

Kerinaiua v Tiwi Land Council & Anor [2007] NTSC 40

PARTIES: KERINAIUA, Adam

v

TIWI LAND COUNCIL

And:

COMMONWEALTH OF AUSTRALIA

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 85 of 2007 (20720166)

DELIVERED: 13 August 2007

HEARING DATES: 2, 3, 7 and 9 August 2007

JUDGMENT OF: SOUTHWOOD J

CATCHWORDS:

Interlocutory Injunction – grant of lease over the township of Nguiu –
consultation, agreement and approval processes – application denied

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

Alderson and Others v Northern Land Council (1983) 20 NTR 1

Australian Broadcasting Corporation v O'Neill (2006) 229 ALR 457

Noble v Murgha [2005] FCAFC 211

Ward and Others v Northern Territory of Australia and Others (2002) 196
ALR 32

REPRESENTATION:

Counsel:

Plaintiff:	A Young
First Defendant:	D Graham QC and John E Goetz
Second Defendant:	S Lloyd

Solicitors:

Plaintiff:	Halfpennys
First Defendant:	Ward Keller town agents for Middletons
Second Defendant:	Australian Government Solicitor

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Kerinaia v Tiwi Land Council & Anor [2007] NTSC 40
No 85 of 2007 (20720166)

BETWEEN:

ADAM KERINAIUA
Plaintiff

AND:

TIWI LAND COUNCIL
First Defendant

AND:

COMMONWEALTH OF AUSTRALIA
Second Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 13 August 2007)

Introduction

- [1] This is an application for an interlocutory injunction. The application is made by summons filed on 25 July 2007. The plaintiff, who claims to be a traditional Aboriginal owner of the township of Nguiu and a member of the Mantiyupwi traditional Aboriginal landowning group of the Tiwi Islands, seeks:

An injunction restraining the Tiwi Land Council, until further order, from giving any direction under s 19A(1) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) to the Tiwi Aboriginal

Land Trust to grant a lease over the township of Nguiu to the Executive Director of Township Leasing.

[2] By way of substantive relief pleaded in an amended originating motion filed in the court on 3 August 2007, the plaintiff seeks:

- 1A. A declaration that there has been no valid consent pursuant to s19A of the Aboriginal Land Rights (Northern Territory) Act 1976 by the Traditional Owners to the proposed township lease over Nguiu;
1. A declaration that the purported termination of Adam Kerinaiua's membership of the Tiwi Land Council is invalid;
2. A declaration that the deliberations of the Tiwi Land Council since the termination of Adam Kerinaiua's membership of the Tiwi Land Council are invalid;
3. A declaration that Adam Kerinaiua is a traditional owner under the Aboriginal Land Rights (Northern Territory) Act for Nguiu;
4. A declaration that Adam Kerinaiua has been wrongly excluded from the process under s 19A (2) of the Aboriginal Land Rights (Northern Territory) Act requiring the consent of the traditional Aboriginal owners to the grant of a lease over Nguiu;
5. An order in the nature of prohibition directed to the Tiwi Land Council ordering that it not give any direction under s 19A (1) of the Aboriginal Land Rights (Northern Territory) Act 1976 that the Tiwi Aboriginal Land Trust grant a lease over Nguiu.

[3] For the purposes of the application for an interlocutory injunction, the plaintiff only argued and relied on the grounds of relief for orders 1A and 5 of the amended originating motion. The plaintiff's claim for orders 1 and 2 above may now be redundant as on 27 July 2007 the Minister for Families, Community Services and Indigenous Affairs, The Honourable Malcolm

Thomas Brough MP, revoked his termination of the plaintiff's appointment as a member of the Tiwi Aboriginal Land Trust. The revocation of the Minister arguably has the effect of reinstating the plaintiff's membership of the Tiwi Land Council.

- [4] In support of his application for an interlocutory injunction the plaintiff read three affidavits of the plaintiff which were sworn by the plaintiff respectively on 25 July 2007, 31 July 2007 and 2 August 2007, two affidavits of Ms Catherine Louise Spurr which were sworn by her respectively on 31 July 2007 and 1 August 2007, and the affidavits of Ms Kilapaiyu Puruntuntameri sworn on 31 July 2007, Mr Jeffrey Thomas Simon sworn on 2 August 2007 and Mr Gawin Tipiloura sworn on 31 July 2007. The plaintiff also relied on annexures JSH54, JSH55 and JSH59 of the affidavit of Mr John Sydney Hicks sworn on 1 August 2007.
- [5] In opposing the application for an interlocutory injunction the Tiwi Land Council relied on the affidavits of Mr Brian Clancy sworn on 2 August 2007, Ms Jennifer Clancy (Ullungura) sworn on 1 August 2007 and 2 August 2007, Mr John Sydney Hicks sworn on 1 August 2007 and 2 August 2007, Mr Walter Kerinaia sworn on 1 August 2007 and 2 August 2007, Mr Marius Puruntatameri sworn on 1 August 2007 and Mr Robert Tipungwuti sworn on 1 August 2007.

The background to the plaintiff's application for an interlocutory injunction

- [6] The Mantiyupwi traditional Aboriginal landowning group is one of the eight groups of traditional Aboriginal landowners on the Tiwi islands. The Mantiyupwi traditional Aboriginal landowning group are the traditional Aboriginal landowners of the area of land on which the township of Nguiu is situated on Bathurst Island.
- [7] The plaintiff claims to be a member of the Mantiyupwi traditional Aboriginal landowning group. He is a member of the Tiwi Aboriginal Land Trust. He is listed in Annexure 6 to the proposed 99 year Head Lease of the township of Nguiu as a traditional Aboriginal owner of the area of land on which the township of Nguiu is situated. In par 10 of his affidavit sworn on 1 August 2007 Mr Hicks states that Annexure 6 to the proposed 99 year Head Lease of the township of Nguiu is a comprehensive register of the members of the Mantiyupwi traditional Aboriginal landowning group. He states that the register was created in 1928 by Professor C.W.M. Hart with the assistance of Mr Arnold R Pilling and that the register was modernised in 1999 as a result of the work of Ms Kathy Barnes and Professor Jane Goodale. Further additions were also made to the register on the advice of Mr Walter Kerinaia (Senior) who is recognised by all parties as a senior elder of the Mantiyupwi traditional Aboriginal landowning group.
- [8] The Tiwi Land Council is a Commonwealth authority under the Aboriginal Land Rights (Northern Territory) Act. The Tiwi Land Council was

established by notice published in Special Gazette No. S162 of 18 August 1978. The membership of the Tiwi Land Council is made up of the land trustees from the Tiwi Aboriginal Land Trust and their nominees. The Tiwi Aboriginal Land Trust holds inalienable freehold title over the Tiwi Islands. The Tiwi Aboriginal Land Trust represents all of the traditional Aboriginal landowners of the Tiwi islands.

[9] In par 13 of his affidavit sworn on 1 August 2007, Mr Hicks states that on 3 August 2004 a meeting of the Management Committee of the Tiwi Land Council was held at Pirlangimpi. The meeting was attended by Mr Frederick Mungatopi, who was then the Chairman of the Tiwi Land Council, and Executive Managers of the Tiwi Land Council Mr Cyril Kalippa, Mr Matthew Wonaeamirri, Mr Andrew Tipungwuti, and Senior Marine Ranger, Mr Jack Long. The minutes of the meeting record that those present at the meeting discussed the Northern Territory Government's approach to land tenure on Aboriginal land including the Northern Territory Government's desire for long term head leases and subleases to land users and a proposal for 99 year head leases.

[10] Since 3 August 2004 there has been in the vicinity of 45 meetings variously of the Management Committee of the Tiwi Land Council, the members of the Tiwi Land Council, the Mantiyupwi traditional Aboriginal landowning group, the residents of Nguuu, the Tiwi Union (an amalgamation of Tiwi organisations including local government, members of the Tiwi Land Council and other Tiwi leaders) and from time to time between the members

and representatives of the traditional Aboriginal landowning group and the other entities and representatives of the Northern Territory Government and the Commonwealth Government at which there have been discussions and consultations about the leasing of the land on which Aboriginal communities are situated and in particular the granting of a 99 year Head Lease over the township of Nguiu to the Executive Director of Township Leasing. The last such meeting was held on 26 July 2007.

