

**Parliamentary Joint Committee on
Native Title and the Aboriginal and
Torres Strait Islander Land Fund**

**Indigenous Land Corporation Annual
Report 1999-2000**

Submission No: 8

18 June 2001

Mr Llewellyn Stephens

Barrister-at-Law

Level 16, M.L.C. Centre

239 George Street

Brisbane QLD 4000

☎ 07 3229 4035 📄 07 3229 2699

E-mail:

LLEWELLYN STEPHENS
B.Com., LL.B. (Qld), LL.M. (Lond)
Barrister-at-Law (Qld and NSW)

Tel: (07) 3229 4035

Level 16, M.L.C. Centre,
239 George Street,
BRISBANE Q 4000.

DX: 40153
Fax: (07) 3229 2699
(07) 3221 4202

18 June, 2001

Committee Secretary,
Parliamentary Joint Committee on Native Title
and The Aboriginal and Torres Strait Islander Land Fund
Parliament House,
Canberra,
ACT 2600

Attention: Peter Grundy

RE: Public Hearing 21 May 2001 - Adverse Mentions

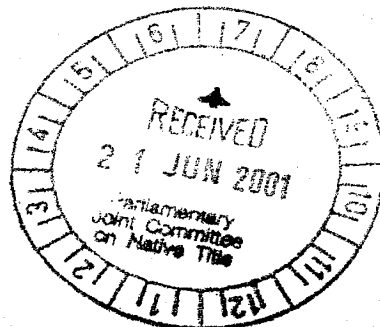
I refer to your letter of 29 May 2001 and to the enclosed transcript. I was referred to NT 80 and, presumably, the remark:

“Mr SNOWDON- I have read through the judgment. I would think, as a novice, reading this judgment, you would have to say that whoever gave you that advise was on another planet.”

Ordinarily an uninformed and intemperate remark such as that made by Mr Snowdon would not merit any response.

However, as I have been invited to respond by the Joint committee of the Senate of the Commonwealth of Australia, I do so.

In my opinion Sharon Firebrace had good prospects of success in her application for an injunction. I enclose a copy of the submissions made to the court.



With Compliments,

Llewellyn Stephens
LLEWELLYN STEPHENS

**IN THE FEDERAL COURT OF AUSTRALIA
AUSTRALIAN CAPITAL TERRITORY
DISTRICT REGISTRY**

NUMBER: A 46 of 2000

SHARON LYNETTE FIREBRACE

Applicant

AND

THE INDIGENOUS LAND CORPORATION

First Respondent

AND

JOHN WILSON

Second Respondent

AND

STEPHEN SKEHILL

Third Respondent

SUBMISSIONS OF THE APPLICANT

MATERIAL

- | | | |
|----|---|-----------------|
| 1. | Application | 21 June 2000 |
| 2. | Statement of Claim | 9 August 2000 |
| 3. | Notice of Motion | 21 August 2000 |
| 4. | Affidavit Sharon Firebrace | 7 August 2000 |
| 5. | Affidavit Fraser Power | 8 August 2000 |
| 6. | Affidavit Sharon Firebrace | 21 August 2000 |
| 7. | Affidavit of Fraser Power | 31 August 2000 |
| 8. | Statement of Facts Issues and Contentions Against the First Respondent | 30 August 2000. |

1. The Federal Court has jurisdiction to hear these matters under s 39B of the Judiciary Act 1903 (Cwth.), s 8 The Administrative Decisions, (Judicial Review) Act 1977 (Cwth.) The Federal Court of Australia Act

1976 (Cwth.) and accrued or ancillary jurisdiction of the court; *New South Wales Aboriginal Land Council and Tasmanian Aboriginal Centre Inc. v ATSIC* (1995) 131 ALR 55.

2. The enquiry by its terms is directed towards a finding of misbehaviour, which will result in the termination of appointment under s 192 H . The Applicant has a real interest in the proceedings and the rules of natural justice apply. *Gaisford v Hunt and Commonwealth of Australia* [1996] 887 FCA 1. *Ainsford v CJC* [1992] 175 CLR 564, 577.
3. The applicant seeks to restrain Stephen Skehill from proceeding with his enquiry because of actual and or apprehended bias and for breach of the rules of natural justice. *Carruthers v Connolly* (1998) 1 Qd R 339. *Gaisford v Hunt and Commonwealth of Australia* [1996] 887 FCA 1 *The Queen v ABC ex parte Hardiman* [1980] 144 CLR 13.
4. The Third respondent has offered an undertaking not to complete his report until 11 September 2000. If the Third Respondent will not offer such an undertaking until the conclusion of this action then the Applicant seeks an interlocutory injunction. The principles applicable were stated by Gleeson C.J. in *Re Minister for Immigration and Multicultural Affairs Ex parte Fejzullahu* [2000] HCA 23 as follows:

“ The principles according to which such a power will be exercised are well established. As Mason ACJ pointed out in *Castlemaine Tooheys Ltd v South Australia* [2], the principles which are to be applied in the exercise of the discretionary power to grant or refuse an interlocutory injunction in private law cases are also applied in public law cases, notwithstanding that different factors may arise for consideration in giving practical effect to those principles. The applicants must show that there is a serious question to be tried in the principal proceedings, and that the balance of convenience favours the granting of an injunction.”

