

## FEDERAL COURT OF AUSTRALIA

### Wavehill (on behalf of the Wubalawun Group) v Northern Territory of Australia [2018] FCA 1602

File number: NTD 49 of 2011

Judge: **WHITE J**

Date of judgment: 24 October 2018

Catchwords: **NATIVE TITLE** – consent determination – requirements under s 87 of the *Native Title Act 1993* (Cth) – agreement of parties – determination of native title by consent.

Legislation: *Native Title Act 1993* (Cth) ss 55, 56, 57, 66, 87, 87A, 94A, 223, 225

Cases cited: *King on behalf of the Eringa Native Title Claim Group v State of South Australia* [2011] FCA 1386; (2011) 285 ALR 454  
*Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58; (2002) 214 CLR 422  
*Munn (for and on behalf of the Gunggari People) v State of Queensland* [2001] FCA 1229; (2001) 115 FCR 109  
*Risk v Northern Territory of Australia* [2006] FCA 404  
*Smith v State of Western Australia* [2000] FCA 1249; (2000) 104 FCR 494

Date of hearing: 24 October 2018

Registry: Northern Territory

Division: General Division

National Practice Area: Native Title

Category: Catchwords

Number of paragraphs: 26

Counsel for the Applicant: Mr D Spicer-Harden

Solicitor for the Applicant: Northern Land Council

Counsel for the Respondent: Ms E Furlonger

Solicitor for the Respondent: Solicitor for the Northern Territory

## ORDERS

NTD 49 of 2011

**BETWEEN:**                    **JIMMY WAVEHILL (ON BEHALF OF THE WUBALAWUN GROUP)**  
Applicant

**AND:**                         **NORTHERN TERRITORY OF AUSTRALIA**  
Respondent

**JUDGE:**                     **WHITE J**

**DATE OF ORDER:**    **24 OCTOBER 2018**

### THE COURT ORDERS THAT:

1.     There be a determination of native title in the matter NTD49/2011 in the terms of the determination set out below.
2.     The native title is not to be held on trust.
3.     An Aboriginal corporation whose name is to be provided within 12 months, or such further time as the Court may allow, is:
  - (i)     to be the prescribed body corporate for the purposes of s 57(2) of the *Native Title Act 1993* (Cth) (the NT Act); and
  - (ii)    to perform the functions outlined in s 57(3) of the Act after becoming a registered native title body corporate.
4.     There be no order as to costs.
5.     The parties have liberty to apply for the following purposes:
  - (i)     to establish the existence of any public work (including any adjacent land or waters), as defined in the NT Act, that is said to fall within para 7 of Schedule D to this determination;
  - (ii)    to establish the precise location and boundaries of the public works and adjacent land and waters identified in relation to any part or parts of the determination area referred to in Schedule D to this determination.

**BY CONSENT THE COURT ORDERS AND DETERMINES THAT:**

**Existence of native title (s 225)**

1. The determination area is the land and waters described in Schedule A and depicted on the map comprising Schedule B (**the determination area**).
2. Native title exists in those parts of the determination area identified in Schedule C.
3. Native title does not exist in those parts of the determination area identified in Schedule D.
4. In the event of any inconsistency between the description of an area in Schedule A and the depiction of that area on the map in Schedule B, the written description will prevail.

**Native title holders (s 225(a))**

5. The native title is held by the persons described in Orders 6 - 9.
6. The land and waters of the determination area comprise part of the estate held by the members of the Wubalawun group.
7. In accordance with traditional laws and customs, the Wubalawun group includes persons who are members of the group by reason of:
  - (a) patrilineal descent;
  - (b) his or her mother, father's mother or mother's mother being or having been a member of the group by reason of patrilineal descent;
  - (c) having been adopted or incorporated into the descent relationships referred to in (a) or (b) above; or
  - (d) descent from a person adopted or incorporated into the descent relationships referred to in (a), (b) or (c) above.
8. In accordance with traditional laws and customs, other Aboriginal people have rights and interests in respect of the determination area, subject to the rights and interests of the members of the Wubalawun group, such people being:
  - (a) the members of the estate groups associated with neighbouring estates;
  - (b) the spouses of the members of the Wubalawun group.
9. Each of the estate groups referred to in Order 8(a) includes persons who are members of the group by reason of:

