according to each State's Associations Incorporation legislation for incorporated, not-for-profit bodies. Penal provisions apply for non-compliance. Common law fiduciary duties for committee members also apply (for both incorporated and unincorporated bodies). The main ones are:

- the duty to exercise due care, diligence and skill,
- the duty to act in good faith,
- the duty to exercise powers for proper purpose,
- the duty to avoid conflicts of interest.

- Ensure that there is adequate insurance to cover all operations and activities of the Centre, including actions of committee members. Different types of insurance are available for incorporated associations and their management committees. Insurance can protect a Centre against losses incurred from a breach of duty by a committee member, including fraudulent or dishonest behaviour. It can also protect individual committee members against personal liability in certain circumstances (for example, directors and officers liability insurance). But such insurance policies covering all reasonable contingencies can be hard to find and can be very expensive.
- Members of the management committee should be in clear agreement about the mission, goals and values of the Centre.
- Management committees should renew themselves regularly. It is advisable to have one or two new committee members elected at each annual general meeting.
- Community Legal Centre management committees must have enough members to share the workload, in tough times as well as easy times. Committee members must not only have the requisite knowledge and skill to manage, they must also have the commitment and time to see that all the bases (of good management and risk) are covered. It is easy to underestimate the commitment and time which may be required of CLC management committees to do their job properly.

And, last of all, good luck!

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NATIVE TITLE

The Larrakia case

ANNEMARIE DEVEREUX discusses the latest High Court native title case ruling out the survival of native title on freehold land.

> *'Native title is extinguished by a grant in fee simple. This statement of law must be taken as settled. It does not admit a qualification.'*

In these words Justice Kirby pithily summarises the effect of *Fejo and Mills v Northern Territory & Oilnet* (High Court of Australia, 10 September 1998) (the *Larrakia* case). The High Court was unanimous in holding that where there has been a valid grant of fee simple over land, native title is thereby extinguished. Such extinguishment is not a temporary suspension of native title but an extinguishment in perpetuity. Whilst the conclusion of the *Larrakia* case is not surprising given the obiter comments of several judges in *Mabo (No 2)*[1] and the judgments of the Court in *Western Australia v the Commonwealth*[2] and the *Wik* cases,[3] it is significant in settling the question definitively and for its rejection of arguments concerning suspension of native title.

The facts giving rise to the *Larrakia* case were as follows. Part of the land over which the Larrakia people claimed native title and the protection of the *Native Title Act 1993* involved land which had been granted in fee simple in 1882. The Commonwealth acquired the land in 1927 for the purposes of establishing a quarantine station. A quarantine station was established in 1935, though in 1956, the land was used as the site for a leprosarium. The land subsequently fell into disuse and there were no dealings with the land until the Northern Territory Government subdivided the land in 1996 and began granting leases over individual parcels. The leases were not merely set term/purpose leases, but allowed the lessee, provided certain terms were met, to surrender the lease and acquire the fee simple interest in the land. One of the leases was granted to Oilnet, the second respondent in the case. Jim Fejo and David Mills (on behalf of the Larrakia people) lodged a native title application over the land leased to Oilnet in December 1996. On 1 April 1997, the application was accepted by the Native Title Tribunal Registrar.[4]

The proceedings were complicated to some extent by the commencement of action by the appellants of two proceedings in the Federal Court of Australia seeking a number of declarations. These declarations included declarations that 'native title exists' in relation to the Oilnet leased area, that 'the Larrakia people are the holders of that native title' and that, before it could grant a valid lease to Oilnet, the Northern Territory was obliged by the Act either to negotiate with the Larrakia people or to compulsorily acquire their native title. The appellants also sought injunctions, both interlocutory and permanent, restraining Oilnet from undertaking or continuing to 'undertake any development of, or the erection of improvements on or affecting' the land, the subject of those leases, and restraining the Northern Territory from accepting a surrender of the Crown leases that it had granted to Oilnet or exchanging those leases for a freehold title. The Northern Territory applied for orders dismissing the proceeding on the grounds that no reasonable course of action was disclosed and that the proceeding was frivolous, vexatious or an abuse of process. On 13 February 1998, the appellants applied by notice of motion for interlocutory injunctions.

