings with the patient. That is not the law of this country."

[21] Thus, the mere fact that members of a native title applicant stand in a fiduciary relationship to the wider native title group – the traditional owners – does not entail that the members of the applicant, by virtue of their authorisation, owe a **positive** duty to the wider group to act in the best interests of that group. However, the members of the applicant can be bound by contract with the wider group to prosecute the claim and exercise incidental powers and duties in a particular way. The consideration for the assumption of such a contractual obligation is, I consider, the authorisation of the members of the applicant to be, or continue to act as, the applicant for a determination of native title. Moreover, the existence of such a contractual obligation does not mean that the relationship between the members of the applicant and the wider group of traditional owners ceases to be fiduciary. As Mason J pointed out in *Hospital Products Ltd v United States Surgical Corporation*[20]:

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them."

[22] The potential for members of an applicant for a native title determination to assume a liability in contract to the wider claim group as a whole raises the cognate questions of whether a member of an applicant can be liable in negligence or for breach of trust to the traditional owners whom the applicant represents.

Are members of an applicant subject to a duty of care in concluding an ILUA or s 312 agreement?

[23] A native title claim is in the nature of a representative action and the persons constituting the applicant are authorised pursuant to s 251B of the Act to deal with all matters arising under the claim[21]. That authorisation extends to, amongst other things, the amendment of the application from time to time (*Drury v Western Australia*[22]) and reduction of the area covered by the claim; see *Champion v Western Australia*[23]. In the latter case, McKerracher J suggested[24] that the members of the wider native title group, if dissatisfied with the applicant's exercise of the functions and discretions which I have just described, could move to replace the members of the applicant pursuant to s 66B of the Act. Similar considerations seem to apply to the discretion to seek leave to discontinue an application. Thus, in *Close on behalf of Githabul People No 2 v State of*

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[20] (1984) 156 CLR 41, at 97 [70]

[21] see s 62A

[22] (2000) 97 FCR 169, at [12]

[23] [2009] FCA 114

[24] *Ibid* at [12]

Queensland[25], Collier J held that an applicant had authority to seek leave to discontinue the application and, in the event, granted leave to discontinue.

[24] Section 24CG(3) of the Act provides that an application for registration of an ILUA must either:

> "(a) have been certified by all representative Aboriginal/Torres Strait Islander bodies for the area in performing their functions under paragraph 203BE(1)(b) in relation to the area; or
>
> (b) include a statement to the effect that the following requirements have been met:
>
> (i) all reasonable efforts have been made (including by consulting all representative Aboriginal/Torres Strait Islander bodies for the area) to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified;
>
> (ii) all of the persons so identified have authorised the making of the agreement;"

[25] The facility for applicants for registration of an ILUA to consult all representative bodies in the area seems to require only such consultation as is necessary for ensuring that "all persons who hold or may hold native title in relation to land or waters in the area covered by [the ILUA] have been identified." There is no apparent need for the consultation with representative bodies to extend to whether registration of the ILUA is in the best interests of all the presumptive holders of native title. That is presumably because s 24CG(3)(b)(ii) requires all the presumptive native title holders to have authorised the application for registration. That requirement in turn imports s 251B of the Act, set out at [8] above, making it necessary for authorisation to be obtained by a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with or, in the absence of such a process, a process of decision-making adopted for the purpose by the persons in the claim group.

[26] The functions assigned to a representative body under s 203BE(1) of the Act are to certify applications for determination of native title in respect of the area for which the representative body has been constituted (s 203BE(1)(a)) and to certify applications for registration of ILUAs in respect of the relevant area (s 203BE(1)(b)). Section 203BE(5) imposes a condition on the certification of an ILUA by providing;

> "A representative body must not certify under paragraph (1)(b) an application for registration of an indigenous land use agreement unless it is of the opinion that:
>
> (a) all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified; and
>
> (b) all the persons so identified have authorised the making of the agreement."

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[25] [2010] FCA 828

[27] It can be seen that s 203BE(5) mirrors, in respect of certification by a representative body, the requirements which s 24CG(3) imposes directly on the applicant for a native title determination when applying for registration of an ILUA without the interposition of a representative body; they are to take all reasonable steps to identify the members of the native title claimant group for the relevant area and to ensure that all persons so identified have authorised the making of the ILUA.

