

DUTIES OF
PEOPLE ON A PBC
or
THE APPLICANT IN A NATIVE TITLE
CLAIM

by

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Introduction

1. The decision of the Federal Court in December 2017 of *Gebadi v Woosup*¹ considered the duties that people constituting the Applicant in a native title claim owe to the claim group as a whole.
2. The decision makes it very clear that people constituting the Applicant, or those representing native title holders in other capacities, owe very important duties to the whole claim group or native title holders and must not make decisions based on self interest. That is, such persons must not prefer their own interests over those of their People or act in a way which brings their duty to act in the best interests of the whole group into conflict with their own personal interests. Consequently, the duties they owe to their People prevent them receiving moneys or other benefits for themselves personally.
3. Put another way, this decision clearly establishes that those people constituting the Applicant in a native title claim and/or those representing native title holders in other capacities owe a fiduciary duty to the whole of the claim group or group native title holders. That is, the Indigenous people who represent the whole group must not at all times act in the interests of the whole group and must NOT act in their own personal interests to the detriment of the interests of the whole group.
4. However, it is important to always keep in mind that the ultimate source of the Applicant's authority is the claim group itself.²

The Applicant in native title proceedings

5. In Native Title Determination Applications proceedings and related processes under the *Native Title Act 1993* (Cth) (*NTA*), the persons who constitute the “*Applicant*” occupy a position of authority and exercise significant powers in relation to the conduct of proceedings for, and determination of, a native title determination application.
6. Those members who are appointed by the claim group to constitute the Applicant exercise significant powers with respect to, among others, the progressing of the native title

¹ *Gebardi v Woosup* [2017] FCA 1467.

² *Kulkalgal People (Aureed Island) v Queensland* [2003] FCA 163 at [6]-[7] per Drummond J; *Bennell v Western Australia* [2004] FCA 760 at [44] per French J; *Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland* (2004) 214 ALR 306; [2004] FCA 1632 at [10]-[11] per Kiefel J; *Shaw v Western Australia* [2011] FCA 102 at [16] per Gilmour J.

determination mediation of the determination application, and the negotiation of ILUAs and other agreements in the context of the right to negotiate process.

Some of the players

7. In 1997, the Ankamuthi People made three separate claims of native title, and in 1999, the three applications were combined and became what was described as the *Ankamuthi People #1* native title claim.³

The combined Ankamuthi claim was entered on the Register of Native Title Claims in 1999.⁴

8. The first respondent in the present proceedings, Mr Larry Woosup (**Woosup**) and the second respondent, Ms Beverley Tamwoy (**Tamwoy**) were formerly two of 13 persons authorised by the Ankamuthi native title claim group to prosecute the native title determination application under s.61 of the *NTA*.⁵ More particularly, Woosup and Tamwoy were individuals constituting the Ankamuthi applicant from the outset of the making of the native title claim in 1997 until April 2016 when they were removed under s.66B of the *NTA* in conformity with resolutions of the native title claim group.⁶
9. On 26 July 2017, the Federal Court made a determination of native title in favour of the Ankamuthi People by reference to the extensive orders and schedules to the orders made that day, supported by reasons for judgment published on that day: *Woosup on behalf of the Ankamuthi People #1 v State of Queensland* [2017] FCA 831.⁷
10. The Court also determined that upon the native title determination taking effect, the native title was to be held in trust for the common law holders, and the prescribed body corporate nominated on behalf of the Ankamuthi People in accordance with s.56 of the *NTA* “to be trustee of the native title” for the Ankamuthi People as the common law holders was and is *Seven Rivers Aboriginal Corporation (ICN 8522)*.⁸

³ *Gebadi v Woosup* [2017] FCA 1467 at [7] per Greenwood J.

⁴ *Gebadi v Woosup* [2017] FCA 1467 at [7] per Greenwood J.

⁵ *Gebadi v Woosup* [2017] FCA 1467 at [8] per Greenwood J.