[11] Included in the history of the above meetings and subsequently are the following meetings and events. On 6 May 2005 the Tiwi Union held its inaugural meeting at Milikapiti. The meeting was attended by 28 Tiwi leaders and 11 other members of the Union Joint Coordinating Committee. Those persons present at the meeting passed a resolution to invite representatives of the Commonwealth Government and the Northern Territory Government to attend the August 2005 meeting of the Tiwi Union to discuss land development and community leasing.

[12] At a meeting of the Management Committee of the Tiwi Land Council On 4 October 2005, the Honourable Amanda Vanstone, who was then the Minister of the Commonwealth Government for Families, Community Services and Indigenous Affairs, announced changes to the Aboriginal Land Rights (Northern Territory) Act which facilitated the granting of 99 year leases of the area of a township on Aboriginal land to an entity approved under the Aboriginal Land Rights (Northern Territory) Act.

[13] In 2006 the Tiwi Land Council and the Commonwealth of Australia established the Nguiu Negotiation Team which has been charged with consulting with and explaining to the Mantiyupwi traditional Aboriginal landowning group and to the residents of Nguiu and other affected Aboriginal people, the nature, purpose and effect of the proposed 99 year Head Lease. The Nguiu Negotiation Team is comprised of the following people: Mr Bill Gray AM, Director, WJG & Associates Pty Ltd Consulting Services; Mr Brian Clancy, school teacher, and Tiwi Training Board Manager; Mr Ernie Chin, development consultant, Chin & Associates Pty Ltd; Walter Kerinaia; Mrs Jennifer Clancy, school teacher and Tiwi Training Board coordinator; Ms Berna Timaeapatua, Mantiyupwi and school teacher; Ms Mavis Kerinaia, Mantiyupwi and administrator; Ms Caroline Edwards, Deputy State Manager (Indigenous Affairs), Commonwealth Government Department of Families, Community Services and Indigenous Affairs, NT Office; Mr Robert Orr QC, Deputy General Counsel, Australian Government Solicitor; Ms Joanna Da Rocha, Commonwealth Government Department of Families, Community Services and Indigenous Affairs; Mr Michael Long, sports administrator and businessman; Mr Greg Orsto, Mantiyupwi and Tiwi Training Board coordinator; and representatives of the Commonwealth Department of Finance and Administration.

[14] On 3 April 2006 a meeting of the Mantiyupwi traditional Aboriginal landowning group was held at Nguiu. The meeting was attended by Mr Hicks, the Chief Executive and Secretary of the Tiwi Land Council,

Mr Brian Stacey, the State Manager of the Northern Territory Office of Indigenous Policy Coordination of the Commonwealth Department of Families, Community Services and Indigenous Affairs, and 78 members of the Mantiyupwi traditional Aboriginal landowning group including Mr Walter Kerinaiaua. Those present at the meeting discussed the concept of community leasing, the proposed head lease and subleases. The minutes of the meeting record that the traditional Aboriginal landowners present at the meeting “unanimously desire to further explore the idea of a 99 year head lease at Nguiu.”

[15] On 19 April 2006 a meeting of the Tiwi Land Council was held at Nguiu. The meeting was attended by members of the Land Council, six visitors and 57 members of the Mantiyupwi traditional Aboriginal landowning group. The minutes of the meeting record discussion about community leasing and subdivisions at Nguiu. Those present at the meeting passed a resolution to support the Mantiyupwi traditional Aboriginal landowning group’s negotiations as they want to develop them with the Commonwealth of Australia.

[16] On 29 April 2006 there was a meeting of the Mantiyupwi traditional Aboriginal landowning group at Nguiu. The meeting was attended by Mr Hicks, Mr Brian Stacey, Ms Kate Huntington (Senior Policy Adviser Office of Indigenous Policy Coordination, Commonwealth Government of Families, Community Services and Indigenous Affairs), Mr Robert Tipungwuti and 71 members of the Mantiyupwi traditional Aboriginal

landowning group including Mr Walter Kerinauia and 26 residents of Milikapiti. The minutes of the meeting record detailed discussion about a proposed 99 year lease of land at Nguiu and that all of the traditional owners present at the meeting agreed that they wanted to enter into a 99 year Head Lease for the township of Nguiu.

[17] On 4 May 2006 the Commonwealth Minister for Families, Community Services and Indigenous Affairs, met with the Land Council at the Fishing Lodge at Milikapiti. Also present were several journalists and officials of the Northern Territory Government. The minutes of the meeting record that at about 1.00 pm the Commonwealth Minister for Families, Community Services and Indigenous Affairs, the Honourable Mr M T Brough MP, met with members of the Mantiyupwi traditional Aboriginal landowning group and signed Heads of Agreement for community leasing at Nguiu.

[18] On 27 September 2006 there was a meeting of the Tiwi Land Council at Maxwell Creek. The meeting was attended by Messrs Cyril Kalippa, Matthew Wonaeamirra, Walter Kerinauia, Andrew Tipungwuti, Gibson Farmer, Max Kerinauia, Brian Tipungwuti, Andrew Bush, John Hicks and four visitors. The minutes of the meeting record that the proposed 99 year Head Lease of the township of Nguiu was supported by Mr Walter Kerinauia.

[19] On 14 November 2006 there was a meeting of the Mantiyupwi traditional Aboriginal landowning group at Paru. The meeting was attended by 75

members of the Mantiyupwi traditional Aboriginal landowning group and other Tiwi leaders, representatives of the Tiwi Island Local Government and representatives of the Tiwi Land Council. At the meeting the members of the Mantiyupwi traditional Aboriginal landowning group resolved that:

We the Mantiyupwi Land Owners being present and having declared our full knowledge of the intent and purpose and 99 year duration of the proposed Head Lease between ourselves and the Commonwealth of Australia over that land comprising the Township of Nguiu on Bathurst Island in the Northern Territory of Australia and having ourselves undertaken a valuation of the improved value of that land and having discussed widely and often among ourselves the effects, impact and circumstances of such a Head Lease upon ourselves and the other Aboriginals affected by our decision have this day resolved to instruct our negotiating team to enter into immediate discussions with the Commonwealth [of Australia] to conclude a Head Lease over our land.

[20] On 14 November 2006 a letter was sent from Mr Walter Kerinaiua (Senior) and Mr Wally Kerinaiua (Junior), a member of the Tiwi Aboriginal Land Trust, to the Commonwealth Minister for Families, Community Services and Indigenous Affairs. The letter stated, among other things, that, “We ... want to conclude the negotiations for leasing this land to an authority of the Federal Government. We ... understand that we are leasing it for 99 years.” The letter went on to state that, “We now advise that a negotiating team is ready to enter into final negotiations with you to draft and execute the Head Lease.”

[21] On 28 April 2007 there was a meeting of the Mantiyupwi traditional Aboriginal landowning group at Nguiu. The meeting was attended by 62 members of the Mantiyupwi traditional Aboriginal landowning group. The

minutes of the meeting record that there was a consideration of the Commonwealth Government's proposed 99 year lease and that 61 of the 62 members of the Mantiyupwi traditional Aboriginal landowning group present at the meeting accept in principle the final offer made by the Commonwealth Government for the leasing of the township of Nguiu for 99 years.

[22] On 9 May 2007 there was a meeting of the Mantiyupwi traditional Aboriginal landowning group at Nguiu. The meeting was organised by the Tiwi Land Council. The meeting was attended by adult members of the Mantiyupwi traditional Aboriginal landowning group including a number of senior members of the group. The minutes record amongst other things that the Mantiyupwi traditional Aboriginal landowning group had been negotiating the issue of township leasing at Nguiu for a long time and that they wish to conclude the matter. The outstanding matter was who the lessee was going to be. The members of the Mantiyupwi traditional Aboriginal landowning group present at the meeting on 9 May 2007 resolved that:

We the undersigned individuals and families declare that we are the recognised and lawful Traditional owners of land comprising the Nguiu Township and that our membership of the Mantiyupwi Traditional Owners Group has been recorded with the Tiwi Land Council and is an accurate representation of our membership.