[28] The combined effect of ss 24CG(3) and 203BE(5) is that an application for registration of an ILUA must be supported by evidence that it has been authorised, in accordance with s 251B, pursuant to a process of decision-making complying with the traditional laws and customs of the wider native title claim group or adopted for the purpose by the persons in that group. That leaves open the question of what are the obligations of the representative body or the applicant (where the application for registration of an ILUA is made without the interposition of a representative body) to provide information or recommendations to the native title claim group to assist that group in deciding whether or not to authorise an application for registration of an ILUA.

[29] Section 203B identifies seven specific functions of representative bodies as well as "such other functions as are conferred on representative bodies under this Act." Of immediate relevance are the "facilitation and assistance functions"[26] and the "agreement making function"[27]. By s 203B(4) a representative body is empowered to assign varying degrees of importance to its allotted functions. That sub-section provides:

> "A representative body:
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> (a) must from time to time determine the priorities it will give to performing its functions under this Part; and
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> (b) may allocate resources in the way it thinks fit so as to be able to perform its functions efficiently;
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> but must give priority to the protection of the interests of native title holders."

[30] The facilitation and assistance functions of a representative body are described as follows in s 203BB(1):

> "The facilitation and assistance functions of a representative body are:
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> (a) to research and prepare native title applications, and to facilitate research into, preparation of and making of native title applications; and
>
> (b) to assist registered native title bodies corporate, native title holders and persons who may hold native title (including by representing them or facilitating their representation) in consultations, mediations, negotiations and proceedings relating to the following:
>
> (i) native title applications;
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> (ii) future acts;
>
> (iii) indigenous land use agreements or other agreements in relation to native title;

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[26] s 203B(1)(a)

[27] s 203B(1)(e)

(iv) rights of access conferred under this Act or otherwise;

(v) any other matters relating to native title or to the operation of this Act."

[31] However, a representative body is prohibited from performing its facilitation and assistance functions in relation to a particular matter "unless it is requested to do so".[28] The mode of performance by a representative body of its facilitation and assistance functions is prescribed by s 203BC which requires it to "consult with and have regard to the interests of", amongst others, any ... persons who may hold native title who are affected by the matter. As well, s 203BC(1)(b) stipulates:

> "if the matter involves the representative body representing such bodies corporate, native title holders or persons--be satisfied they understand and consent to any general course of action that the representative body takes on their behalf in relation to the matter."

[32] The agreement making function of a representative body is more tersely described in s 203BH(2) as follows;

> "In performing its agreement making function in respect of an area, a representative body must, as far as practicable, having regard to the matters proposed to be covered by the agreement, consult with, and have regard to the interests of, persons who hold or may hold native title in relation to land or waters in that area."

[33] The general tenor of the provisions in the Act which confer on applicants and representative bodies a facility to negotiate and make agreements including ILUAs, reflects a concentration on consultation with, and obtaining the authorisation of, all native title holders in the relevant area. However, there seems to be little or no indication of what applicants and representative bodies must do to ensure that fully informed consent underpins any authorisation procured from native title holders. This gap in the legislative framework is especially glaring when one attempts to mark out the limits of any duty owed by applicants to members of the wider claim group of native title holders.

[34] By contrast, the duty owed by non-executive directors to exercise reasonable care and skill in the interests of their company has long been recognised in equity. In *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392, Lindley MR, at 422-3 identified five principles, three of which were applicable to the governance of a corporation. The first was that "in equity the promoters of a company stand in a fiduciary relation to it and to those persons whom they induce to become shareholders in it." After referring to the second principle which is not relevant to the present discussion, the Master of the Rolls continued, at 422:

> "The third principle is that the directors of a company acting within their powers, and with reasonable care, and honestly in the interest of the company, are not personally liable for losses which the company may suffer by reason of their mistakes or errors in judgment. *Overend, Gurney & Co v Grigg*[29] is the leading authority on this head."