⁶ *Gebadi v Woosup* [2017] FCA 1467 at [12] per Greenwood J.

⁷ *Gebadi v Woosup* [2017] FCA 1467 at [3] per Greenwood J.

⁸ *Gebadi v Woosup* [2017] FCA 1467 at [6] per Greenwood J.

Background to these proceedings

11. As touched upon above, one of the rights possessed by the Applicant in a native title claim, once the claim is registered with the National Native Title Tribunal is to negotiate with third parties who might wish to do things on or over the land and waters which affects the native title rights claimed by the Indigenous People in question. Typically, the persons who constitute the Applicant will conduct negotiations with those wishing to exploit resources within the native title claim area. Those wishing to exploit resources might include mining companies which might seek to develop mineral resources on or affecting the land and waters that form part of the native title claim.
12. In this case, Woosup and Tomway conducted negotiations with Gulf Alumina Limited (**Gulf**).⁹ They subsequently entered an agreement with Gulf pursuant to which the Ankamuthi People were to be paid pre-payments and royalties for the exploitation by Gulf of bauxite resources on and in connection with the land and waters.¹⁰
13. However, Woosup and Tamwoy did not tell the Ankamuthi native title claim group prior to entering the agreement with Gulf of the rights they purported to give to Gulf in consideration of Gulf performing the terms of the Agreement, including the making of payments to Woosup and Tamwoy.¹¹ A consequence of this failure on the part of Woosup and Tamwoy was that the Ankamuthi native title claim group were deprived of the opportunity of considering the agreement with Gulf, consistent with their cultural traditions.¹² That is, the Ankamuthi People did not have the opportunity of considering, and determining, among other things, whether the agreement contemplated with Gulf was in accordance with their traditional laws and customs and/or whether they were happy with the deal being offered by Gulf.
14. Further, Woosup and Tamwoy did not advise the Ankamuthi native title claim group of the agreement being made, nor did they provide them with a copy of the agreement,¹³ nor of details of the moneys they received.

⁹ *Gebadi v Woosup* [2017] FCA 1467 at [154(1)] per Greenwood J.

¹⁰ *Gebadi v Woosup* [2017] FCA 1467 at [154(1)] per Greenwood J.

¹¹ *Gebadi v Woosup* [2017] FCA 1467 at [154(1)] per Greenwood J.

¹² *Gebadi v Woosup* [2017] FCA 1467 at [154(2)] per Greenwood J.

¹³ *Gebadi v Woosup* [2017] FCA 1467 at [154(7)] per Greenwood J.

15. Woosup received more than \$370,000 for and on behalf of the Ankamuthi People.¹⁴ However, he appropriated this money to his own benefit all of those moneys and failed to deal with those moneys for and on behalf of his people (some \$371,267.25).¹⁵
16. The Ankamuthi People eventually learnt of these facts. Consequently, seven of them, being seven of the 10 who maintained proceedings on behalf of the Ankamuthi People as a *native title claim group* within the meaning of s.253 of the *NTA*, under s.61 of the *NTA*,¹⁶ acted as representatives for and on behalf of the Ankamuthi People (**claimants**) and brought these legal proceedings against Woosup and Tamwoy.
17. Those legal proceedings were heard in Brisbane in July 2017.
18. The Ankamuthi People argued, among other things, that when Woosup and Tamwoy acted as representatives of the Ankamuthi People in the manner outlined above, they owed a “*fiduciary duty*” (that is, duties of trust and confidence) to all members of the Ankamuthi native title claim group, and that duty continued when they entered the agreement with Gulf.
19. Woosup and Tamwoy both chose not to attend, or otherwise take part in the legal proceedings. However, the Court proceeded to hear and determine the matter in their absence.