And further that following detailed consultation over two years and with the support of independent legal, administrative and commercial advice, we understand both the nature and purpose of a proposed lease of land over the Nguiu Township;

And have determined this day to accept the final offer made by the Federal Government for the Township leasing of Nguiu for 99 years, and have instructed our representatives on the Tiwi Land Council to direct the Tiwi Aboriginal Land Trust to grant such a lease on the terms and conditions that we have ourselves negotiated with the Federal Government.

[23] On 17 May 2007 there was a members only meeting of the Mantiyupwi traditional Aboriginal landowning group at Nguiu. The meeting was followed by a meeting between the Mantiyupwi traditional Aboriginal landowning group, the Commonwealth Minister for Families, Community Services and Indigenous Affairs and representatives of the Tiwi Land Council. The latter meeting on 17 May 2007 was also open to the Nguiu community generally. The latter meeting was attended by 100 members of the Mantiyupwi traditional Aboriginal landowning group. The minutes of the meeting record that the Mantiyupwi traditional Aboriginal landowning group as a whole had been discussing their interest in entering into a 99 years lease of the township area of Nguiu; that they had advised the Minister for Families, Community Services and Indigenous Affairs of their determination to request the Tiwi Land Council to enter into such a lease on their behalf; and that Mr Walter Kerinaia noted the Mantiyupwi people wish to record their determination together with the Minister for Families, Community Services and Indigenous Affairs.

[24] On 17 May 2007 the Minister for Families, Community Services and Indigenous Affairs and Mr Walter Kerinaia signed a joint acknowledgment

of their agreement in principle for a 99 year lease over the township of Nguiu. The joint acknowledgment states that:

The Mantiyupwi people being the Traditional Owners of the Township of Nguiu in the Tiwi Islands and the Honourable Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs, on behalf of the Australian Government acknowledge that they have reached agreement on the terms and conditions upon which a 99 year lease over the Township of Nguiu will be granted.

[25] On 20 July 2007 the solicitors for the plaintiff wrote to the solicitors for the Tiwi Land Council. In the letter the solicitors for the plaintiff raised his concern about the consultation process that had been undertaken by the Tiwi Land Council.

[26] On 23 July 2007 the solicitors for the Tiwi Land Council wrote to the solicitors for the plaintiff. In the letter the solicitors for the Tiwi Land Council stated that the position of the Tiwi Land Council was that the process of consultation for the Head Lease of the township of Nguiu was ongoing.

[27] On 25 July 2007 the plaintiff commenced this proceeding by way of originating motion. In an affidavit sworn on 25 July 2007, the plaintiff stated that he believed that the Commonwealth Minister for Families, Community Services and Indigenous Affairs would be visiting the Tiwi Islands in the next few days and the main reason for the visit was the execution of the proposed s 19A Aboriginal Land Rights (Northern Territory) Act Head Lease over the township of Nguiu or that there would a

significant formal step towards a direction by the Tiwi Land Council to the Tiwi Aboriginal Land Trust to grant the head lease over the township of Nguiu.

[28] On 26 July 2007 members of the Mantiyupwi traditional Aboriginal landowning group held a meeting at Nguiu. Thirty two people attended the meeting. The majority of the people in attendance were Mantiyupwi traditional Aboriginal landowners. All of the Mantiyupwi traditional Aboriginal landowners present and voting at the meeting resolved that:

We as Mantiyupwi traditional owners of Nguiu understand the nature and purpose of the proposed 99 year lease of the Township of Nguiu and consent to it. This approval is given having considered and discussed the draft lease document dated 23 July 2007 which is necessarily subject to any further amendment which might be made including those which may arise out of the consultation process.

[29] The minutes of the meeting of the Mantiyupwi traditional Aboriginal landowning group held on 26 July 2007, which is annexure JSH52 to the affidavit of Mr Hicks sworn on 1 August 2007 also record that:

Questions were asked regarding the permit system. Bill explained that the position of the Mantiyupwi has always been that the permit system should remain as is, with the permit system in the lease allowing non Tiwi sub lease holders the freedom of access as set out under the existing Land Rights Act. He noted, however, that the Federal Government has announced its intention to amend the Land Rights Act to remove the need for permits in relation to all major towns on Aboriginal land in the Northern Territory, including Nguiu. Bill made it clear that it will be the legislation rather than the head lease that will determine if permits are required or not. Some discussion was held about what could be done to convince the Minister not to scrap the permit system for Nguiu, Walter [Kerinaia] said that the Tiwi land Council strongly supported the current permit system and had made their position clear to the

Federal Government that they did not want the permit system changed. People did not think there was any benefit stopping the 99 year lease going ahead as a protest, as they would lose all of the benefits contained in the agreement and the permit system would be changed anyway.

[30] On 7 August 2007 the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Others Measures) Bill (Cth) passed through the Commonwealth House of Representatives. The Bill is yet to pass through the Senate. The Bill significantly alters the permit system for Aboriginal land. The Explanatory Memorandum to the Bill provides that:

Schedule [4] makes changes to the provisions governing access to Aboriginal land to increase interaction with the wider community and promote economic activity. It removes the requirement for people to obtain permits to enter and remain on certain areas of Aboriginal land, including common areas of townships, road corridors, airstrips and boat landings. It also allows for the placement of temporary restrictions on access to these areas to protect the privacy of cultural events or public health and safety. The Schedule allows government officials and members of Parliament to enter and remain on Aboriginal land when performing relevant duties and for people to attend court hearings on Aboriginal land.

Section 19A and related provisions of the Aboriginal Land Rights (Northern Territory) Act

[31] Pursuant to the Aboriginal Land Rights (Northern Territory) Amendment Act (No 93/2006) the Commonwealth Parliament made significant amendments to the Aboriginal Land Rights (Northern Territory) Act. The Aboriginal Land Rights (Northern Territory) Amendment Act (No 93/2006) was assented to on 5 September 2006. The Amendment Act implemented reforms to the Aboriginal Land Rights (Northern Territory) Act 1976 arising

from three reviews of the Act conducted over the last nine years prior to the enactment of the Amending Act. Among its provisions the Amendment Act made provision for the granting of long term leases over townships on Aboriginal land. The explanatory memorandum stated that the purpose of these provisions was to make it easier for Aboriginal people to own homes and businesses on land in townships. The township lease provisions which commenced operation on 1 October 2006 are largely contained in sections 19A, 19C, 19D, 19E, 20 and 20A of the Aboriginal Land Rights (Northern Territory) Act.

[32] The Aboriginal Land Rights (Northern Territory) Act was further amended by the Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007 which was assented to on 28 June 2007. The Amendment Act enacts, among other provisions, sections 20B to 20S of the Aboriginal Land Rights (Northern Territory) Act. Those sections provide for the appointment of an Executive Director of Township Leasing by the Governor-General. The functions of the Executive Director of Township Leasing are to enter into, on behalf of the Commonwealth, leases under s 19A of the Aboriginal Land Rights (Northern Territory) Act; and to administer leases granted to the Commonwealth under s 19A, including administering subleases and other rights and interests derived from such leases, in accordance with their terms and conditions; and any other functions that are prescribed by the regulations, being functions relating to the matters immediately previously referred to.

[33] Section 19A of the Aboriginal Land Rights (Northern Territory) Act provides as follows:

19A Land Trust may grant headlease over township

Grant of lease

(1) A Land Trust may grant a lease of a township to an approved entity if:

- (a) the Minister consents, in writing, to the grant of the lease; and
- (b) the Land Council for the area in which the land is situated directs, in writing, the Land Trust to grant the lease.

A consent or direction under this subsection is not a legislative instrument.

Land Council direction

(2) A Land Council must not give a direction under subsection (1) for the grant of a lease unless it is satisfied that:

- (a) the traditional Aboriginal owners (if any) of the land understand the nature and purpose of the proposed lease and, as a group, consent to it; and
- (b) any Aboriginal community or group that may be affected by the proposed lease has been consulted and has had adequate opportunity to express its view to the Land Council; and
- (c) the terms and conditions of the proposed lease (except those relating to matters covered by this section) are reasonable.

