McLennan on behalf of the Jangga People v State of Queensland [2009] ⇐ FCA 236 ⇒ (18 March 2009)

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FEDERAL COURT OF AUSTRALIA

McLennan on behalf of the Jangga People v State of Queensland
⇐ [2009] FCA 236 ⇒

COLIN MCLENNAN AND OTHERS ON BEHALF OF THE JANGGA PEOPLE v STATE OF QUEENSLAND
QUD 6230 of 1998

RARES J
18 MARCH 2009
SYDNEY (VIA TELEPHONE LINK TO BRISBANE)

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY **QUD 6230 of 1998**

BETWEEN:	**COLIN MCLENNAN AND OTHERS ON BEHALF OF THE JANGGA PEOPLE** **Applicant**
AND:	**STATE OF QUEENSLAND** **Respondent**
JUDGE:	**RARES J**
DATE OF ORDER:	**18 MARCH 2009**
WHERE MADE:	**SYDNEY (VIA TELEPHONE LINK TO BRISBANE)**

THE COURT ORDERS THAT:

1. Orders 2 to 9 inclusive made on 5 March 2009 be vacated.
2. By 5 pm on Friday 27 March 2009 the applicant prepare and provide to the State of

Queensland, and any other respondent who so requests, historical and anthropological material on which they seek to rely in support of their claim for a determination of native title having regard to the connection guidelines of the State and s 223 of the *Native Title Act 1993* (Cth) in respect of:

(a) aboriginal presence in the claim area at the assertion of sovereignty;

(b) identification of any society of aboriginal people who had, or are likely to have had, a traditional connection to the claim area at the assertion of sovereignty;

(c) a summary of the locations, dates and circumstances of the eight apical ancestors of the Jangga people;

(d) the genealogy of the apical ancestor of Charlie Tears.

3. By 5 pm on 17 August 2009 the applicant prepare and provide the State, and any other respondent who so requests, all other historical and anthropological material on which they seek to rely in support of their claim for a determination of native title.
4. The applicant pay the costs of the State of Queensland and Mount Isa Mines Limited of 5 March 2009 and the notice of motion filed 17 February 2009.
5. On or before 27 March 2009 the applicant file and serve an affidavit attaching a copy of each contract they have entered into, or which has been entered into on their behalf for the production of the material the subject of order 2 (provided that any such copy may be redacted in respect of matter the subject of any claim for legal professional privilege) and detail in that affidavit all steps they propose to take to ensure compliance with order 3.
6. If the applicant does not comply with each of orders 2, 3 and 5 the matter will stand dismissed on the next day after that order was due to be complied with, unless the Court otherwise orders.
7. On or before 27 March 2009 the Northern Queensland Land Council show cause, by filing and serving an affidavit, why the Court should not order it to pay the costs the subject of order 4.
8. Any party has liberty to apply on three days notice.

THE COURT NOTES THAT:

1. The material provided in compliance with order 3 will be sufficient if it identifies the matters required to establish the applicant's claim to native title without it separately, or when taken together with the material in order 2, needing to be in the form of expert evidence provided that, by 17 August 2009, all the material served pursuant to orders 2 and 3, together, addresses all of the matters relied on by the applicant to satisfy s 223 of the *Native Title Act 1993* (Cth).

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using eSearch on the Court's website.

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Applicant

AND: **STATE OF QUEENSLAND**
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JUDGE: **RARES J**
DATE: **18 MARCH 2009**
PLACE: **SYDNEY (VIA TELEPHONE LINK TO BRISBANE)**

REASONS FOR JUDGMENT

1. This is a motion seeking an extension of the time for the Jangga People, the applicant, to provide proper particulars of how they propose to establish the matters required by s 223 of the *Native Title Act 1993* (Cth).
2. I heard the motion on 5 March 2009 and made an order vacating orders 2 and 3 made on 7 March 2008. Those orders required the Jangga People to provide the particulars by 9 March 2009 and in default of compliance the proceedings would be dismissed. I also made on order extending the time for the provision of those particulars with a number of related orders and gave ex tempore reasons. However, I ordered that the parties have the opportunity to make submissions on the final form of orders which I would make. These reasons are largely a revision of the ex tempore reasons I gave on 5 March 2009, but they also take account of the parties' suggested revisions and the amendments which I have made to the final form of the orders in light of those suggestions. I have also given the reasons (which I made apparent during the course of argument) for the costs orders that I have made.