Serious Question to Be Tried

5. The question to be tried is whether Stephen Skehill should be disqualified for actual and apprehended bias touching the matters upon which he is required to investigate and report and for failing to accord natural justice and procedural fairness to the applicant.
6. Bias or the apprehension of bias may be found or inferred from the following facts matters and circumstances.
 - (a) The circumstances of his appointment.
 - i. Affidavit Sharon Firebrace 7 August, 2000 Paragraph 22,23 24, 25, 26, 27, 28, 27, 28 29, 30 to 38 and the exhibits.
 - ii. Affidavit Sharon Firebrace 21 August 2000 Paragraph 13 and exhibit SF1.
 - iii. Affidavit Stephen Skehill 23 August 2000 Paragraph 2, 9 to 18 and exhibit SF1.
 - iv. The evidence leads to the conclusion that the Minister wants to remove the Chairman from the board of the ILC because he considers it is not functioning properly. He cannot remove her on that ground but only on the ground of misconduct after consultation with ATSIC. S 192H Aboriginal and Torres Strait Islander Commission Act 1989.
 - v. Graeme Campbell says that the man who nominated Mr. Skehill Mr. Max More-Wilton knew the result of the enquiry on 13 June 2000 "she will be done like a dinner". This evidence is uncontradicted.
 - vi. The inquiry, though it has far reaching consequences is completely informal, does not have power to take evidence on oath, permit cross-examination or even the observation of the evidence gathering procedure. The minister has the power to commission a more formal enquiry. He did not. He commissioned an enquiry that did not have the power to accord the Applicant procedural fairness in circumstances which will deprive the Applicant of her position as

Chairperson of the Indigenous Land Council. *Laws v ABT* [1990] 170 CLR 70 at 90.

- vii. The terms of the enquiry are directed at Sharon Firebrace's conduct almost exclusively.
 - viii. The inquiry was commissioned after specific allegations were made by the board which have never been disclosed to her. See Ex 1, 2 and 3 to affidavit of Coleman.
 - ix. Mr. Stephen Skehill is not a person who is independent. He has spent 27 years as an employee of the Commonwealth who appointed him.
 - x. Mr. Stephen Skehill by being a protagonist in these proceedings, making submissions and filing an affidavit in these proceedings directly contradictory of the plaintiffs affidavit and submissions has destroyed the impartiality which he is expected to maintain in subsequent proceedings by him. *The Queen v ABC ex parte Hardiman* [1980] 144 CLR 13.
- (b) At an early stage of his enquiry the said Steven Skehill expressed a firm view to the applicant that the suspension of Mr. Wilson was wrong and has prejudged the issue of misconduct. *Gaisford* (supra). *Carruthers* (supra).
- (c) The "Draft Factual Chronology" of 27 July 2000 is biased and selective in its reporting of facts, reports irrelevant facts, and contains some 45 pages of random insults, hearsay and opinion and is biased towards a finding of misconduct against the Applicant.
- (d) The "Draft Factual Chronology" of 27 July 2000 does not consider the conduct of other directors other than in the context of the biased and selective reporting on the Chairperson and contains random insults, hearsay and opinion and is biased towards other directors.

- (e) Mr. Stephen Skehill has ignored the fact that the board wrongfully and contrary to statute purported to pass a resolution standing the chairperson down.
 - (f) Mr. Stephen Skehill has ignored the conduct of Director Baffsky directing the said John Wilson in refusing to co-operate with the Chair and in wrongfully withdrawing her entitlements.
 - (g) Mr. Stephen Skehill has ignored the fact that the said John Wilson and Director Baffsky have altered the terms of reference of the Street inquiry.
 - (h) Mr. Stephen Skehill has ignored the fact that the said Director Baffsky has recommended the appointment of Sir Laurence Street, has conferred with Sir Laurence Street in private about the staffing and conduct of his enquiry despite the fact that the conduct of Director Baffsky was to be a subject of the enquiry.
 - (i) Mr. Stephen Skehill has ignored the fact that the said John Wilson was not validly appointed and did not have a contract of employment or an instrument of appointment at the time and was not an employee or an acting employee when he was stood down by the chairperson.
 - (j) By not affording the Applicant natural justice in the conduct of the enquiry he has demonstrated bias against her.
7. Secondly, the applicant has been denied natural justice in the conduct of the enquiry and in particular:
- (a) The enquiry is flawed from the outset because Mr. Skehill does not have the powers to provide natural justice to the applicant. She is to be tried and convicted of misbehavior and sacked from one of the most important positions under the Aboriginal and Torres Strait Islander Commission Act 1989 by an enquiry that does not have the power to accord procedural fairness. Mr. Skehill does not have the power to charge the plaintiff, summons witnesses, apply the rules of evidence, take evidence on oath, permit cross-