(3) If a Land Council, in giving a direction for a grant of a lease, fails to comply with subsection (2), that failure does not invalidate that grant unless the approved entity to whom the grant was made procured the direction of the Land Council by fraud.

Term of lease

(4) Subject to subsection (5), the term of a lease granted under this section is 99 years.

(5) If, before the end of the 69th year of the term of a lease (the *original lease*) granted under this section, a Land Trust grants another lease under this section to the same approved entity covering the area of land concerned (whether or not the other lease also covers other land), the original lease ends at the time the other lease takes effect.

(6) A lease granted under this section must not make provision for the lessee to make a payment to a person other than the lessor.

Transfer of lease

(8) A lease granted under this section must not be transferred, except to another approved entity with the written approval of the Minister. An approval is not a legislative instrument.

Lease not to be used as security

(9) A lease granted under this section must not be used as security for a borrowing.

Preserving any existing right, title or other interest

(10) Any right, title or other interest in land the subject of a lease granted under this section that existed immediately before the time the lease takes effect is preserved as a right, title or interest in that land after that time.

(11) If that right, title or other interest was granted by the Land Trust, then, at the time the lease granted under this section takes effect, that right, title or other interest has effect as if it were granted by the approved entity on the same terms and conditions as existed immediately before that time.

(12) If:

(a) subsection (11) applies in relation to a right, title or other interest; and

(b) the lease is transferred in accordance with this section; and (c) the right, title or other interest existed immediately before the time the transfer takes effect;

then, at that time, the right, title or other interest has effect as if it were granted by the transferee on the same terms and conditions as existed immediately before that time.

Subleases

(13) This section does not prevent a sublease of a lease granted under this section.

(14) A lease granted under this section must not contain any provision requiring the consent of any person to the grant of a sublease of the lease.

(15) A lease granted under this section must not contain any provision relating to the payment of rent, or the non-payment of rent, in relation to a sublease of the lease.

[34] Importantly, under s 19A(1) of the Aboriginal Land Rights (Northern Territory) Act an Aboriginal Land Trust may only grant a lease of a township to an approved entity and a Land Trust cannot grant a lease of a township to an approved entity unless the Minister for Families, Community Services and Indigenous Affairs consents in writing to the grant of the lease and the Land Council for the area in which the land is situated directs in writing the Aboriginal Land Trust to grant the lease. Significantly a Land Council cannot direct an Aboriginal Land Trust to grant a lease unless it is satisfied that:

- (a) the traditional Aboriginal owners (if any) of the land understand the nature and purpose of the proposed lease and, as a group, consent to it; and
- (b) any Aboriginal community or group that may be affected by the proposed lease has been consulted and has had adequate opportunity to express its view to the Land Council; and
- (c) the terms and conditions of the proposed lease (except those relating to matters covered by this section) are reasonable.

[35] Before a lease can be granted by an Aboriginal Land Trust, the traditional Aboriginal owners of the land that is the subject of the lease must both understand the nature and purpose of the lease; and, as a group, the traditional Aboriginal landowners must consent to the granting of the lease of the township. Further, the members of any Aboriginal community or group that may be affected by the proposed lease must have been consulted by the Land Council and have been given an adequate opportunity to express their view about any proposed lease to the Land Council.

[36] The Commonwealth of Australia also submitted that the proposed lease over the township of Nguiu is a contract involving the payment and receipt of an amount exceeding \$1,000,000. Therefore the provisions of s 27(3) and (4) and s 23(3) of the Aboriginal Land Rights (Northern Territory) Act apply to the lease of the township of Nguiu. Sections 27(3) and (4) of the Aboriginal Land Rights (Northern Territory) Act provide as follows:

- (3) A Land Council shall not, without the approval of the Minister, enter into, or permit a Land Trust holding land in its area to enter into, a contract involving the payment or receipt of an amount exceeding \$1,000,000, or, if a higher amount is prescribed, that higher amount.

(4) The Minister shall not give an approval under subsection (3) with respect to entering into a contract relating to Aboriginal land unless the Minister is satisfied that the Land Council concerned has, in taking the action that has resulted in the proposed contract, complied with any duty imposed on it by subsection 23(3).

[37] Section 23(3) of Aboriginal Land Rights (Northern Territory) Act provides as follows:

In carrying out its functions with respect to any Aboriginal land in its area, a Land Council shall have regard to the interests of, and shall consult with, the traditional Aboriginal owners (if any) of the land and any other Aboriginals interested in the land and, in particular, shall not take any action, including, but not limited to, the giving of consent or the withholding of consent, in any matter in connexion with land held by a Land Trust, unless the Land Council is satisfied that:

- (a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed action and, as a group, consent to it; and
- (b) any Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its view to the Land Council.

[38] If applicable, the effect of the above provisions of the Aboriginal Land Rights (Northern Territory) Act is that in addition to the requirements of s 19A (2) the Tiwi Land Council could not direct the Tiwi Aboriginal Land Trust to enter into the proposed lease of the township of Nguiu unless it had first obtained the Minister's approval and the Minister could not give his approval unless he was satisfied that the Tiwi Land Council had complied with any duty imposed on it by s 19A and s 23(3) of the Aboriginal Land Rights (Northern Territory) Act.

[39] As to the consent of traditional Aboriginal owners, s 77A of the Aboriginal Land Rights (Northern Territory) Act provides as follows:

Where, for the purposes of this Act, the traditional Aboriginal owners of an area of land are required to have consented, as a group, to a particular act or thing, the consent shall be taken to have been given if:

(a) in a case where there is a particular process of decision making that, under the Aboriginal tradition of those traditional Aboriginal owners or of the group to which they belong, must be complied with in relation to decisions of that kind—the decision was made in accordance with that process; or

(b) in a case where there is no such process of decision making—the decision was made in accordance with a process of decision making agreed to and adopted by those traditional Aboriginal owners in relation to the decision or in relation to decisions of that kind.

The permit system and the amending legislation

[40] In his written submissions dated 9 August 2007 Junior Counsel for the Commonwealth of Australia, Mr Simon Daley, usefully summarised the existing permit system and the proposed amendments to the Aboriginal Land Rights (Northern Territory) Act as follows. Section 70(1) of the Aboriginal Land Rights (Northern Territory) Act creates an offence of entering or remaining on Aboriginal land. Section 70(2A) provides a defence to that offence if the person entering or remaining on the land is performing functions under the Aboriginal Land Rights (Northern Territory) Act or otherwise in accordance with the Act or a law of the Northern Territory.

[41] Sections 5, 5A and 6 of the Aboriginal Land Act 1978 (NT) provide for the issue of permits to a person to enter into and remain on Aboriginal land or a

road. Thus it is not unlawful for a person to enter or remain on Aboriginal land if that person has been issued a permit pursuant to the provisions in the Aboriginal Land Act.

[42] Section 70 of the Aboriginal Land Rights (Northern Territory) Act provides various defences to the offence established under s 70(1). For example, for entry and remaining on land if that is leased under s 19A of the Aboriginal Land Rights (Northern Territory) Act in specified circumstances (see s 70(2C)), or if entry or remaining on the land is due to necessity (see s 70(3)) and for gaining access to land in the vicinity of Aboriginal land in specified circumstances (see s 70(4)).

[43] The proposed amending legislation seeks to extend the range of permissible circumstances where a person can enter and remain on vested Aboriginal land without the need for a permit. The proposed amending legislation will remove the requirement for a person to obtain a permit to enter and remain on certain areas of Aboriginal land, including: Access roads to communities (s 70B); Aerodromes (s 70C); Landing places for vessels (s 70D); Roads within communities (s 70E); and Common areas (s 70F). The net effect is that the changes to the permit system to be effected by the amending legislation are directed to access to townships and common areas within townships

[44] The proposed amending legislation also allows for the placement of temporary restrictions on access to these areas to protect the privacy of

cultural events or public health and safety. In addition, the proposed amendments allow for government officials and members of Parliament to enter and remain on Aboriginal land when performing relevant duties and for people to attend court hearings on Aboriginal land.