- (a) patrilineal descent;
- (b) his or her mother, father's mother or mother's mother being or having been a member of the group by reason of patrilineal descent; or
- (c) having been adopted or incorporated into the descent relationships referred to in (a) or (b) above.

**The nature and extent of native title rights and interests (s 225(b), s 225(e))**

- 10. Subject to Orders 12, 13 and 14, the native title rights and interests of the members of the Wubalawun group are the rights:
  - (a) to access, remain on and use the areas;
  - (b) to access and to take for any purpose the resources of the areas; and
  - (c) to protect places, areas and things of traditional significance on the areas.
- 11. Subject to Orders 12, 13 and 15, the native title rights and interests of the persons referred to in Order 8 are the rights:
  - (a) to access, remain on and use the areas;
  - (b) to access the resources of the areas.

**Qualifications on native title rights and interests (s 225(b), s 225(e))**

- 12. The native title rights and interests referred to in Orders 10 and 11 do not confer:
  - (a) any right of possession, occupation, use and enjoyment of the land and waters on the native title holders to the exclusion of all others; or
  - (b) any right to control the access to and use of the determination area.
- 13. The native title rights and interests are exercisable in accordance with, and subject to:
  - (a) the traditional laws and customs of the native title holders; and
  - (b) the laws of the Northern Territory and the Commonwealth, including the common law.
- 14. Notwithstanding anything in this determination, there are no native title rights and interests in:
  - (a) such minerals (as defined in s 2 of the *Minerals (Acquisition) Act* (NT));
  - (b) such petroleum (as defined in s 5 of the *Petroleum Act* (NT));

- (c) such prescribed substances (as defined in s 3 of the *Atomic Energy (Control of Materials) Act 1946* (Cth) and/or s 5(1) of the *Atomic Energy Act 1953* (Cth)) - in the determination area.

**The nature and extent of any other interests (s 225(c))**

- 15. The nature and extent of other rights and interests in relation to the determination area are those set out in Schedule E (**other interests**).

**Relationship between native title rights and other interests (s 225(d))**

- 16. Except as otherwise provided for by law, the relationship between the native title rights and interests and the other interests is as follows:
  - (a) the determination does not affect the validity of those other interests;
  - (b) to the extent of any inconsistency between the other interests and the continued existence, enjoyment or exercise of the native title rights and interests, the native title rights and interests continue to exist in their entirety, but they have no effect in relation to the other interests to the extent of the inconsistency during the currency of the other interests; and
  - (c) otherwise, the other interests co-exist with the native title rights and interests. To avoid doubt, the doing of an activity required or permitted under those interests prevails over the native title rights and interests and their exercise, but does not extinguish them.
- 17. The non-extinguishment principle applies to Bore RN29014 validly constructed on Lot 19 Town of Larrimah by or on behalf of the Power and Water Corporation.

**Definitions**

- 18. In this determination, unless the contrary intention appears:
  - (a) “**land**” and “**waters**” respectively have the same meanings as in the NT Act;
  - (b) “**Native Title Act**” means the *Native Title Act 1993* (Cth);
  - (c) “**the Commonwealth**” means the Commonwealth of Australia;
  - (d) “**the Northern Territory**” means the Northern Territory of Australia