examination and re-examination, permit legal representation and to allow legal representatives to hear the evidence or the submissions of others to him or to make submissions on fact and law or submissions in reply. *Laws v ABT* [1990] 170 CLR 70 at 90

- (b) She has not been informed of the nature of the charges that are brought against her in an investigation that is to result in a finding of misbehavior against her.
- (c) she has not heard any of the evidence of the witnesses;
- (d) she has not had an opportunity of cross-examining witnesses;
The Queen v ABC ex parte Hardiman [1980] 144 CLR 13.
- (e) she has been given insufficient time and resources to investigate and respond to the "Draft Factual Chronology" containing some 45 pages;

- 8. The Applicant has been denied funding for legal representation. *Detrich v The Queen* [1992] 177 CLR 293

Balance of Convenience

- 9. As the case against the Third Respondent is strong and the balance of convenience favours the granting of an injunction.
- 10. It might be convenient to the minister to appoint a biased inquirer but it could not be in the interests of justice to permit a biased inquirer to continue.
- 11. The subject matter of the litigation will be lost if Mr. Skehill is not restrained because he will certainly make a finding of misbehavior and the minister will remove the Applicant before this litigation is concluded.
- 12. The ILC operations have not been affected:

- (a) The ILC board has resolved on 6 June 2000: "to function as normal during the period of review.... The Board will not move into 'caretaker' roll during the period of review. The Board should get on with progressing the business of the ILC"
- (b) No effect is shown on the staff
- (c) The affidavit of Coleman Para 15 alleging some lack of confidence in the staff is opinion evidence and inadmissible.
- (d) The purported Resolution of 10 August 2000 has not been proved. The Minute of meeting is not produced. The deponent is not entitled to give secondary evidence of a document. *Mack v Lenton* 1993 32 NSWLR 259.
- (e) Despite demand the ILC have refused to produce a copy of the minutes of meeting of 10 August 2000 to the Applicant.
- (f) The alleged resolution would be ultra-vires the board because it is in conflict with its statutory duties and in particular, 191N (4) and (5) and 191 Q.
- (g) Further the purported resolution acknowledges that continuing policy development work is being conducted.
- (h) The resolution a refer to policy work where no decision of the board required
 - i. For the National Indigenous land strategy by May 2001
 - ii. Amendments to Part IV A Spring 2000
 - iii. Budget for 2000/2001 No time limit specified.
- (i) The only likely change in the board would not change the majority position. All resolutions have been carried unanimously.
- (j) No sufficient connection has been shown between the inquiry and the purported resolution. In particular it is not shown that there is any likelihood the appointment of a new chairman in some several months time should prevent the adoption of the proposed 2000/2001 budget. The Skehill Inquiry is not due till September 2000. The Minister must consult with ATSIC. The decision might

be subject to further litigation. There is no evidence of the time to be taken on the Appointment process. There is no evidence that the change will occur in the period 2000/2001. Therefore it cannot be shown that any delay in that board decision would result in a different decision.

- (k) The purported resolution is self-inflicted for the purpose of showing detriment. A party is not permitted to create its own detriment.
- (l) The Applicant is not seeking to restrain the enforcement of a statute.

- 13. The ILC has continued to operate during this enquiry. See Minutes of meeting Exhibited to affidavit of Fraser Power 31 August 2000. The First and Second respondents have refused to produce the minutes of 10 August 2000.
- 14. The Enquiry into Roebuck Plains and Cardabia Station is not related to the Enquiry of Mr. Skehill and an independent enquiry should be undertaken immediately.

The Joinder of the Minister as a Defendant

- 15. The Applicant objects to the joinder of the Minister as a Defendant only on the ground of costs. If he gives an undertaking not to seek costs against the applicant in any event then the applicant has no objection to his joinder. The minister is not a necessary party as no relief is sought against him.
- 16. The Decision of *News Limited v ARL* [1996] 21 ACSR 635 is distinguishable as there the orders set aside were made with respect to players who were not parties.