[45] The proposed amending legislation will effect the operation of the permit system for the township of Nguiu. Bathurst Island is ‘vested Aboriginal land’ as defined in proposed s 70A(1) and the township of Nguiu falls within the definition of ‘community land’ in proposed s 70A(2) as it is land described in proposed Schedule 7.

The argument of the plaintiff

[46] In support of the application for an interlocutory injunction counsel for the plaintiff, Mr Young, confined his submissions to the relief pleaded in pars 1A and 5 of part two of the amended origination motion. He argued that the purpose for holding the meetings of 9 May 2007 and 26 July 2007 was to obtain the consent of the traditional Aboriginal landowners to the grant of a 99 year lease over the township of Nguiu. The Tiwi Land Council would subsequently be relying on the resolutions of the meetings of 9 May 2007 and 26 July 2007 as constituting the consent of the traditional Aboriginal owners as a group to the granting of a 99 year Head Lease over the township of Nguiu. Mr Young argued that the resolutions of the meetings of 9 May 2007 and 26 July 2007 could not and did not constitute consent of the

traditional Aboriginal owners for the purposes of s 19A(2) of the Aboriginal Land Rights Act (NT).

[47] The resolutions of each of the two meetings was said to be vitiated on the following grounds. First, there were serious irregularities following the meeting of 9 May 2007. The irregularities are that the signatures of the plaintiff and Mr Jeffrey Thomas Simon were placed on the document containing the resolutions of the meeting of 9 May 2007 by persons other than the plaintiff and Mr Simon; the plaintiff was recorded as being present at the meeting in the minutes of the meeting of 9 May 2007; and persons who were not members of the Mantiyupwi traditional Aboriginal landowning group signed their names to the written record of the resolution passed at the meeting; and those in attendance at the meeting were paid \$50 if they signed their name to the written record of the resolution passed at the meeting. Whereas in fact the plaintiff did not attend the meeting of 9 May 2007 and Mr Simon refused to sign the written record of the resolution passed at the meeting of 9 May 2007. Mr Simon was against a 99 year Head Lease of the township of Nguiu being granted to the Executive Director of Township Leasing.

[48] Secondly, the traditional owners were misled by the Commonwealth of Australia and the Tiwi Land Council about the nature and purpose of the proposed 99 year Head Lease of the township of Nguiu. Prior to the meetings of 9 May 2007 and 26 July 2007, representatives of the Commonwealth Government, the Tiwi Land Council and the Nguiu

Negotiating Team distributed explanatory documents which suggest that the existing permit system for entry into Nguuu would remain in place in some form after the 99 year Head Lease is granted by the Tiwi Aboriginal Land Trust to the Executive Director of Township Leasing. Whereas in fact it was the intention of the Commonwealth Government to radically alter the nature of the permit system by passing Amendments to the Aboriginal Land Rights (Northern Territory) Act. As a result of the distribution of the explanatory documents the traditional Aboriginal owners could not and do not understand the nature and purpose of the proposed 99 year Head Lease of the township of Nguuu.

[49] Thirdly, under the Aboriginal traditions of the Mantiyupwi traditional Aboriginal landowning group there is a particular process of decision making that must be complied with when decisions are made by the group about the leasing of their land. Such decisions are made by the male elders of the group after the male elders have deliberated as a group. The resolutions, which were passed at the meetings held on 9 May 2007 and 26 July 2007, were not made in accordance with the Aboriginal traditions of the group. Alternatively, if there is no particular process of decision making under Aboriginal tradition, the decision to grant a Head Lease over the township of Nguuu must be made in accordance with a process of decision making agreed to and adopted by the Mantiyupwi traditional Aboriginal landowning group. The resolutions of the meetings of 9 May 2007 and

26 July 2007 were not made in accordance with a process of decision making that was agreed to and adopted by the group.

[50] Mr Young submitted that the Tiwi Land Council had virtually completed its consultations about the 99 year Head Lease of the township of Nguiu and very soon the Tiwi Land Council would be directing the Tiwi Aboriginal Land Trust to grant the 99 year Head Lease to the Executive Director of Township Leasing. In doing so the Tiwi Land Council would be relying on the resolutions passed by the meetings held on 9 May 2007 and 26 July 2007. As a result the direction of the Tiwi Land Council to the Tiwi Aboriginal Land Trust would not be in accordance with the provisions of the Aboriginal Land Rights (Northern Territory) Act. As a traditional Aboriginal landowner the plaintiff was entitled to have the decision making processes conducted in accordance with the provisions of the Aboriginal Land Rights (Northern Territory) Act.

[51] An interlocutory injunction was required to preserve the status quo because a failure by the Tiwi Land Council to comply with the provisions of s19A of the Aboriginal Land Rights (Northern Territory) Act before giving a direction to the Tiwi Aboriginal Land Trust for a grant of a lease did not invalidate that grant unless the approved entity to whom the grant was made procured the direction of the Tiwi Land Council by fraud.

[52] The plaintiff accepted that he was too impecunious to give a meaningful undertaking as to damages. However, Mr Young submitted that the court

should not require the plaintiff to give an undertaking as to damages as the litigations was being brought in the public interest.

The evidence about the plaintiff's grounds of relief

[53] The following evidence is relevant to the issues that arose during the course of the application for an interlocutory injunction.

[54] The plaintiff, Mr Simon and Ms Teresita Kilapaiyu Puruntuntameri swore affidavits about the irregularities which are said to have occurred following the meeting on 9 May 2007. In his affidavit sworn on 31 July 2007 the plaintiff deposes that contrary to what is stated in the minutes of the meeting of 9 May 2007, he did not attend the meeting of 9 May 2007 and what appears to be his signature under the written record of the resolutions made at the meeting on 9 May 2007, is not his signature.

[55] In his affidavit of 2 August 2007 Mr Simon deposes as follows:

1. ...
2. I was present at a meeting of the Mantiyupwi group of traditional owners held at the Tiwi Island Training Centre on the veranda area on 9 May 2007. My purpose for being there that day was not to attend the Mantiyupwi meeting but to talk to John Hicks about funding for my band for band equipment. Although I was present, I did not listen to what was going on.
3. While I was there I was aware that every one who signed the paper received \$50.00. They went into a room and came out with \$50.00 and they were telling other people as they came out, "If you sign that paper, you will get \$50.00.
4. I went into the room and saw some papers, ... As I was standing there I was approached by Jennifer Clancy and another person (I

can not remember who) and they asked me to sign this paper on the back and said, “If you sign this, we’ll give you \$50.00.” I asked the second person, “What am I signing? What is it about?” They said, by signing this, you agree to the 99 year lease, and I said, “No, I am not signing it “because I am not for it.” (...).

5. ...

6. My name appears on the last line of page three of the papers [containing the resolutions of the meeting]. It is not my hand writing, and I did not write it there.

7. I am the only Jeff Simon on both islands apart from my son, Jeff Junior, who is only five years old and was at school that day.

[56] In her affidavit of 31 July 2007 Ms Teresita Kilapaiyu Puruntuntameri states that 10 of the people whose signatures appear under the written record of the resolutions passed at the meeting on 9 May 2007 are not members of the Mantiyupwi traditional Aboriginal landowning group. Mr Nicholas Kebisi, Ms Carmeita Dulla, Ms Mavis Kerinaiaua, Mr Neville Wommatakimmi, Mr Joachim T (Taracumbie), Mr Gerard T, Mr Jeffrey Simon, Ms Zelic Tipiloura, Mr Fabian U (Ullungura) and Mr Lucai Plakui are not members of the Mantiyupwi traditional Aboriginal landowning group.

[57] Not including the plaintiff and Mr Simon, about 130 people attended the meeting held on 9 May 2007.

[58] The evidence of the plaintiff, Mr Simon and Ms Teresita Kilapaiyu Puruntuntameri about the meeting on 9 May 2007 is disputed by the defendants. In his affidavit of 2 August 2007, Mr Hicks states as follows:

1. ...