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[28] s 203BB(2)

[29] L.R. 5 H.L. 480

[35] In *Permanent Building Society (in liq) v Wheeler*[30], Ipp J, after quoting from the passage just cited from *Lagunas Nitrate*, emphasised at 157, that "a director's duty to exercise reasonable care, though equitable (as well as legal) is not a fiduciary obligation". This suggests that different considerations may apply when imputing a duty of care from those which govern the enforcement of the fiduciary obligation discussed at [17] and [19]-[21] above.

[36] Sub-section 180(2) of the *Corporations Act 2001* (Cth) adds another, statutory, layer to the equitable and common law duty of care owed by company directors. That sub-section has introduced a "business judgment" rule by providing:

> "A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
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> (a) make the judgment in good faith for a proper purpose; and
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> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
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> (d) rationally believe that the judgment is in the best interests of the corporation.
>
> The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.:

Sub-section 180(1) obliges a director or other officer of a corporation to exercise the powers and discharge the duties of the office with the degree of care and diligence that a reasonable person would exercise in the same position. By s 180(3), "business judgment" is defined to mean "any decision to take or not to take action in respect of a matter relevant to the business operation of the corporation." The standard of care imposed by s 180 is not materially different from that to which company directors are subject at common law; *Vines v Australian Securities and Investments Commission.*[31]

[37] The "business judgment" rule embodied in s 180 of the *Corporations Act* would furnish a counsel of perfection for native title applicants in negotiating ILUAs and recommending their authorisation by the wider group of native title holders. However, I have been unable to discern any provision in the Act which compels the exercise by an applicant of a corresponding "business judgment." Moreover, for reasons explained below, it is doubtful whether the criteria enumerated in s 180(2) are adapted to the circumstances in which most members of a native title applicant are likely to find themselves.

[38] It has long been accepted that whether a company director has been in breach of the duty of care imposed by common law or a statutory provision like s 180 will turn on an examination of a variety of factors including the size of the company, the experience and professional qualifications of the relevant director and the resources available to the

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[30] (1994) 14 ACSR 109

[31] (2007) 62 ACSR 1

company from other officers and directors and external sources; see e.g. *AWA Ltd v Daniels (trading as Deloitte Haskins & Sells).*[32] I suggest that considerations like these would be particularly applicable to an assessment of the corresponding duty owed to the wider native title claim group by members of an applicant.

[39] The variable content of any duty of care owed by members of an applicant when negotiating an ILUA or recommending its authorisation by the wider claim group is underlined when one takes account of the permissible range and scope of agreements which may be concluded under s 24CB of the Act in relation to an area ILUA. That section provides:

> "The agreement must be about one or more of the following matters in relation to an area:
>
> (a) the doing, or the doing subject to conditions (which may be about procedural matters), of particular future acts, or future acts included in classes;
>
> (aa) particular future acts (other than intermediate period acts), or future acts (other than intermediate period acts) included in classes, that have already been done;
>
> (ab) changing the effects, that are provided for by section 22B or by a law of a State or Territory that contains provisions to the same effect, of an intermediate period act or of intermediate period acts included in classes;
>
> (b) withdrawing, amending, varying or doing any other thing in relation to an application under Division 1 of Part 3 in relation to land or waters in the area;
>
> (c) the relationship between native title rights and interests and other rights and interests in relation to the area;
>
> (d) the manner of exercise of any native title rights and interests or other rights and interests in relation to the area;
>
> (e) extinguishing native title rights and interests in relation to land or waters in the area by the surrender of those rights and interests to the Commonwealth, a State or a Territory;
>
> (eaa) providing a framework for the making of other agreements about matters relating to native title rights and interests;
>
> (ea) compensation for any past act, intermediate period act or future act;
>
> (f) any other matter concerning native title rights and interests in relation to the area;
>
> (g) any matter concerning rights conferred by Subdivision Q (which gives certain persons covered by registered native title claims rights of access to non-exclusive agricultural and pastoral leases)."