BACKGROUND

3. The Jangga People have been persistently in default of providing anthropological or other connection material in these proceedings over many years. The proceedings were commenced in 1998 but, to date, no proper particulars, anthropological evidence or connection material has been served on any of the respondents or filed in court. Since the matter came before me for the first time as the docket judge, on 26 September 2006, I have made directions on a number of occasions with a view to providing a timetable for the eliciting of that material.
4. Finally, on 7 March 2008, the State of Queensland sought an order bringing this lamentable state of affairs to a head. During the course of that hearing, the Jangga People were represented by the principal solicitor of the Central Queensland Land Council. But because the Commonwealth Government had proposed the merger of that land council's responsibilities with the Northern Queensland Land Council's responsibilities, the principal solicitor of the Northern Queensland Land Council was present as an amicus curiae by telephone. During the course of that hearing, the State applied for an order that relevant connection material be served within one year. The State had sought that period of 12 months as a reasonable period in which to obtain, essentially, detailed particulars of the way in which the Jangga People put their case for the purposes of establishing their claim to native title having regard to s 223 of the Act. There was then discussion about the transition between the land councils that was proposed to take place on 1 July 2008. Because it was anticipated that the Northern Queensland Land Council might experience unexpected difficulties, when it had a chance to assess the nature of the claim and the efforts which were then underway to meet the orders proposed, the principal solicitor for that land council asked that the orders make provision for the matter to be reported on if need be towards late August or early September 2008. This had regard to the fact that that land council was taking over about 19 active claims and that each of them would require individual assessment.
5. Ultimately, I made orders that the Jangga People prepare and provide to the State, and any respondent who so requested, historical and anthropological material on which they sought to rely in support of their claim for a determination of native title by 9 March 2009 (order 2) and that if they did not comply with that order the matter would stand dismissed unless the Court otherwise ordered (order 3). Order 4 made on 7 March 2008 provided that the Jangga People file and serve an affidavit on or before 30 September 2008 as to their ability to comply with order 2 and, if they considered that they were likely not to comply, to cause the matter to be

relisted. The orders made clear that the material to be provided by 9 March 2009 need not be in the form of expert evidence but, nonetheless, had to articulate the essence of the Jangga People's claim to establish native title.