2. I have read the affidavit of Adam Troy Kerinaia (Adam), sworn on 31 July 2007.
3. I am able to recall Adam being present at the meeting held at Nguiu on 9 May 2007. It was my normal practice to only record the names of persons present.
4. In addition to the meetings to which he refers in paragraphs 11 and 15 [of his affidavit sworn on 25 July 2007], Adam attended and participated in a meeting on 26 June 2007, which is referred to in annexure JSH48 to my affidavit sworn the 1st August 2007.
5. I have read the affidavit of Jeffrey Thomas Simon sworn 1 August 2007, and in relation to the allegations contained therein concerning the payment of money to him, say that I was directed by the Mantiyupwi leaders present, Robert Tipungwuti and the landowners to draw upon the Land Use Funds for the Mantiyupwi people for the purpose of paying those Mantiyupwi for attending the meeting.
6. I do not know whether he was offered any money but I would be surprised because he is not Mantiyupwi. I am unable to say why his name appears on the list of attendees.

[59] In his affidavit of 2 August 2007 Mr Robert Tipungwuti states as follows:

1. ...
2. I have read the affidavit of Adam Troy Kerinaia (Adam) sworn 31 July 2007.
3. ...
4. I distinctly recall being present at the meeting referred to in paragraph 2 of Adam's affidavit and I recall Adam also being present.
5. I have since spoken to John Hicks, Walter Kerinaia, Cyril Kalippa, all of whom told me and I believe that their recollection is that Adam was present.
6. ...

7. ...

8. I have read the affidavit of Jeffrey Thomas Simon sworn 1 August 2007 and in relation to the allegations therein concerning the payment of money, I directed the secretary of the Land Council, Mr Hicks, to draw funds from the Land Use Fund for the Mantiyupwi people for the purpose of paying those Mantiyupwi people who attended the meeting. This was in accordance with normal practice for such meetings. No offers of payment were made upon condition that people consent to the 99 year head lease.

[60] In her affidavit sworn on 2 August 2007 Ms Jennifer Clancy states that she disagrees with the statements made by Mr Simon in the affidavit that he swore on 1 August 2007. Mr Simon only asked her if he could see Mr Hicks. She had no other discussion with him that day. Ms Clancy specifically denies the conversation referred to in par three of Mr Simon's affidavit.

[61] In his affidavits of 1 August 2007 and 2 August 2007 Mr Walter Kerinauia states that he is the senior male elder of the Mantiyupwi traditional Aboriginal landowning group whose members are the traditional Aboriginal landowners of the township of Nguiu on Bathurst island; Ms Mavis Kerinauia is a member of the Mantiyupwi traditional Aboriginal landowning group; and he does not understand why Ms Teresita Kilapaiyu Puruntuntameri has said in her affidavit that Ms Mavis Kerinauia is not a traditional Mantiyupwi landowner.

[62] Before considering the evidence that the plaintiff tendered about the allegedly misleading explanatory documents I note the following.

Mr Lloyd, who appeared as counsel for the Commonwealth of Australia, stated that the position of the Minister for Families, Community Services and Indigenous Affairs and of the Commonwealth Government is that legislation is to be introduced into the Commonwealth Parliament to amend the operation of the permit system in relation to Aboriginal land in the Northern Territory of Australia. The amending legislation will apply to the Tiwi Islands and to the township of Nguiu regardless of whether the proposed 99 year Head Lease of the township of Nguiu is granted or not. Mr Lloyd told the court that the effect of the amendments to the permit system proposed by the Commonwealth of Australia is that permits would not be required for common areas such as access roads to the township of Nguiu, roads and public places within the township of Nguiu or for people who were legitimate visitors of residential sublessees or for customers or suppliers of businesses whose owners were sublessees.

[63] On 7 August 2007 the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 was passed by the Commonwealth House of Representatives. The ramifications of the Bill are set out in pars [40] to [45] above.

[64] Clause 7 of the proposed Head Lease provides as follows:

7. Access

7.1 General

- (a) The Parties agree that any person wishing to enter the Township must have a Permit except to the extent either:
 - (i) such entry or access is otherwise permitted or authorised by or pursuant to the Land Rights Act; or
 - (ii) such person has a defence under the Land Rights Act to any allegation that such person improperly entered or remained in or on the Township.
- (b) The Parties undertake that they will do all things reasonably necessary to enable the LE to enjoy and exercise its rights and interests under this Lease.
- (c) The Parties undertake that they will do all things reasonably necessary to enable Sublessees, Licensees and Underlessees, to enjoy and exercise their rights, title and other interests under their Township Subleases, Township Licences and Underleases.
- (d) The Land Trust and Land Council agree to grant all necessary Permits under to any persons requesting permits to enter the Land to gain access to the Township for any purposes related to the use or enjoyment or an estate or interest in land within the Township by the owner of the estate or interest, so as to allow those persons to pass across the Land to get to and from the Township (it being recognised that no such permit is required under subsection 70(2C) of the Land Rights Act to authorise a person to enter or remain in or on the Township for any purpose that is related to the use or enjoyment of an estate or interest in the whole or a part of the Township by the owner of the estate or interest).
- (e) For the avoidance of doubt, nothing in clauses 7.1(c) 7.1(d), 10 or 11 absolves any person from any obligation to obtain a Permit in accordance with or under the Land Rights Act or the Aboriginal Land Act.

7.2 Permit System

- (a) In the event that access to the Land is not regulated by the Aboriginal Land Act, the Parties agree that, any

person wishing to enter the Township must have a Permit except to the extent either:

- (i) such entry or access is otherwise permitted by or authorised by or pursuant to the Land Rights Act; or
 - (ii) such person has a defence under the Land Rights Act to any allegation that such person improperly entered or remained in the Township.
- (b) If clause 7.2(a) is applicable, the provisions contained within Part 2 of the Aboriginal Land Act as at the Commencement Date will apply to the issuing of Permits under clause 7.2(a) as if such provisions were still in force (Permit System).
 - (c) If the LE is aware of, or has been informed of a breach of this clause 7.2, then the LE must take all reasonable steps to remedy that breach, which may include informing the relevant authorities.
 - (d) The LE must take all reasonable steps to prevent access to any person who refuses to comply with the Permit System outlined in this clause 7.2.

7.3 Land Trust and Land Council right of access

- (a) In addition to clause 8.5(a), the Land Trust or the Land Council may so often as they reasonably require (at reasonable times and on reasonable notice) enter the Township to make reasonable investigations as the Land Trust or the Land Council may deem necessary for the purpose of ascertaining whether or not there has been any breach of the terms, covenants or conditions expressed or implied in this Lease.
- (b) In addition to their rights under clause 7.3(a), the Land Trust and Land Council are entitled to:
 - (i) enter and use all Designated General Access Areas in the Township; and

- (ii) conduct their legitimate business (except that referred to in clause 7.3(a)) in the Township at any time, subject to any existing right, title or other interest, Right of Occupation, and to the rights of Township Sublessees and Licensees.

7.4 Access to Vacant Land

Aboriginal people referred to in clause 16.1(a)(i) may pass and repass over any Vacant Land.

7.5 Use of Vacant Land for traditional purposes

Aboriginal people who would be entitled to enter and use land in the Township but for this Lease may enter upon and use Vacant Land in accordance with Aboriginal Tradition governing the rights of those Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.

7.6 Access to Sacred Sites

- (a) Notwithstanding any other provision in this Lease, Aboriginals must have free access to Sacred Sites in accordance with Aboriginal Tradition.
- (b) Any person who has the express approval of the Custodian of a Sacred Site to enter that Sacred Site for a purpose permitted by Aboriginal Tradition, must be granted access to that Sacred Site by reasonable means and by the most direct practical route between a place of public access and the Sacred Site (or between Sacred Sites).
- (c) The LE undertakes to do all things necessary to enable those persons entitled to enjoy and exercise their rights and interests under this clause 7.6.