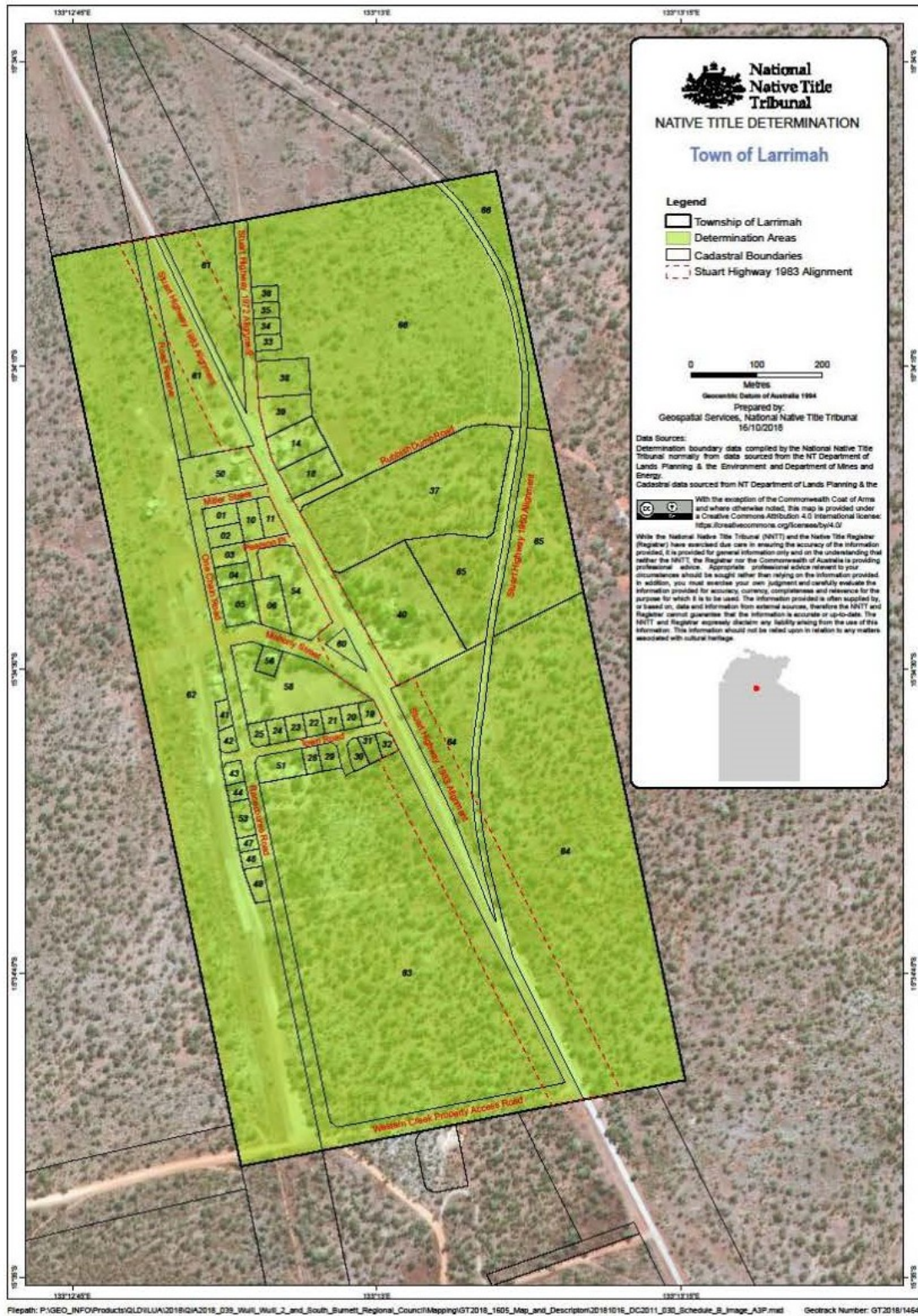
Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

### **Schedule A - Written description of the determination area**

The determination area comprises all the land and waters within the external boundary of the Town of Larrimah - Gazette Number NTG G43 dated 31 October 1984 as further described below, being the areas shown generally on the map in Schedule B.