Decision of the Court

20. Justice Greenwood handed down his decision in December 2017.
21. In his decision, the Court also made findings to the following effect:
 - (a) Woosup and Tamwoy entered into the Agreement with Gulf in December 2013;¹⁷
 - (b) Woosup and Tamwoy did not disclose to the Ankamuthi native title claim group the terms of the Agreement with Gulf;¹⁸
 - (c) Woosup and Tamwoy owed fiduciary obligations to the Ankamuthi People as members of the native title claim group;¹⁹

¹⁴ *Gebadi v Woosup* [2017] FCA 1467 at [154(10)] per Greenwood J.

¹⁵ *Gebadi v Woosup* [2017] FCA 1467 at [160] per Greenwood J.

¹⁶ *Gebadi v Woosup* [2017] FCA 1467 at [2] per Greenwood J.

¹⁷ *Gebadi v Woosup* [2017] FCA 1467 at [46] per Greenwood J.

¹⁸ *Gebadi v Woosup* [2017] FCA 1467 at [47] per Greenwood J.

- (d) By entering into the Agreement with Gulf, Woosup and Tamwoy breached fiduciary obligations they owed to the Ankamuthi native title claim group;²⁰
- (e) Woosup breached particular fiduciary obligations he owed to the Ankamuthi native title claim group because he:²¹
 - (i) Personally received moneys as a result of the Agreement with Gulf;
 - (ii) Did not advise members of the Ankamuthi claim group of the payments of those moneys;
 - (iii) Retained and used the moneys paid under the Agreement for his own purposes;
 - (iv) Did not pay those moneys to the claim group;
- (f) Consequently, Woosup was required to account to the Ankamuthi claim group for those moneys he received.²²

22. The Court determined that Woosup held those monies when he received them, on trust for the Ankamuthi People.

Court's reasoning

23. In arriving at its decision, the Court's reasoning included the following:

- (a) In accepting a role (as a member of the Ankamuthi People), of acting as persons constituting the Ankamuthi applicant so as to make the native title claim for the native title claim group, Woosup and Tamwoy accepted and undertook to act for and on behalf of the members of the claim group in the exercise of any right, power or discretion affecting the interests of the Ankamuthi native title claim group in either a legal sense or a practical sense.²³
- (b) The principles which lead to that result in the context of the role of persons who constitute the applicant in a native title determination application are the essential

¹⁹ *Gebadi v Woosup* [2017] FCA 1467 at [48] per Greenwood J.

²⁰ *Gebadi v Woosup* [2017] FCA 1467 at [49] per Greenwood J.

²¹ *Gebadi v Woosup* [2017] FCA 1467 at [50] per Greenwood J.

²² *Gebadi v Woosup* [2017] FCA 1467 at [51] per Greenwood J.

²³ *Gebadi v Woosup* [2017] FCA 1467 at [154(9)] per Greenwood J.

principles which determine whether a person has accepted or assumed fiduciary obligations to another. The *context* in the case of Woosup and Tamwoy, in accepting and undertaking to act as persons constituting the applicant, is the relevant context but the *principles* to be applied in determining whether they owed fiduciary obligations to the native title claim group are the same principles for deciding whether a person has, in all the circumstances, assumed particular fiduciary obligations to another.²⁴

- (c) In determining whether Woosup and Tamwoy owed such fiduciary obligations to members of the Ankamuthi People, the principles to be applied are those outlined in *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd*²⁵ in which the Full Court (Dowsett, Greenwood and White JJ) considered in depth the question of whether particular parties owed fiduciary obligations to another.²⁶
- (d) Woosup and Tamwoy, as persons constituting the applicant, undertook or agreed to act for and on behalf of and in the interests of the native title claim group in the exercise of any and all powers, responsibilities and discretions affecting the interests of the claim group in a legal or practical sense.²⁷
- (e) Woosup and Tamwoy thus stood in a fiduciary relationship (that is, they were in a relationship of “*trust or confidence*” with the members of the Ankamuthi native title claim group.²⁸
- (f) Hence, the members of the Ankamuthi People were entitled to expect that Woosup and Tamwoy would act in the best interests of all of the Ankamuthi People in exercising any of the functions, powers, responsibilities or discretions conferred upon an applicant.²⁹
- (g) Consequently, the obligations or duties Woosup and Tamwoy owed to the members of the Ankamuthi People included:³⁰

²⁴ *Gebadi v Woosup* [2017] FCA 1467 at [154(9)] per Greenwood J.

