



Federal Court of Australia
District Registry: South Australia
Division: General

No: SAD215/2021

NUKUNU (AREA 2) NATIVE TITLE CLAIM

LINDSAY JOHN THOMAS and others named in Schedule 8
Applicant

STATE OF SOUTH AUSTRALIA and others named in Schedule 8
Respondent

AMENDED ORDER
(Amended pursuant to r 39.05(g) of the *Federal Court Rules 2011* (Cth))

JUDGE: JUSTICE CHARLESWORTH

DATE OF ORDER: 03 February 2022

WHERE MADE: Adelaide

THE COURT NOTES THAT:

- A. Native Title Determination Application No. SAD215 of 2021 (formerly SAD 6012 of 1998) was lodged with the Federal Court of Australia on 16 December 1998, having been filed and registered with the National Native Title Tribunal as SC 1996/005 on 10 April 1996.
- B. The Application was amended in the form of documents filed on 25 September 2012 and 30 August 2019 and that portion that was not overlapped by the Kokatha No.3 claim (SAD 83 of 2016) was determined by consent on 17 June 2019: *Turner on behalf of the Nukunu People v State of South Australia* [2019] FCA 863 (**Area 1**).
- C. On 30 August 2019 the remainder of the Application was reduced to resolve any overlap by forming a common boundary between the Application and the remainder of the formerly overlapping Barngarla Native Title Determination Application (SAD 6011 of 1998).
- D. The balance of the area of the Application not covered by the consent determination for Nukunu Area 1 and as amended to resolve the area of overlap is referred to as Nukunu **Area 2**.



- E. The applicant and the first respondent (**State**) have negotiated in good faith and with full advice from their legal representatives, including counsel, and experts, and have reached a compromise which is set out in an Indigenous Land Use Agreement (Nukunu (Area 2) Settlement **ILUA**) and in this **Determination** of native title. This Determination will take effect upon the registration of the ILUA under Div 3 of Pt 2 of the *Native Title Act 1993* (Cth) (**NTA**).
- F. The applicant and the State have carried out an analysis of the historical tenure records within the Nukunu Area 2 (**Determination Area**). The tenure position reflected in this Determination represents a compromise that has been agreed between the parties for the purposes of settlement. The applicant and the State agree that the Determination Area (including the Native Title Land and the area where native title does not exist) was Nukunu country at sovereignty.
- G. The parties agree that the **ILUA**:
- (i) contains the agreement of the applicant and the State that the vesting of Adjacent land and Subjacent land in the Minister under s 15(1)(a) of the *Harbors and Navigation Act 1993* (SA) is a valid act to which the non-extinguishment principle applies. The effect of registration of the ILUA will be that, pursuant to s 24EBA of the NTA and s 32B of the *Native Title (South Australia) Act 1994* (SA), the validity of the vesting will be confirmed, and any extinguishing effect of the vesting will be changed so that the non-extinguishment principle will apply to the vesting of Adjacent land and Subjacent land which is within the Determination Area; and
 - (ii) addresses the native title status of parcels which, in the course of negotiating the tenure schedules to this determination, were agreed by the parties to be included in the ILUA.
- H. The parties acknowledge that, when this Determination takes effect, the members of the native title claim group described below, in accordance with the traditional laws acknowledged and the traditional customs observed by them, will be recognised as the Native Title Holders for the Native Title Land.

Being satisfied that a determination in the terms sought by the parties would be within the power of the Court and it appearing to the Court appropriate to do so:



THE COURT ORDERS THAT:

1. There be a Determination of native title in the Determination Area in the terms set out at paragraphs 6 to 21 below.
2. The Determination take effect upon the ILUA being registered on the Register of Indigenous Land Use Agreements.
3. In the event that the ILUA is not registered on the Register of Indigenous Land Use Agreements within eight (8) months from the date of this order, or such later time as the Court may order, the matter is to be listed for further directions.
4. The applicant (prior to the Determination taking effect) or the Prescribed Body Corporate (after the Determination takes effect), the State and any other respondent have liberty to apply on 14 days' notice to a single judge of the Court:
 - (a) if that party considers that the ILUA will not be registered on the Register of Indigenous Land Use Agreements within eight months of the date of this order;
 - (b) to establish the precise location and boundaries of any Public Works and adjacent land and waters referred to in items 2 or 3 of Schedule 5;
 - (c) to determine the effect on native title rights and interests of any Public Works as referred to in item 3 of Schedule 5.
5. Each party to the proceeding is to bear its own costs.