### Schedule B – Map of the determination area

The determination area comprises the areas of land and waters shown generally on the map below.





### **Schedule C - Areas where native title exists**

In this schedule, "(part)" signifies that native title has been extinguished over part of the lot by a public work. The public works that have extinguished native title are set out at paragraph 5 of Schedule D and include the roads described in paragraph 6 of Schedule D.

The parts of the determination area in respect of which the native title rights and interests exist are the following lots in the Town of Larrimah:

1. Lot 1;
2. Lot 2;
3. Lot 3;
4. Lot 10;
5. Lot 11;
6. Lot 19;
7. Lot 20;
8. Lot 21;
9. Lot 22;
10. Lot 23;
11. Lot 24;
12. Lot 28;
13. Lot 29;
14. Lot 30;
15. Lot 31;
16. Lot 32;
17. Lot 33;
18. Lot 34;
19. Lot 35;
20. Lot 36;
21. Lot 37;
22. Lot 38;
23. Lot 39 (part) - being that part not subject to Schedule D Para 5 (a);
24. Lot 61 (part) - being that part not subject to the Stuart Highway 1983 Alignment;
25. Lot 63 (part) - being that part not subject to the Stuart Highway 1983 Alignment;
26. Lot 64 (part) - being that part not subject to the Stuart Highway 1983 Alignment;
27. Lot 65 (part) - being that part not subject to Rubbish Dump Road;
28. Lot 66 (part) - being that part not subject to Rubbish Dump Road.

### **Schedule D - Areas where native title does not exist**

Native title rights and interests do not exist in the following areas of land and waters:

1. The whole of each of the following lots in the Town of Larrimah, which have been the subjects of grants of estates in fee simple: 4, 5, 6, 14, 18, 25, 40, 43, 44, 47, 48, 50, 51, 53 and 56.
2. The whole of Lot 58 in the Town of Larrimah, which was the subject of a grant of Crown Lease Perpetual.
3. The whole of Lot 54 in the Town of Larrimah, which was the subject of grants of Leases of Town Lands.
4. The whole of each of the following lots in the Town of Larrimah upon which public works have been constructed: 41, 42, 49, 60 and 62.
5. The parts where the public works set below have been constructed, and any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work:
  - (i) Lot 39: One reticulation water pipe and meter (3 metres).
  - (ii) Lot 60: One .22kV powerline (5 metres) and one .415kV powerline (4 metres).
6. The following roads in the Town of Larrimah:

Stuart Highway 1950 Alignment (10 metres) as depicted on the plan at Schedule B and labelled "Stuart Highway 1950 alignment" and as depicted on OP/1187 plan dated 1950.

Stuart Highway 1972 Alignment (20 metres) as depicted on the plan at Schedule B and labelled "Stuart Highway 1972 alignment" and as depicted on S72/036 plan dated 1972.

Stuart Highway 1983 Alignment (100 metres) as depicted on the plan at Schedule B and labelled "Stuart Highway 1983 alignment" and as depicted on R83-1729 plan dated 1983.

Pearson Place (15 metres)

Mahony Street (30 metres), including that road abutting Lots 54 and 60

Town Road (15 metres)

Western Creek Property Access Road (30 metres)

Racecourse Road (20 metres)

Miller Street (20 metres)

### One Chain Road (20 metres)

Road reserve between Lots 61 and 62 (formerly part of One Chain Road) as depicted on the plan at Schedule B and labelled "Road Reserve".

Rubbish Dump Road being a corridor running parallel to the northern boundary of Lot 37, passing between Lot 18 and Lot 37 (a corridor of 15 metres) and onwards to the intersection with the western boundary of Lot 65 (being a 20 metre corridor), then south easterly to a point on the eastern boundary of Lot 65 at approximately Latitude 15.571959° South (being a 20m corridor) subject to survey.

The bracketed distances given above in metres reflect the widths of the respective road corridors and the extent of the adjacent area relevant to those roads within the meaning of s 251D of the NT Act.

