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Human rights lessons from the Decision of the United Nations Committee of the Wunna Nyiyaparli People

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Introduction

- In its opinion on 10 July 2023, the United Nations Human Rights Committee (UNHRC) found that Australia had violated the rights of the Wunna Nyiyaparli people under the International Covenant on Civil and Political Rights (ICCPR), following the Federal Court of Australia (the Court)'s dismissal of the Wunna Nyiyaparli people's native title claim and the Court's subsequent positive determination of the wider Nyiyaparli people's claim.

Background

- The Wunna Nyiyaparli people are a local group within the wider Nyiyaparli people. In January 2012, the Wunna Nyiyaparli people filed a native title claim in the area of the Roy Hill Pastoral Lease in the eastern Pilbara region, Western Australia. The claim overlapped a wider Nyiyaparli people's claim filed in 1998. The Wunna Nyiyaparli people were excluded from that wider claim in 2010 on the findings of anthropological research. The Court ordered a separate question proceeding in 2016 to determine whether the Wunna Nyiyaparli people were part of the broader Nyiyaparli native title claim group.

- The Wunna Nyiyaparli people's lawyers ceased to act in March 2016, and the Wunna Nyiyaparli people were not represented for the remainder of the proceedings. The Wunna Nyiyaparli people reported that they could not understand the nature and implications of the proceedings, and consequently failed to attend several hearings. The Wunna Nyiyaparli people subsequently failed to provide notice of their intention to participate in the separate question hearing in July 2016. Three members of the Wunna Nyiyaparli people attended the separate question hearing to give evidence, but the Court did not allow the evidence in the interests of justice.

- The Court ultimately decided the separate question in the negative and dismissed the Wunna Nyiyaparli people's native title claim. In 2018, the Court positively determined the broader Nyiyaparli native title claim, effectively eliminating any future opportunity for the Wunna Nyiyaparli people to claim native title rights and interests in the Roy Hill Pastoral Lease.

- The Wunna Nyiyaparli people subsequently filed a complaint to the UNHRC that the Court had, in its decision, violated the rights of the Complainant by not affording them the opportunity to effectively participate in the Court proceedings and by consequently making a decision in the broader Nyiyaparli native title proceeding which deprived them of the enjoyment of rights and interests to their traditional territory. The Wunna Nyiyaparli people argued that, due to the lack of resources for legal advice and reliable access to information, they were unable to understand the nature and implications of the Court proceedings and were further denied the opportunity to give evidence on their rights to country.

The Decision

The UNHRC found that, pursuant to the ICCPR, Australia (via the Court) was under an obligation to provide due process guarantees to the Wunna Nyiyaparli people in their claim for native title rights and interests.

The UNHRC in turn found that the Court's conduct in the proceedings had amounted to a violation of the following ICCPR articles:

- Article 14(1) (the right to equality before courts and tribunals), read alone and in conjunction with article 2(3) (the right to effective remedy against a violation of civil and political rights); and
- Article 27 (the right of minority groups to the enjoyment of their own culture) read in light of article 1 (the right of self-determination).

Pursuant to Article 2(3), the UNHRC consequently found that Australia is required to provide the Wunna Nyiyaparli people an effective remedy to the violation of their rights, recommending that Australia:

- reconsider the Wunna Nyiyaparli people's native title claim and ensure their effective participation in the reconsideration of the claim;
- abstain from acts that may impact the Wunna Nyiyaparli people's enjoyment of their traditional rights and interests;
- review the mining interests granted in the Wunna Nyiyaparli people's claim area without their consultation, to determine if those interests need to be modified to preserve the Wunna Nyiyaparli people's traditional interests; and
- provide adequate compensation to the Wunna Nyiyaparli people for any damage suffered.

The UNHRC further recommended that Australia review the native title funding model with respect to overlapping native title claims to ensure all indigenous parties are provided sufficient opportunity to effectively participate in proceedings.

The UNHRC requested Australia provide a report to the UNHRC within 180 days of the decision on the steps it has taken to give effect to the UNHRC's views.

What Next

- The UNHRC's decision is non-binding, and the Court is ultimately bound by Australian legislation (including the Native Title Act 1993 (Cth) (NTA)) and common law in how it manages and decides native title proceedings. Indeed, as at the date of this article, Australia has not responded to the UNHRC's request for a report, which was due in February 2024. As a ratifying party to the ICCPR, the opinion nonetheless draws international attention to Australia's native title processes, and the limits of Australia's legislative framework in ensuring First Nations People's political and civil rights in resolving land rights disputes.
  The opinion raises several considerations about how the native title framework interacts with Aboriginal and Torres Strait Islander people's political and civil rights, including:

Right of Redress

- The UNHRC recommended that the Court reconsider the positive Nyiyaparli native title determination. A decision of the Court is generally considered full and final.[1] The NTA nonetheless provides a statutory exception,[2] making provision for an application to vary or revoke a final order of the Court. However, such an application may only be brought by the registered native title body corporate, the Commonwealth Minister, the State Minister or the Native Title Registrar, and there are only limited instances to date in which the Court has varied a determination.[3]

  The native title legislative framework does not provide general procedural recourse for indigenous parties who may, on account of a determination in favour of another indigenous group, be denied the opportunity to assert and enjoy native title rights and interests to their traditional territory. Indeed, while the Preamble of the NTA acknowledges the importance of protecting the rights of Australia's indigenous people through recognising international standards of universal human rights, including through the ratification of the ICCPR, it also upholds the public interest in the certainty of outcomes in native title proceedings. Reconsidering native title claims after they have been determined would introduce significant complexity and uncertainty in the interaction between native title rights and interests and other land interests and would have significant implications for stakeholders who may have already entered into agreements with determined native title holders.

  In the absence of an avenue to vary a native title determination, and without a constitutional bill of rights or human rights act through which to assert specific rights as indigenous people, indigenous parties may in future seek redress through international institutions such as the UNHRC. As indicated above, such redress will not be binding on Australia or the Court.

[1] DJL v Central Authority (2000) 201 CLR 226.
[2] Native Title Act 1993 (Cth), s 13(1).
[3] For instance, the Court may vary a determination in the interests of justice where changes to the law have caused the basis of earlier determinations to no longer be correct; see e.g. Top End Aboriginal Corporation RNTBC v Northern Territory of Australia [2022] FCA 74.

Effective participation of indigenous parties

- The UNHRC noted the Court's obligations pursuant to the ICCPR to guarantee due process to indigenous parties through effective participation in Court proceedings. The UNHRC found the Court's decisions not to allow the Wunna Nyiyaparli people to adduce evidence and not to adjourn the proceedings arbitrary and in violation of the principles of a fair trial.

  The obligation to enable an indigenous party's effective participation in proceedings needs to be considered against the Court's obligation to uphold procedural justice to parties. For instance, to admit evidence from an indigenous party who has failed to notify other parties of its participation in a hearing may unfairly prejudice those other parties.

  A party's right to effective participation moreover needs to be considered against the public interest in achieving a just determination of issues as quickly, inexpensively and efficiently as possible.[1] Native title proceedings are long, resource intensive and uncertain. Adjournments to a proceeding to allow an indigenous party to bring subsequent evidence would impact claimants who may have already invested considerable time, information and resources in seeking a resolution to their claim.

[1] Federal Court of Australia Act 1976 (Cth), s 37M.

Importance of quality advice

- This case is also a general reminder of the importance of quality, clear and timely legal advice in ensuring parties' effective participation in proceedings. The UNHRC found that the Court had failed to take sufficient measures to ensure that the Wunna Nyiyaparli people understood the nature and implications of the proceedings and were able to participate in the proceedings.

  The Wunna Nyiyaparli people were unrepresented in the proceedings from March 2016, and reported that their prior relations with the laws were not functioning. Effective advice to the Wunna Nyiyaparli people would have assisted them to understand the nature and implications of, and sufficiently prepare for, the court hearings.

Effective participation of indigenous parties

- The UNHRC recommended that Australia review its native title funding model. Native Title Representative Bodies and Service Providers (NTRB/SPs) play an important role in facilitating and assisting native title holders and those who may hold native title in proceedings such as native title claims.[1]

  NTRB/SPs are required to provide assistance to native title claimants and indigenous respondents in a way that supports the orderly, effective and cost-efficient processing of their claims. Early resourcing of parties can assist them, and the Court resolve disputes in an orderly and cost-effective manner and may also enable parties to resolve disputes without the need for trial.

  The NTA also requires NTRB/SPs to make efforts to limit the number of applications covering the same lands or waters.[2] As such, NTRB/SPs must balance the benefits of resourcing indigenous parties with competing interests in way that supports their effective and orderly participation in proceedings with the risks of several native title applications covering the same lands or waters.[3]

  NTRB/SPs must also make strategic decisions on how best to apply limited resources in a way that best achieves its functions prescribed by the NTA.

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[1] See Native Title Act 1993 (Cth), ss 203B(1)(a) & 203BB(1)(b).
[2] Native Title Act 1993 (Cth), s 203BC(3).
[3] For instance, Yamatji Marlpa Aboriginal Corporation RNTBC, the NTRB/SP for the area, originally opposed the registration of the Wunna Nyiyaparli people's native title claim on the basis that it was not authorised by the wider Nyiyaparli group. The National Native Title Tribunal, in registering the claim, was nonetheless prima facie satisfied that the rights and interests asserted by the narrower Wunna Nyiyaparli group were sufficiently separate to the wider Nyiyaparli group.