[40] If any duty of care owed by a member of an applicant to a native title group is even partly analogous to that owed by a company director, it will become particularly onerous when the proposed ILUA provides for certain future acts[33], the withdrawal or amendment of an application for a determination of native title[34], the extinguishment of

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[32] (1992) 7 ACSR 759

[33] s 24CB(a)

[34] s 24CB(b)

native title rights and interests by their surrender to the Commonwealth or a State or Territory[35], an adjustment between native title rights and interests and other rights and interests in relation to the area[36] or compensation for any past act, intermediate period act or future act.[37] Intricately bound up with a decision to recommend an ILUA about one or more of those matters will be an assessment of the risks and benefits which the proposal entails for the wider claim group. That will be so, I consider, even if the duty of care is different from that owed to a company by one of its directors. Thus, in *Wyong Shire Council v Shirt*[38] Mason J focused on the assessment of risk, observing, at 47;

> "... The perception of the reasonable man's response [to the risk] calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

[41] Balancing the risks and benefits involved in an ILUA which provides for the withdrawal in whole or part of a claim for a determination of native title or the extinguishment of native title in return for compensation or the provision of some other benefit for the wider claim group will often be a complex exercise. It may call for an assessment of the prospects of successfully pursuing the native title claim to determination or the value, often intangible, of existing or inchoate native title rights. The evaluation to which I have just referred will call for skills and experience of a kind not usually possessed by members of an applicant for a native title determination. Experience suggests that they will have been selected because of the demonstrable strength of their genealogical connection with the claim area or because of a desire for the applicant to comprise representatives of various sub-groups within the wider group claimed to be native title holders. Peter Sutton, in his work *Native Title in Australia,* makes the related point that:

> "... claims are usually made to areas of land and/or sea according to cadastral or administrative boundaries ... The sorting out of administration of the block, once title is recognised, is left to the successful claimants and those others who may also establish such a relationship to the same land, in conjunction with their regional land council or similar body."[39]

[42] Considerations like those outlined in the last paragraph will generally affect the standard of care which members of a native title applicant can be expected to exercise when negotiating or recommending authorisation of an ILUA. Rarely, if ever, will the level of care and skill demanded of a professional company director in cases like *Australian Securities and Investment Commission v Macdonald (No 11)*[40] be required of the member of a native title applicant. In that case Mr Macdonald had been the chief executive officer and a director of James Hardie Industries Ltd ("JHIL") which, by a

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[35] s 24CB(e)

[36] s 24CB(c) and (d)

[37] s 24CB(ea)

[38] (1980) 146 CLR 40

[39] *Native Title in Australia* (C.U.P.) 2003, p 109

[40] (2009) 256 ALR 199

members' scheme of arrangement created a new group holding company, James Hardie Industries NV ("JHINV"), a company incorporated in the Netherlands. In the course of his tenure Mr Macdonald made representations at a "roadshow" in Edinburgh and London at which slides ("the UK slides") for a power point presentation were used. He was also responsible for, amongst other things, submitting to the Board of JHIL a draft announcement to the Australian Stock Exchange ("ASX") to the effect that a foundation to be established as part of the corporate restructure would have sufficient funds to meet all legitimate asbestos claims, that it was fully funded and provided certainty for people with legitimate asbestos claims. Mr Macdonald also approved the provision of the UK slides to the ASX. Gzell J found that certain statements made in the UK slides and in the draft ASX statement were false or misleading. His Honour therefore concluded, at [656]-[657]:

> "656 A reasonable person, if a director and chief executive officer of a corporation in JHIL's circumstances occupying the offices held by Mr Macdonald with the same responsibilities within the corporation, would not have made the above statements. Mr Macdonald was aware, or ought to have been aware, of the potential harm such statements would have for JHIL for the reasons discussed in relation to the Draft ASX Announcement.
>
> 657 ASIC has made out its case against Mr Macdonald that the Press Conference Statements included statements that were false or misleading and potentially harmful to JHIL and Mr Macdonald was thereby in breach of Section 180(1)."

In relation to the UK slides, his Honour observed, at [1010];

> "A reasonable person, if a director and chief executive officer of a corporation in JHINV's circumstances, occupying the offices held by Mr Macdonald and with the same responsibilities within the corporation, would not have approved the provision of the UK Slides to the ASX or would have advised that they be amended to remove the false or misleading material in them. Such a reasonable person would not have made the statements as to the sufficiency of funding of the Foundation and the statement as to the provision of legal advice in the Edinburgh Representations and in the London Representations. In these respects Mr Macdonald was in breach of his duty of care and due diligence to JHINV."