7. Those parts of the determination area not identified in paragraphs 4, 5 and 6 of this Schedule, if any, on which there exists a public work (including any adjacent land or waters as defined in section 251D of the NT Act) which were constructed, established or situated prior to 23 December 1996 or commenced to be constructed or established on or before that date.

## Schedule E - Other Interests

The nature and extent of other interests in relation to the determination area as they exist at the date of this determination as follows:

- (a) the rights and interests of Telstra Corporation Limited:
  - (i) as the owner or operator of telecommunications facilities within the determination area;
  - (ii) created pursuant to the *Post and Telegraph Act 1901* (Cth), the *Telecommunications Act 1975* (Cth), the *Australian Telecommunications Corporation Act 1989* (Cth), the *Telecommunications Act 1991* (Cth) and the *Telecommunications Act 1997* (Cth), including rights:
    - a. to inspect land;
    - b. to install and operate telecommunications facilities; and
    - c. to alter, remove, replace, maintain, repair and ensure the proper functioning of its telecommunications facilities;
  - (iii) for its employees, agents or contractors to access its telecommunications facilities in, and in the vicinity of, the determination area, in the performance of their duties; and
  - (iv) under any license, access agreement or easement relating to its telecommunications facilities in the determination area;
- (b) the rights of Aboriginal persons (whether or not native title holders) by virtue of the *Northern Territory Aboriginal Sacred Sites Act* (NT);
- (c) the rights of access by an employee, servant, agent or instrumentality of the Northern Territory or the Commonwealth, or other statutory authority as required in the performance of statutory duties;
- (d) rights and interests held by reason of the force and operation of the *Water Act* (NT);
- (e) the interests of persons to whom valid and validated rights and interests have been:
  - (i) granted by the Crown pursuant to statute or otherwise in the exercise of executive power; or
  - (ii) otherwise conferred by statute.

## REASONS FOR JUDGMENT

### WHITE J:

#### Introduction

1 On 19 October 2011, the Applicant filed an application for the determination of native title over the land and waters comprising the Town of Larrimah, as gazetted on 31 October 1984. This is an area of about 1 sq km.

2 The Northern Territory is the sole Respondent to the proceedings.

3 The Applicant and the Northern Territory have reached agreement on the application and join in asking the Court to make a determination of native title by consent.

#### The Court's power and approach

4 Section 87 of the *Native Title Act 1993* (Cth) (the NT Act) permits the Court to make a determination by consent without holding a formal hearing if it is satisfied of a number of matters:

- (a) the period specified in the notice given under s 66 of the NT Act has ended (s 87(1));
- (b) there is agreement between the parties on the terms of an order of the Court in relation to the proceedings (s 87(1)(a)(i));
- (c) the terms of the agreement are in writing, signed by or on behalf of the parties, and filed with Court (s 87(1)(b));
- (d) the Court is satisfied that an order in, or consistent with, the terms agreed upon by the parties is within the power of the Court (s 87(1)(c)); and
- (e) the Court is satisfied that it is appropriate to make the orders sought (s 87(1) and (2)).

5 The first three of these requirements are of a formal or procedural kind. They are satisfied in the present case.

6 I am also satisfied, for the reasons which I will elaborate below, that the terms of the proposed agreement are within the Court's power.

7 The requirement that the Court be satisfied that it is appropriate to make the proposed determination reflects the fact that a determination of native title made by consent will bind the community generally, and not just the parties to the present proceeding: *Munn* (for and on

*behalf of the Gunggari People) v State of Queensland* [2001] FCA 1229; (2001) 115 FCR 109 at [22].

8 There is an evident policy in the NT Act to encourage parties to reach agreement with respect to claims of native title. Doing so has the obvious advantage of avoiding the need for a formal Court hearing. Sections 87 and 87A allow the Court to give effect to agreements by making consent determinations.