6. On 29 September 2008, Mr van der Eyk, a solicitor for the Northern Queensland Land Council, swore an affidavit in which he expressed the view that, based on advice by a consultant anthropologist, it was not likely that the Jangga People would be able to comply with order 2 made on 7 March 2008. When the matter came before me on 17 October 2008 I made an order that if the Jangga People wished to vary orders 2 and 3 made on 7 March they should file and serve a notice of motion and any affidavits in support.
7. On 17 February 2009 the Jangga People filed a motion seeking a variation of orders 2 and 3 made on 7 March 2008 to have the time for compliance extended to 26 June 2009. Mr van der Eyk swore affidavits on that day, and 4 March 2009, identifying difficulties that had occurred in the transition period before the North Queensland Land Council assumed responsibility for the matter. Those problems included that the solicitors with carriage of the matter in the Central Queensland Land Council and its anthropologist all ceased their employment there in about April 2008 and that the relevant files were not received by Mr van der Eyk or the Northern Queensland Land Council until about 21 July 2008. He noted that, having reviewed the anthropological materials collected by the Central Queensland Land Council, all of those materials were properly characterised as internal working reports and that they had not been drafted for submission to other parties in the contested litigation. He also pointed to difficulties in, first, engaging anthropologists who were available to undertake work in native title claims and, secondly, in having them comply with timeframes set by court orders.
8. Mr van der Eyk deposed that from October 2008 the North Queensland Land Council expedited its search for a consultant anthropologist who was prepared to agree to review and co-ordinate the existing evidence and to conduct the necessary additional research to be in a position to report within a deadline of February 2009. He said that, ultimately, Dr John Taylor was identified as a senior experienced anthropologist consultant who would be available in early January 2009. In November 2008 Mr van der Eyk met with Dr Taylor who, finally, signed a contract to provide a report by 28 February 2009.
9. As revealed in Mr van der Eyk's affidavits the land council, however, did not require the report to be made in respect of all of the matters necessary to comply with order 2 made on 7 March 2008. Rather, the report was required, first, to focus on whether there was evidence of a pre-sovereignty normative society which could be identified, secondly, to examine the situation of named apical ancestors in the claim at the time of the assertion of sovereignty and, thirdly, to detail specific genealogies. Significantly, Dr Taylor had not been required by his contract at that time or, as I understand the position, to date to report in detail as to the continuity of connection. But he has indicated that he is available to undertake that task.
10. The application for an extension of time was listed on 5 March 2009. Mr van der Eyk gave oral evidence that during an adjournment of that hearing he contacted Dr Taylor to ask him when he would be in a position to deliver the report the subject of his current contract. Dr Taylor told Mr van der Eyk that that will be done by 23 March 2009. Mr van der Eyk said that the Jangga People propose that the contents of that report be considered and discussed internally by the Jangga People and the land council so that it can be submitted to the State by 27 March 2009. Mr van der Eyk also said that Dr Taylor had committed himself to Mr van der Eyk that morning, to report by 31 July 2009 on the balance of the material required to satisfy the orders I made on 7 March 2008. Thereafter, Mr van der Eyk proposed, on behalf of the Jangga People, that they meet and approve that further material, together with any other material necessary to satisfy the order, so that it all be filed by no later than 17 August 2009.
11. The position is that the Jangga People are seeking a further indulgence, extending the time in which to put on anthropological material. When the matter was before me on 17 October 2008 the parties who have been described as the AgForce pastoral respondents, filed a written submission detailing the history from December 2002 of the attempts by the Jangga People to put on anthropological material and evidence. On 3 December 2002 the Court was advised that an anthropologist had been engaged, but would take about three years for the research to be completed. In February 2004 at a case management conference before a Deputy District

Registrar, the Jangga People then suggested that a full connection report and anthropological material was at least 12 to 18 months away, but thereafter, a summary of a report was provided in June 2004. Later, a number of directions hearings occurred before Dowsett J, in which his Honour was advised that an anthropologist had been commissioned, but his report had not been completed. On 12 March 2007 I was informed by the solicitor for the Jangga People that Dr Paul Gorecki had been engaged to prepare a report and would be undertaking fieldwork. Subsequently, in August 2007, Dr Gorecki advised the Central Queensland Land Council that he was no longer available. In November 2007 other anthropologists were engaged. They were no longer available by early 2008.

12. It was in that context last March that the State applied to have made, in effect, a guillotine-type order to bring the proceedings to some form of finality. And, after discussion with the parties, with a view to setting a timetable that could be met and was fair, I made the orders I have described on 7 March 2008.