[65] Clause 7 of the proposed Head Lease does not specify what impact the proposed amendments to the permit system for Aboriginal land will have on the general public's rights of entry or access to the township of Ngiuu. Nor

does clause 7 of the Head Lease specify what rights of entry or access will be permitted or authorised by the amendments to the Aboriginal Land Rights (Northern Territory) Act. Currently, the right of entry onto Aboriginal land is determined, in part, by the provisions of the permit system established under the Aboriginal Land Act (NT).

[66] In Pars 63 to 76 of the affidavit of Mr Hicks sworn on 1 August 2007 he states that various documents were published and distributed as part of the explanatory material concerning the proposed 99 year Head Lease for the Township of Nguiu. A number of the explanatory documents are also annexed to the affidavit of Mr Hicks. Counsel for the plaintiff, Mr Young, argued that a number of the documents annexed to the affidavit of Mr Hicks misrepresented what would be the right of entry into the township of Nguiu once the 99 year Head Lease was granted to the Executive Director of Township Leasing.

[67] Mr Young told the court that annexures JSH54, JSH55 and JSH59 to the affidavit of Mr Hicks sworn on 1 August 2007 were misleading. He said that as a result of the publication and distribution of annexures JSH54, JSH55 and JSH59 to the affidavit of Mr Hicks, the members of the Mantiyupwi traditional Aboriginal landowning group could not have understood the nature and purpose of the proposed 99 year Head Lease of the township of Nguiu prior to passing the resolutions at the meetings held on 9 May 2007 and while those who attended the meeting on 26 July 2007 may have been aware of what was the Commonwealth Government's

position, a much smaller number of traditional owners had attended the meeting on 26 July 2007. Any traditional Aboriginal landowners who read annexures JSH54, JSH55 and JSH59 must have thought that entry into the township of Nguiu would be more restricted under the 99 year Head Lease than it will be if the relevant amendments are made to the Aboriginal Land Rights (Northern Territory) Act by the Commonwealth Parliament.

[68] Annexure JSH54 to the affidavit of Mr Hicks sworn on 1 August 2007 is a document published by the Department of Families Community Services and Indigenous Affairs of the Commonwealth Government. The document is entitled “Explaining Township Leasing Northern Territory Aboriginal Land Rights Act”. The second and third parts of the second column on the first page of the document state as follows:

If a Head Lease is in place then the Permit System is relaxed. If someone has a sublease over a piece of land, they are allowed to go there.

People will be able to go to a Township lease area without a Permit if they have a good reason for being on the land, like visiting a friend at their home or going to a business.

[69] In par 65 of his affidavit sworn on 1 August 2007 Mr Hicks states that the document entitled “Township Leasing – What does this mean for you?” was distributed at consultative meetings on 9 May 2007, 17 May 2007, 19 June 2007, 26 June 2007, 5 July 2007 and 19 July 2007. It was also mailed to the relevant mailing list of the Tiwi Land Council and to those people on the Hand Delivery List.

[70] Annexure JSH55 to the affidavit of John Sydney Hicks sworn on 1 August 2007 is a document published by the Office of Indigenous Policy Coordination of the Australian Government. The document is entitled “Questions and Answers on Leasing of Land in Aboriginal Townships”. On page 11 of the document under the heading “What about the Permit System?” the document states:

If a Head Lease is signed, then the Permit System is relaxed. A person would not require a permit to enter or remain on land within the Township where they need to be on that land in order to make use of a sublease. People who have legitimate business to conduct with a sublessee will also be permitted on the land.

This does not make the Township entirely “open”. A permit would still be required for any person who does not have legitimate business in relation to a sublease or for a person who wanted to go places in the town beyond their business related to a sublease.

[71] The document entitled “Questions and Answers on Leasing of Land in Aboriginal Townships” was distributed at the meetings on 9 May 2007, 17 May 2007, 19 June 2007, 26 June 2007, 5 July 2007 and 19 July 2007. The document was also sent to people on the Tiwi Council’s Mailing List and to people on the Tiwi Land Council’s Hand Delivery List.

[72] Annexure JSH59 to the affidavit of Mr Hicks sworn on 1 August 2007 is entitled, “Nguiu Township, Terms and Conditions Proposed, A Booklet for the Further Information of Landowners and People that may be affected by a Lease over the 454 Hectares Comprising the Township of Nguiu”. Paragraphs 2.4(a) and 2.4(b) of the documents state as follows:

2.4 Access to Nguiu

(a) Permits required to enter Nguiu

Unless a person is specifically exempted or authorised by the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), or has a defence under that Act to any allegation that they have improperly entered the township, any person wishing to enter Nguiu must have a permit under the Aboriginal Lands Act 1978 (NT).

The Land Trust, Land Council and Executive Director will do all things reasonably necessary to enable sublessees, licensees and underlessees to enjoy and exercise their rights and interests under their respective subleases, licences and underleases.

The Land Trust and Land Council will grant all necessary permits to any person requesting permits to gain access to Nguiu for any purposes related to the use or enjoyment of an estate or interest in land within Nguiu by the owner of the estate or interest.

(b) Removal of the permit system

In the event that access to Nguiu is not regulated by the Aboriginal Land Act 1978 (NT), any person wishing to enter Nguiu must still have a permit as if the Aboriginal Land Act was still in force as at the commencement of the lease (unless that person is otherwise authorised or has defence under the Aboriginal Land Rights (northern Territory) Act 1976 (Cth)).

[73] The document entitled, “Nguiu Township, Terms and Conditions Proposed, A Booklet for the Further Information of Landowners and People that may be affected by a Lease over the 454 Hectares Comprising the Township of Nguiu”, was distributed by the Mantiyupwi traditional Aboriginal landowning group at the consultative meetings on 19 July 2007 and 26 July 2007.

[74] Ms Teresita Kilapaiyu Puruntuntameri gave evidence about the decision making processes of the Mantiyupwi traditional Aboriginal landowning

group. In her affidavit sworn on 31 July 2007 Ms Puruntuntameri stated that she is a Senior Member of the Timaepatua Family. She is a Member of the Mantiyupwi traditional Aboriginal landowning group. The group is recognised by the Tiwi Land Council as the traditional Aboriginal landowners of the township of Nguiu. She is employed as a supervisor at the Women's Centre at Nguiu. Ms Puruntuntameri is also a member of the Strong Women's Group. The Strong Women's Group is a group of grandmothers. The model of the Strong Women's Group is that its members perform a grandmother's role in the community. They discuss community problems and try to develop programs for healthy families. They also teach culture to the students from the Nguiu School. She stated that the traditional way that the Mantiyupwi traditional Aboriginal landowning group make decisions about things to do at the land is by group decision making. The final decision is made by the elders of the group but usually only the men because the men run the ceremonies. The male elders who make the decisions are the heads of the different families that form part of the Mantiyupwi traditional Aboriginal landowning group. Usually the elders will consult other members of their family group, but they make the actual decision. To make a decision the male elders sit together in a group and talk about whatever is proposed and reach a group decision. The male elders of the Mantiyupwi traditional Aboriginal landowning group are Messrs Walter Kerinaia, Bruno Wilson, Gibson Iltorminni, Philip Patlas, Gordon Pupangaraminni, Raymond (Archie) Timaepatua, Isaac Timaepatua, Terry

Timaepatua, Ian Timaepatua, Cyril Timaepatua, Ian Kerinaiaua, Damascene Orsto, Brian Ullungura and Thomas Monkanomi.

[75] The evidence of Ms Puruntuntameri was disputed by the defendants. In his affidavit dated 2 August 2007 Mr Walter Kerinaiaua, who is recognised by Ms Puruntuntameri as a Senior Member of the Mantiyupwi traditional owner group, stated that the form of decision making referred to in pars 23 to 25 inclusive of her affidavit is adopted on some occasions. On other occasions the Mantiyupwi traditional Aboriginal landowning group approach the task of decision making in a different way. In respect of the proposed 99 year Head Lease of the township of Nguiu the method of decision making is as described in the affidavit of Mr Hick's sworn on 1 August 2007. I take that to mean that the decision making process of the Mantiyupwi traditional Aboriginal landowning group involved the holding of the various meetings referred to in the Affidavit of Mr Hicks sworn on 1 August 2007 and the passing of resolutions at those meetings by a show of hands.