9 The Court's approach when the parties seek a determination by consent pursuant to s 87 or s 87A of the NT Act is informed by the policy just mentioned. It places particular reliance on the State and Territory parties to native title proceedings. In *Smith v State of Western Australia* [2000] FCA 1249; (2000) 104 FCR 494 at [38], Madgwick J said:

... State governments are necessarily obliged to subject claims for native title over lands and waters owned and occupied by the State and State agencies, to scrutiny just as careful as the community would expect in relation to claims of non-Aborigines to significant rights over such land. ...

10 In *King on behalf of the Eringa Native Title Claim Group v State of South Australia* [2011] FCA 1386; (2011) 285 ALR 454 at 458, Keane CJ spoke of the role of the States and Territories as follows:

[19] More recently, the Court has been prepared to rely upon the processes of the relevant State or Territory about the requirements of s 223 being met to be satisfied that the making of the agreed orders is appropriate. That is because each State and Territory has developed a protocol or procedure by which it determines whether native title (as defined in s 223) has been established. It acts in the public interest and as the public guardian in doing so. It has access to anthropological, and where appropriate, archaeological, historical and linguistic expertise. It has a legal team to manage and supervise the testing as to the existence of native title in the claimant group. Although the Court must, of course, preserve to itself the question whether it is satisfied that the proposed orders are appropriate in the circumstances of each particular application, generally the Court reaches the required satisfaction by reliance upon those processes. They are commonly explained in the joint submissions of the parties in support of the orders agreed. ...

11 Applying this approach, the Court does not, on an application pursuant to s 87 or s 87A, examine the underlying evidence with a view to satisfying itself that the evidence would justify a determination following a full hearing. Instead, the Court satisfies itself that the agreement was freely entered into on an informed and rational basis, that the parties are acting in good faith, and that the State or Territory party has taken steps to satisfy itself that there is a credible

basis for the application. This approach has been adopted in numerous decisions of the Court and it is the approach which I will apply in this case.

### **Consideration**

- 12 For the purposes of determining the appropriateness of the proposed consent order, I have had regard to the application filed in the Court on 19 October 2011, the Statement of Agreed Facts provided by the parties on 17 October 2018, and the joint submissions of the parties provided on the same date. In addition, the parties have provided the Court with a copy of the anthropological report for the Town of Larrimah prepared by Mr John Laurence at the request of the Northern Land Council and with a copy of the report of the conference of experts held on 30 January 2018 between the anthropologists Mr Graham (retained by the Northern Land Council on behalf of the Applicant) and Professor Sansom (retained by the Northern Territory). That conference concerned the right to take resources from the area of the determination. All of the anthropologists are well qualified to express the opinions which they have in the reports. Mr Laurence reported that the group which holds primary rights under Aboriginal tradition and “speaks for country” in relation to the Town of Larrimah is the Wubalawun Estate Group. That is reflected in para [6] of the proposed determination of native title.
- 13 In assessing the parties’ submissions concerning the appropriateness of the Court making the determination, I have taken into account the following matters:
- (a) the long period during which the proceedings have been on foot. That period has allowed ample opportunity for the claim of the Applicant to be assessed, and the reports of the anthropologists indicate that it has been appropriately assessed;
  - (b) the Northern Territory has considered the anthropological reports and has assessed them against criteria agreed by the parties as satisfying the requirements of s 223 of the NT Act. As part of the assessment, the Territory referred the reports prepared by Mr Laurence and Mr Graham to Professor Sansom for his opinions;
  - (c) the Territory raised the issues it had arising from the anthropological reports of Mr Laurence and Mr Graham with the Applicant, and the parties have conferred in relation to them;
  - (d) as indicated above, Mr Graham and Professor Sansom participated in a conference of experts on 30 January 2018 and reached substantial agreement concerning the issues concerning the right to take resources; and

- (e) following a process of negotiation and conferral, the Applicant and the Territory have reach agreement as to those parts of the determination area in which native title does and does not exist.