CONSIDERATION

13. The Jangga People's application for the extension of time is supported by the Isaac Regional Council, the Charters Towers Regional Council, and the Whitsunday Regional Council. Those councils have been working with the Jangga People and the North Queensland Land Council to arrive at indigenous land use agreements. The solicitor acting for the regional councils has deposed that the Jangga People and their land council have been negotiating in good faith, with appropriate professionalism and expedition throughout the mediation process before the National Native Title Tribunal.
14. The State and the AgForce pastoralists do not support the extension. However, they are unable to identify any prejudice that could not be cured by an order for costs in their favour, although the AgForce pastoralists do not seek costs because they are funded by the Commonwealth.
15. It is a truism that justice delayed is justice denied: *R v Lawrence* [1982] AC 510 at 517B per Lord Hailsham of St Marylebone LC. In these and other proceedings I have been managing together with them, a number of persons with knowledge of the facts have passed away. That is not surprising given that it is over 10 years since they were instituted. But it is a sad thing that people who may have been able to give real evidence about connection, or lack of it, will not be able to do so because there has been no proper attention given to getting these proceedings onto a realistic footing of contested litigation by compliance with timetables. The role of the Court is not to punish litigants for failing to comply with orders by denying them the right to have their case heard and determined on the merits in situations where no substantive prejudice is suffered by their opponents.
16. It is a tragedy that, from all that appears on the record of the Court, a claim first made in 1998 has not appeared to progress at all since it was first filed apart from some simple, but formal, amendments of the claim form. This native title litigation is being conducted in a manner that does not regard compliance with court orders, or the advancement of the claim in a coherent and articulated way, as being the normal course of litigation. At the moment, I have no idea whether the Jangga People have a claim or not, although since September 2006, I have been seeking to manage the proceedings to a position where they can be heard and determined, or at least all the parties can be seized of sufficient information to be able to find a means of resolving the matter for themselves. Regrettably, I have failed in that objective because, at every stage, the Jangga People have defaulted.
17. Nonetheless, at the moment, I do not attribute these defaults to being a form of recognition that there really is no case to be brought. But the position is rapidly approaching where such an inference could be drawn because of the Jangga People's persistent failure to bring forward some form of coherent and satisfactory articulation of how they propose to make out their claim for native title in a way that complies with s 223 of the Act.
18. Persistent default in compliance with directions, however, is a well recognised basis on which the Court may dismiss a claim. Then, the person in default will be seen to have failed to comply with the Court's orders to enable the matter to be brought to hearing and determination. Order 35A of the *Federal Court Rules* provides a framework under the rules

where the court can bring about a summary result.

19. Ultimately, the role of the Court is to do justice between the parties: *Queensland v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146 at 154-155 per Dawson, Gaudron and McHugh JJ. I gave anxious consideration during the hearing as to whether I should have maintained the then current order which would have resulted in the proceedings being brought to an end on the following Monday, 9 March 2009. At the end of the day, I concluded that in the interests of justice the Jangga People should have one last and final chance to get their litigious house in order. I did that with considerable reluctance, because one year before I had set a time in which a realistic attempt could have, and should have, been made to obtain the material necessary to provide the other parties to the litigation with sufficient detail to enable them to know what the case being made was.
20. Even at the hearing on 5 March 2009, despite the Jangga People's admission that they would not be able to comply with order 2 made on 7 March 2008, their representatives presented an entirely unsatisfactory state of affairs for the future conduct of the litigation. No person had been then contracted by the Northern Queensland Land Council to produce the balance of the material required to comply with the existing orders after the limited contract with Dr Taylor had been completed. The order I will make will require the Jangga People to file Dr Taylor's limited material or similar material by 27 March 2009. The Jangga People at that time will have to identify definite bases on which the matter will be progressed, failing which, the matter will be dismissed.

COSTS

21. On 5 March 2009, I made orders for the Jangga People to pay the costs of the State and Mount Isa Mines Limited and for the Northern Queensland Land Council to show cause why it should not be ordered to meet those costs on an indemnity or some other basis. Subsequently, the Jangga People submitted that by reason of s 85A of the Act there should be no order as to costs. The State did not seek indemnity costs. Mount Isa Mines has not made any submission.
22. Prior to the commencement of the hearing on 5 March 2009, the Jangga People had not put forward any evidence or timetable that would result in the provision of the particulars they were supposed to supply by 9 March 2009. Initially, the motion sought that the orders for those particulars and the dismissal of the proceedings in default be varied to take effect from 26 June 2009. That was in the context of the evidence that Dr Taylor had only been required to produce a report as to the position up to white sovereignty. The Jangga People and their representative body, the Northern Queensland Land Council, did not suggest that this limited material would be provided to the State and other respondents before 26 June 2009 nor did they provide any evidence that the balance of the material due on 9 March 2009 would be provided by 26 June 2009. This was unsatisfactory for a party in default of the order made one year before.
23. The hearing on 5 March 2009 was protracted because, first, the Jangga People initially resisted providing any time frames in which, ultimately, compliance with the earlier order would occur. Next, they sought an extension of time from 26 June to 17 August 2009. However, had Dr Taylor's report, when received, revealed that they had no claim based on the position at white sovereignty the proceedings would require immediate attention. The Jangga People would then either have to seek a further extension of time (since a timetable set on the presumption that Dr Taylor's initial report were supportive of the existence of the first stage of proof in establishing their claim would no longer be apposite to enabling full particulars to be given by 17 August 2009) or to bring the proceedings to an end (if the Jangga People accepted the report's findings or the respondents decided to oppose further delay and the Court accepted that contention).
24. Again, given that, on the oral evidence before me, Dr Taylor's report will now be able to be finalised by 23 March 2009, this proposal was inappropriate. The Jangga People had chosen to seek a limited report from him knowing that, had it been provided in final form before 9 March 2009, they still would not have complied with the earlier orders. In that context, if they considered having a limited report useful they advanced no reason why, given its subject