[43] Some of the issues raised in the James Hardie litigation went on appeal to the New South Wales Court of Appeal and then to the High Court but nothing occurred in the course of those appeals to cast doubt on the principles applied by Gzell J at first instance in relation to Mr Macdonald. On the contrary, in the High Court, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said in a joint judgment on an appeal by Mr Shafron, the general counsel and company secretary of JHIL;

> "... it is enough to say that there is no reason to doubt the correctness of the factual findings made in relation to this aspect of the matter by both the primary judge and the Court of Appeal. It follows that Mr Shafron's argument in this Court, that he "was entitled to assume that Allens [JHIL's solicitors] would have advised him if disclosure of the DOCI [i]nformation to the ASX was required", founders on the rock of the finding at trial (citation omitted), not disturbed on appeal (citation omitted)

> , that Allens' retainer neither expressly nor impliedly extended to considering that question."[41]

Their Honours had earlier observed in respect of the duty of care to which Mr Shafron was alleged by ASIC to be subject;

> "As the title "general counsel and company secretary" given to Mr Shafron indicates, he was qualified as a lawyer – he was admitted to practise law both in Australia and in California. An important element in Mr Shafron's responsibilities was his giving advice about and, where appropriate, taking steps necessary to ensure compliance with all relevant legal requirements, including those that applied to JHIL as a listed public company. The primary judge (citation omitted) and the Court of Appeal (citation omitted) described this aspect of Mr Shafron's responsibilities as a duty to protect the company "from legal risk". No doubt that included ensuring that purely administrative functions were performed like transmitting necessary material to the ASX and maintaining appropriate records of the board. But Mr Shafron's responsibilities did not end at that point. His responsibilities were wider than administrative, and extended to the provision of necessary advice.[42]
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> ... ...
>
> ... The degree of care and diligence that is required by s 180(1) is fixed as an objective standard identified by reference to two relevant elements – the element identified in par (a): "the corporation's circumstances", and the element identified in par (b): the office *and* the responsibilities within the corporation that the officer in question occupied and had. No doubt, those responsibilities include any responsibility that is imposed on the officer by the applicable corporations legislation. But the responsibilities referred to in s 180(1) are not confined to statutory responsibilities; they include *whatever* responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer (original emphasis).[43]

[44] As will be apparent from the various judgments in the *James Hardie* litigation, the liability in negligence of the respective directors turned principally on the effect of their actions and decisions in exposing the company to claims of misleading and deceptive conduct in contravention of s 18 of the *Australian Consumer Law*. An applicant for a native title determination has no relevant connection with a corporate entity and, in that capacity, is not engaged in trade or commerce. Accordingly, no direct analogy can be drawn between any duty of care owed by a member of an applicant and that owed by a director of a company in the position of JHIL.

[45] I also suggest that the standard of care which courts will expect of members of an applicant will be less than that which recent cases indicate is now demanded of company directors. Early authorities postulated a standard of "reasonable care" requiring the exercise of no greater degree of skill than might reasonably be expected from a person of the particular director's knowledge and experience. If that subjective test were to be applied to members of an applicant for a native title determination, account would be taken of the individual's grasp of written and spoken English, level of formal education and previous experience in negotiating land use agreements as well as

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[41] *Shafron v Australian Securities and Investments Commission* [2012] 247 CLR 465 at 481 [33].

[42] Ibid. at 475 [15].

[43] Ibid. at 476 [18].

any specialist qualifications which he or she might possess. In *City Equitable Fire Insurance Co Ltd*[44], Romer J observed, at 426;

> "It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement. It is indeed impossible to describe the duty of directors in general terms, whether by way of analogy or otherwise. The position of a director of a company carrying on a small retail business is very different from that of a director of a railway company. The duties of a bank director may differ widely from those of an insurance director, and the duties of a director of one insurance company may differ from those of a director of another. In one company, for instance, matters may normally be attended to by the manager or other members of the staff that in another company are attended to by the directors themselves. The larger the business carried on by the company the more numerous, and the more important, the matters that must of necessity be left to the managers, the accountants and the rest of the staff. The manner in which the work of the company is to be distributed between the board of directors and the staff is in truth a business matter to be decided on business lines."