²⁵ [2017] FCAFC 141.

²⁶ *Gebadi v Woosup* [2017] FCA 1467 at [96] per Greenwood J. Those principles are outlined in depth at [98].

²⁷ *Gebadi v Woosup* [2017] FCA 1467 at [101] per Greenwood J.

²⁸ *Gebadi v Woosup* [2017] FCA 1467 at [101] per Greenwood J.

²⁹ *Gebadi v Woosup* [2017] FCA 1467 at [100] per Greenwood J.

³⁰ *Gebadi v Woosup* [2017] FCA 1467 at [102] per Greenwood J.

- (i) An obligation to not place themselves in a position where their private or personal interests came into conflict with the interests of the members of the Ankamuthi People: a conflict of interest and duty;
 - (ii) An obligation to not pursue and secure a personal benefit: a conflict of interest and duty;
 - (iii) An obligation to not make a profit from their position of trust unless expressly permitted to do so with the informed consent of the Ankamuthi People: a conflict of interest and duty;
 - (iv) An obligation to not place themselves in a position where their personal interests or duties conflicted with duties owed to the Ankamuthi People: a conflict of interest and duty, and a conflict of duty and duty.
- (h) Woosup and Tamwoy owed these duties and obligations to the Ankamuthi native title claim group throughout the entire period in which they were persons constituting the applicant.³¹

Orders of the Court

24. In summary, the Court ordered that:

- (a) Woosup account to the Ankamuthi People for the financial benefits derived by him in the sum of \$370,000.00,³² and that he pay that amount to the PBC for the Ankamuthi People³³ out of his own pocket;
- (b) Woosup be prevented from exercising any right to conduct transactions in relation to any account operated by or on behalf of the Ankamuthi People in the name of Prescribed Body Corporate as trustee for the native title holders being the Ankamuthi People;³⁴

³¹ *Gebadi v Woosup* [2017] FCA 1467 at [103] per Greenwood J.

³² *Gebadi v Woosup* [2017] FCA 1467 at Order 4.

³³ *Gebadi v Woosup* [2017] FCA 1467 at Order 5.

³⁴ *Gebadi v Woosup* [2017] FCA 1467 at Order 9.

- (c) Woosup and Tamwoy pay the legal costs incurred by the Ankamuthi People in bringing those legal proceedings.³⁵

Importance of the decision

25. This is a very important decision because it clearly establishes that when people (such as Woosup and Tamwoy) do things as representatives of a group of Indigenous People (such as the Ankamuthi People):
- (a) They must, at all times, act in the best interests of the whole of the group of Indigenous People.
 - (b) They are not entitled to put their own private interests ahead of those of the Indigenous People they represent, and they must not act in a way which brings their duty to act in the best interests of the Indigenous People they represent into conflict with their own personal interests.
 - (c) If they breach the duties owed to the broader group of Indigenous People, they are liable to be made to repay the money involved and additionally, they may be prevented from acting on behalf of the group of Indigenous People in the future.
 - (d) They might also be ordered to pay the legal costs of the Applicant in the subsequent proceedings brought against them.
26. While the decision dealt with the circumstances of an Applicant in a Native Title Determination Application, there is no reason why the principles outlined therein would not equally apply to any person who is acting in any capacity on behalf of a group of Indigenous People.
27. Hence, those principles would apply to those persons who are providing their services on a Prescribed Body Corporate. This is because Prescribed Bodies Corporate are charged under the *NTA* with the responsibility of holding native title rights and interests on behalf of the common law native title holders.

³⁵ *Gebadi v Woosup* [2017] FCA 1467 at Order 7.