On 27 February 1998, O'Loughlin J refused the application for interlocutory injunctions and dismissed the proceeding on the basis that native title could not exist over the land given the prior grant of fee simple. The appellants appealed to the Full Court of the Federal Court. The first ground of the appeal concerning the existence of native title was removed to the High Court. In the High Court proceedings, there were two central questions:

- was it appropriate for the Court to be determining the existence of native title at this stage of the proceedings given the statutory regime for determination of native title ('the procedural question'); and
- what was the effect of the 1882 grant of fee simple and the later acquisition of the land by the Commonwealth?

The High Court's conclusions were adverse to the appellants on both points. In the main judgment (authored by Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ), the Court concluded that it was not premature for the Federal Court to consider the question of the existence of native title in deciding whether or not to grant interlocutory injunctions. The court considered that the situation was distinguishable from the *Waanyi*[5] case since the application for native title had been accepted and the activities surrounding the Oilnet lease did not give rise to a right to negotiate under the *Native Title Act 1993*. The processes of the Act would be followed, including any applicable rights to mediation. Thus the Court considered that the injunction being sought was not to protect procedural rights under the *Native Title Act 1993*, but to protect the claimed native title. In such circumstances, it was appropriate that the Federal Court consider the strength of the claim to native title (whether they had a sufficiently arguable case) in deciding whether to grant an interlocutory injunction. The judgment of Kirby J was to similar effect, though he was prepared to concede a greater role for injunctions where necessary to protect the statutory rights of mediation.

On the substantive point, that is the effect of a grant of fee simple on native title, the Court's judgment is clear. Native title is extinguished by a grant in fee simple. It is extinguished because the rights that are given by a grant in fee simple are rights that are inconsistent with native title holders continuing to hold any of the rights or interests which together make up native title. In reaching this conclusion, the Court referred to orthodox definitions of fee simple, that it confers 'the lawful right to exercise over, upon, and in respect to, the land, every active ownership which can enter into the imagination'.[6] Whilst native title has its origin in indigenous traditional law, continuing existence of rights in customary law is not a sufficient basis for recognition of native title by the common law.

The Court rejected the appellants' argument that native title had been merely suspended by the grant of fee simple and was able to be resurrected at a later date (for example, when the land became effectively vacant Crown land).[7] Such an argument was characterised by the Court as seeking to convert the fact of continued connection with the land into a right to maintain that connection. Instead, the common law recognised the right of the sovereign to extinguish native title and established separate tests for continued existence of native title. Analogies put forward by the appellants between property rights existing within the common law system such as easements and profits a prendre were rejected with the Court concluding that different considerations applied where one is dealing with the intersection between rights owing their origin to statute or the common law and rights emanating from a different tradition. Significantly for other cases, the Court also showed marked caution with the use of authorities from other jurisdictions including Canada and the United States, noting the effect of historical considerations on legal reasoning and conclusions.

In his separate judgment of some length, Kirby J reached the same conclusion on the substantive point, but examined in greater detail the legal policy questions and the validity of the grant of fee simple raised by the case. The appellants had raised in evidence limitations within the Letters Patent concerning the establishment of South Australia. Kirby J found that such Letters Patent did not confine actions outside their geographical reach (the subject land being outside the realm of the then boundaries of South Australia) and that subsequent Letters Patent governing the Northern Territory did not contain limitations regarding aboriginal rights. Furthermore, the alienation of land was as a result of statutory grants of power rather than the prerogative such that limitations in the Letters Patent would not impinge upon grants within the terms of the statute. In considering the effect of fee simple grants on native title, Kirby J considered that 'legal history, authority and principle' combined to make irreversible extinguishment of native title the result.

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References

1. (1992) 175 CLR 1 at 68-9 per Brennan J, 89-90, 95 and 110 per Deane and Gaudron JJ.
2. (1995) 183 CLR 373 at 439 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
3. *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84 per Brennan CJ.
4. The application was accepted pursuant to section 63 of the *Native Title Act 1993*.
5. *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595.
6. *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 42; quoting Challis's *Real Property*, Third Edition (1911) at 218.
7. The appellants had relied heavily on suggestions to this effect in the judgment of Toohey J in *Wik* (1996) 187 CLR 1 at 108.