His Lordship later went on, at 428 to indicate;

> "There are, in addition, one or two other general propositions that seem to be warranted by the reported cases: (1) A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. A director of a life insurance company, for instance, does not guarantee that he has the skill of an actuary or of a physician."

[46] Since Romer J gave those indications of the essentially subjective standard of care and skill which was then expected of a company director, Australian courts and companies legislation have moved a considerable way in imposing a higher, and more objective, standard of skill. Thus, for example, in *Commonwealth Bank of Australia v Friedrich*[45], Tadgell J said, at 126;

> "... the parliaments and the courts have found it necessary in legislation and litigation to refer to the demands made on directors in more exacting terms than formerly; and the standard of capability required of them has correspondingly increased. In particular, the stage has been reached when a director is expected to be capable of understanding his company's affairs to the extent of actually reaching a reasonably informed opinion of its financial capacity. ... I think it follows that he is required by law to be capable of keeping abreast of the company's affairs, and sufficiently abreast of them to act appropriately if there are reasonable grounds to expect that the company will not be able to pay all its debts in due course ..."

[47] This necessarily cursory examination of the nature of the duty owed by members of an applicant in relation to negotiating and seeking authorisation of an ILUA makes it clear that they owe a fiduciary duty to the wider group of native title holders whom they

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[44] [1925] Ch 407

[45] (1991) 5 ACSR 115

represent; see *Weribone.*[46] However, the nature and extent of the duty of care and skill which members of an applicant owe to the same group has not, as far as I am aware, been addressed in the Act as it stands. As a result, the nature and extent of the duty is left to be gleaned from implication and analogy. I conclude by making a few tentative suggestions by way of giving content to the duty and marking up the matters to which it does not extend.

[48] I consider that there is a positive duty on members of an applicant to explain to meetings of the wider claim group called to authorise entry into an ILUA the risks and benefits which the ILUA entails for the presumptive native title holders as a group. That explanation, in my view, should be given in simple terms likely to be intelligible to those attending the meeting and should accurately reflect the collective views of the applicant as a whole or those members of the applicant who are proffering the explanation. The explanation should also reflect any relevant advice received by the members of the applicant from any source, including the Land Council or other representative body.

[49] Difficulties may arise in complying with the suggestion made in the last preceding paragraph because, not infrequently, the Land Council or representative body will have been involved in negotiating the very terms of the ILUA for which authorisation is sought from the wider group of presumptive native title holders. However, that involvement, I consider, does not relieve the representative body of the need to disclose to members of the applicant, or directly to the authorisation meeting of the wider claim group, any information in its possession, including legal advice, which would assist the meeting to make an informed assessment of the risks and benefits of entering into the proposed ILUA. That is not to say that the representative body is obliged positively to commission specialist advice from external sources. As noted at [29] above, the representative body has a general discretion to allocate priorities and resources in the course of performing its statutory functions.

[50] Even more obviously, members of an applicant are not required to obtain advice or information by expenditure of their own resources. When regard is had to the variety and complexity of matters listed at [39] above which may be the subject of an ILUA, it will be apparent that informed authorisation of entry into an ILUA may require a range of specialist advice from experts such as lawyers, accountants, actuaries, valuers of real estate and mining royalty streams, investment bankers and the like. If advice and information of that kind is reasonably seen to be necessary but has not been available to the authorisation meeting, the question suggests itself as to whether the Native Title Registrar has a discretion to defer registration of an ILUA until appropriate independent advice has been furnished to the wider group of native title holders, perhaps at the expense of other parties to the ILUA. The better view seems to be that, if the application for registration of the ILUA has been certified by the representative body and any objection by a person claiming to hold native title has been withdrawn or rejected as not satisfying s 203BE(5)(a) and (b), then the Registrar **must** register the ILUA; see s 24CE of the Act.

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[46] [2013] FCA 255