### **Mandatory requirements**

- 14 Section 94A of the NT Act requires that a determination of native title must set out details of the matters mentioned in s 225. Section 225 provides:

#### **225 Determination of native title**

A *determination of native title* is a determination whether or not native title exists in relation to a particular area (the *determination area*) of land or waters and, if it does exist, a determination of:

- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the nature and extent of any other interests in relation to the determination area; and
- (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
- (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

Note: The determination may deal with the matters in paragraphs (c) and (d) by referring to a particular kind or particular kinds of non-native title interests.

- 15 The term “native title rights and interests” used in s 225(b) is defined in s 223(1) of the NT Act as follows:

#### *Common law rights and interests*

- (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
  - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
  - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
  - (c) the rights and interests are recognised by the common law of Australia.



- 16 The elements of s 223(1) were considered by the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58; (2002) 214 CLR 422 and were also reviewed by Mansfield J in *Risk v Northern Territory of Australia* [2006] FCA 404. It is necessary that there be a recognisable group or society which presently recognises and observes traditional lands and customs in the area of the proposed determination. Matters bearing upon the identification of that group or society include:
- (a) that the members of the society are united in and by their acknowledgement and observance of a body of accepted laws and customs;
  - (b) the present day body of accepted laws and customs of the society is in essence the same body of laws and customs acknowledged and observed by the ancestors of members of the society adapted to modern circumstances; and
  - (c) the acknowledgement and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty and the society has continued to exist throughout that period as a body united in and by its acknowledgement and observance of those laws and customs.
- 17 The parties have satisfied themselves that members of the Wubalawun Estate Group satisfy these requirements and that there has been substantially uninterrupted observance by them of the traditional laws and customs in the proposed determination area since sovereignty. The interests of the Wubalawun in the adjacent or nearby Birdum and Middle Creek Pastoral Lease areas were recognised in two consent determinations in October 2013. Paragraphs [6]-[9] inclusive of the proposed determination identify the Wubalawun Estate Group as the native title holders, as well as persons in neighbouring estates. These paragraphs also provide for the criteria by which group membership is determined. Accordingly, this requirement of s 94A of the NT Act will be satisfied.
- 18 Paragraphs [1]-[3] inclusive of the proposed determination, together with Schedules A, B, C and D set out with appropriate particularity the area which is the subject of the proposed determination. Schedule D to the proposed determination indicates those parts of the determination area in which native title is agreed not to exist.
- 19 Paragraphs [10]-[13] inclusive of the proposed determination set out the nature and extent of the native title rights and interests in the determination area and indicate that these rights are non-exclusive.

- 20 Paragraph [14] of the proposed determination identifies certain resources in respect of which native title rights do not exist.
- 21 Paragraph [16] of the proposed determination describes, as required by s 225(d) the relationship between the native title rights referred to in paras [10] and [11] and the other rights and interests in the determination area identified in para [15].
- 22 Sections 55 and 56 of the NT Act require that the Court determine whether the native title be held on trust and, if so, by whom. Proposed Order 2 provides expressly that the native title is not to be held on trust.
- 23 As I have already indicated, the agreement of all parties is necessary for an exercise of power under s 87. The fact of the agreement is also relevant to the appropriateness of the orders. The fact that all affected parties both consent to, and support, the making of the determination is very relevant.
- 24 Both parties have legal representation. There is no reason to suppose that a lack of legal representation has caused disadvantage to any party.
- 25 The parties have not yet agreed on a prescribed body corporate for the purposes of s 57(2) of the NT Act. The parties propose, however, an order that a body corporate be nominated within the next 12 months.

### **Conclusion**

- 26 For the reasons set out above, I am satisfied that it is appropriate in this case to make the determination by consent with respect to native title over the area of the Town of Larrimah.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White.

Associate:



Dated: 24 October 2018