matter and the circumstances, it should not be provided to the State and other respondents without delay. However, during the hearing they resisted, for a time, even that, until they eventually proposed orders of the nature made today for the provision of the outstanding particulars.

25. A properly prepared and presented application for an extension of time would have addressed a concrete and realistic proposed timetable made after proper enquiries of Dr Taylor to cure the default, particularly having regard to the consequence of the application failing. The respondents would then have been able to assess whether the Jangga People and the Northern Queensland Land Council had taken appropriate steps to ensure compliance, albeit late, with their obligation to identify the basis for the claim. The State and Mount Isa Mines, who resisted the application, were entitled to do so because the relief sought in the motion and the evidence in its support served on them before 5 March 2009 did not disclose a proper basis to vacate the orders which would have resulted in the proceedings being dismissed on 9 March 2009. And the hearing was protracted by the Jangga People's unreasonable failure for a considerable period to propose an appropriate timetable.
26. I am of opinion that the notice of motion was filed far later than it should have been. It was obvious to those representing the Jangga People by, at least, late September 2008 that not only, would they not comply with the order to file material by 9 March 2009, but they had not even engaged an anthropologist to begin work. And, in late November and early December 2008, the scope of work discussed with Dr Taylor and given to him when he was engaged was clearly inadequate for the Jangga People to comply with the order. There was then no prospect that the Jangga People would file the requisite material in time. The motion itself sought an extension to 26 June 2009. But, even that date had been given no proper consideration. Only after I suggested to Mr van der Eyk that he seek instructions as to when Dr Taylor could prepare a final report did he do so. That led to him seeking the longer timetable that I propose to order.
27. This was not a satisfactory way to conduct this litigation, particularly given the nature of the orders made on 7 March 2008. Having regard to the circumstances above, I am of opinion that in the exercise of my discretion under s 85A(1) of the Act and s 43 of the *Federal Court of Australia Act 1976* (Cth) I should order the Jangga People to pay the costs of the State and Mount Isa Mines in respect of the notice of motion. I discussed the principles applicable to the exercise of the discretion to order costs in *Birri Gubba (Cape Upstart) People v State of Queensland* [2008] FCA 659 at [20]- [25]. And, I consider that it is appropriate to require the Northern Queensland Land Council to show cause why it should not be ordered to pay those costs on party/party basis having regard to its apparent (on the material before me) responsibility for the costs I have ordered the Jangga People to pay: *Knight v FP Special Assets Ltd* [1992] HCA 28; (1992) 174 CLR 178.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 18 March 2009

Solicitor appearing for the Jangga People: Mr P van der Eyk

Solicitor appearing for the State of Queensland: Ms K Snape

Solicitor appearing for Whitsunday Regional Council, Issac Regional Council, Charters Towers Regional Council, Ergon Energy Corporation Limited and QLACCA:	Mr S Sivarajah
Solicitor appearing for Mt Isa Mines Limited and Colinta Holdings Pty Ltd:	Mr S Cobb
Solicitor appearing for AgForce Pastoralists	Mr M Boge
Date of Hearing:	5 March 2009
Date of Judgment:	18 March 2009