Conclusion

[76] In my opinion the first ground of relief relied on by the plaintiff is inconsequential. There is no evidence to suggest that the signature of the plaintiff was falsely added or indeed added at all to the signatories of those Aboriginal people who endorsed the written record of the resolution passed at the meeting of members of the Mantiyupwi traditional Aboriginal landowning group and others held at Nguiu on 9 May 2007. I accept the

submissions of the Tiwi Land Council that in addition to the plaintiff Alec Kerinauia, Alan John Kerinauia and Ainsley Gerard Kerinauia are adult members of the Mantiyupwi traditional Aboriginal landowning group whose first names begin with the letter “A” and that the signature relied on by the plaintiff could be either the signature of Ainsley Gerard Kerinauia or Alec Kerinauia. In any event the Tiwi Land Council does not assert that the plaintiff signed his name to the written record of the resolution passed at the meeting on 9 May 2007.

[77] I do not accept Mr Simon’s evidence that the people in attendance at the meeting were offered \$50 if they signed their names endorsing the written record of the resolution passed at the meeting on 9 May 2007. His evidence is contradicted by a number of other witnesses and it is not uncommon for Aboriginal people to be paid attendance money for participating in and deliberating at such important meetings concerning their land. It beggars belief that traditional Aboriginal landowners would agree to sign the written record of such a resolution for \$50 if they did not agree with a 99 year Head Lease being granted over the township of Nguiu. While the manner in which the signature that purports to be that of Mr Simon came to be placed on the written record of the resolution passed at the meeting on 9 May 2007 remains unclear and while it may be that nine or 10 of the signatures appearing beneath the written record of the resolution may not be members of the Mantiyupwi traditional Aboriginal landowning group, there is really no dispute that the vast majority of people who attended the meeting on

9 May 2007 were members of the Mantiyupwi traditional Aboriginal landowning group who supported the granting of a 99 year Head Lease over the township of Nguiu. In any event these are all matters which may be taken into consideration by the Minister and by the Tiwi Land Council in determining whether the provisions of the Aboriginal Land Rights (Northern Territory) Act have been complied with prior to giving consent and the necessary direction to the Tiwi Aboriginal Land Trust for the grant of a lease over the township of Nguiu.

[78] Neither can ground two in support of the plaintiff's application for an interlocutory injunction be sustained. By its express terms cl 7 of the draft 99 year Head Lease for the township of Nguiu makes it clear that even after the lease is granted entry into the township of Nguiu would still ultimately be determined by the provisions of the Aboriginal Land Rights (Northern Territory) Act. Clause 7.2 provides for an alternative permit system in the event that the Aboriginal Land Act ceases to regulate the land covered by the lease (in effect by continuing on a de facto basis the arrangements that currently exist under the Aboriginal Land Act). However, whether access by permits is to be required under the Aboriginal Land Act or pursuant to cl 7.2, is subject to the provisions of the Aboriginal Land Rights (Northern Territory) Act (as in force from time to time). The terms of the 99 year Head Lease make it clear that the lease is subject to the ordinary operation of the Aboriginal Land Rights (Northern Territory) Act and the Aboriginal Land Act insofar as those Acts regulate access to land through the issue of

permits. Likewise the provisions of annexure JSH59 to the affidavit of Mr Hicks make it clear that ultimately entry into the township of Nguuu will be determined by the provisions of the Aboriginal Land Rights (Northern Territory) Act.

[79] While there is some force in the argument that the contents of annexures JSH54 and JSH55 do not adequately explain what is likely to be the impact of the proposed amendments to the Aboriginal Land Rights (Northern Territory) Act upon the existing permit system the position was clarified at the meeting of members of the Mantiyupwi traditional Aboriginal landowning group on 26 July 2007 (see par [29] above) and Senior and Junior Counsels appearing for the Tiwi Land Council have told the court that it will now be necessary for the Tiwi Land Council to consult with the traditional Aboriginal landowners and other affected Aboriginal people about the details of the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill (Cth) and the impact that the Bill will have on the permit system if ultimately the Bill is passed by the Commonwealth Parliament.

[80] Significantly, in none of the affidavits tendered in evidence by the plaintiff is there any evidence of any person stating that they were misled by the contents of annexures JSH54, JSH55 and JSH59 to the affidavit of Mr Hicks sworn on 1 August 2007. In his affidavit sworn on 25 July 2007 the plaintiff's concerns are expressed to be about the lack of updated

information as to the impact that the Commonwealth Government's intervention will have on the permits system in the Northern Territory. Implicit in his concerns is recognition that entry to Aboriginal land including the township of Nguiu will ultimately be determined by the legislative actions of the Commonwealth Government. Likewise in par 6 of his affidavit sworn on 31 July 2007 Mr Gawin Tipiloura states, "I believe that mine is an important voice to be heard in the Tiwi Land Council forum on behalf of the younger generation of Tiwi, in particular in relation to the crucial issue of the proposed "township" lease for Nguiu, especially in the light of the declaration by Minister Brough that the permit system will be abolished in all "prescribed communities" (I am informed and believe that Nguiu will be one of them)." There is again recognition that entry into the township of Nguiu will ultimately be determined by the legislative actions of the Commonwealth Government.

[81] As to ground three on which the plaintiff relied in support of the application for an interlocutory injunction, I accept Senior Counsel for the Tiwi Land Council, Mr Douglas Graham QC's, submissions that the provisions of s 77A of the Aboriginal Land Rights (Northern Territory) Act as to the manner in which traditional Aboriginal landowners, as a group, may give their consent are not exhaustive as to the processes which may be adopted by traditional Aboriginal owners for the purposes of giving consent. Nor can the provisions of s 77A be interpreted as requiring a unanimous decision of all of the members of the Mantiyupwi traditional Aboriginal landowning

group: *Alderson and Others v Northern Land Council* (1983) 20 NTR 1. The provisions are facultative.

[82] Overall I am not satisfied on the evidence before the court that there is a sufficient likelihood of the plaintiff succeeding to justify the status quo being held: *Australian Broadcasting Corporation v O'Neill* (2006) 229 ALR 457. Regardless of the statement made from the bar table by Mr Douglas Graham QC, which I accept, that the Tiwi Land Council is still undertaking a consultative process about these matters, there is a strong argument on the available evidence that the Mantiyupwi traditional Aboriginal landowning group has adopted the process of decision making outlined in the affidavit of Mr Hicks dated 1 August 2007 and, as a group, consent to the granting of a 99 year Head Lease over the township of Nguuu: *Ward and Others v Northern Territory of Australia and Others* (2002) 196 ALR 32; *Noble v Murgha* [2005] FCAFC 211. There is a plethora of evidence about extensive consultation and negotiation over a long period of time. Further, the Tiwi Land Council itself has not yet met and determined that the meeting of the traditional Aboriginal landowners on 9 May 2007 and 26 July 2007 constitute consent by the traditional Aboriginal landowners as a group to the grant of a lease over the township of Nguuu. The Tiwi Land Council will not meet to do so until the consultative process is complete.

[83] The balance of convenience is in favour of allowing the Tiwi Land Council to fulfil its obligations under the Aboriginal Land Rights Act. Senior and Junior Counsels for the Tiwi Land Council told the court that the Tiwi Land

Council had not completed its consultative processes and that the Tiwi Land Council shall be consulting with the Mantiyupwi traditional Aboriginal landowning group and other affected Aboriginal people about the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill (Cth) and its ramifications for entry into the township of Nguuu and the permit system. Only after these processes are completed will the Tiwi Land Council then consider the requirements of s 19A of the Aboriginal Land Rights (Northern Territory) Act. While this is being done the plaintiff will be able to consult with all of the male elders mentioned in par [20] of the affidavit of Ms Puruntantameri and he will be able to attend the further consultative meetings and arguably sit as a member of the Tiwi Land Council when it meets to decide whether the Tiwi Land Council should direct the Tiwi Aboriginal Land Trust to grant a 99 year Head Lease over the township of Nguuu.

Order

[84] The application for an interlocutory injunction is dismissed. I will hear the parties further as to costs.