THE COURT DETERMINES THAT:

Interpretation

6. In this Determination, including its schedules:
 - (a) unless the contrary intention appears, the words and expressions used have the same meaning as they are given in Pt 15 of the NTA;
 - (b) **Adjacent land** and **Subjacent land** have the meaning given to them in s 4(1) of the *Harbors and Navigation Act 1993* (SA);
 - (c) **Native Title Land** means the land and waters referred to in paragraph 8 of these orders; and



- (d) in the event of an inconsistency between a written description of an area in a schedule and the depiction of that area on the maps in Schedule 2, the written description shall prevail.

Determination Area

7. Schedule 1 describes the external boundaries of the Determination Area.

Areas within Determination Area where native title exists (Native Title Land)

8. Subject to Schedule 5, native title exists in the land and waters described in Schedules 3, 4 and 6.
9. Section 47A or s 47B of the NTA apply to those parcels or parts of parcels described in parts A and B respectively of Schedule 4. Save for public works described in items 2, 3 and 4 of Schedule 5 the extinguishment of native title rights and interests over those areas prior to 10 April 1996 is disregarded and native title exists in those parcels or parts of parcels.
10. Native title is recognised in Adjacent land and that portion of Subjacent land that lies within the Determination Area, excluding those areas identified in Schedule 5, which are vested in the Minister under s 15(1)(a) of the *Harbors and Navigation Act 1993* (SA) and which are identified on the maps at Schedule 2 and described in Schedule 6.

Areas within Determination Area where native title does not exist

11. Pursuant to s 225 of the NTA, native title does not exist in relation to all of the land and waters comprised in those areas described in Schedule 5.

Native Title Holders

12. Under the traditional laws and customs of the Nukunu People the Native Title Holders are those living Aboriginal people who are the descendants (including by adoption, as defined below) of the following apical ancestors:
- (a) Jinny, mother of Florence, Sam, John, Eliza and Jessie James and Frank Walters; and



(b) Mary, grandmother of Frederick Graham
and who identify as Nukunu and are recognised by the other Native Title Holders under those traditional laws and customs as having rights and interests in the Determination Area (collectively, **Native Title Holders**).

In the foregoing, the words “including by adoption” are intended to include as Native Title Holders:

- (a) those Aboriginal persons, who were or are raised as children and as part of the families of any of the apical ancestors or their biological descendants; and
- (b) descendants of the Aboriginal persons described in (a) above.

Rights and Interests

13. Subject to paragraphs 14, 15 and 16, the nature and extent of the native title rights and interests in the Native Title Land are the non-exclusive rights to use and enjoy those lands and waters, being:

- (a) the right of access to the land and waters;
- (b) the right to live on, use and enjoy the land and waters including for ceremonial purposes;
- (c) the right to take, use enjoy, share and exchange the resources of the land and waters including by fishing, hunting and gathering; but excluding those resources referred to in item 1 of Schedule 5;
- (d) the right, subject to the *Natural Resources Management Act 2004* (SA) or any successor act, to use the natural water resources;
- (e) the right to conduct funerals and burials on the land and waters;
- (f) the right to visit, maintain and protect places of importance under traditional laws, customs and practices on the land and waters;
- (g) the right to teach traditional laws and customs to each other on the land and waters; and
- (h) the right to be accompanied on the land and waters by those people who, though not Nukunu persons, are
 - (i) spouses of Nukunu persons; or



- (ii) people required by the traditional laws and customs for the performance of ceremonies or cultural activities.

General Limitations

- 14. The native title rights and interests set out at paragraph 13 are for personal, domestic and communal use but do not include the right to trade in, or the commercial use of, the Native Title Land or the resources from it.
- 15. The native title rights and interests described in paragraph 13 do not confer possession, occupation, use and enjoyment of the land and waters on the Native Title Holders to the exclusion of others.
- 16. The native title rights and interests set out at paragraph 13 are subject to and exercisable in accordance with:
 - (a) the traditional laws and customs of the Native Title Holders; and
 - (b) the valid laws of the State and Commonwealth, including the common law.

Other Interests and Relationship with Native Title

- 17. The nature and extent of other interests in the Native Title Land are:
 - (a) the interests of the Crown in right of the State of South Australia;
 - (b) the interests of the Commonwealth of Australia, if any;
 - (c) in relation to reserves as defined in the *National Parks and Wildlife Act 1972* (SA):
 - (i) the rights and interests of the Crown in right of the State of South Australia pursuant to the *National Parks and Wildlife Act 1972* (SA); and
 - (ii) the rights and interests of the public to use and enjoy those reserves consistent with the *National Parks and Wildlife Act 1972* (SA);
 - (d) interests of persons to whom valid or validated rights and interests have been granted or recognised by the Crown in right of the State of South Australia or by the Commonwealth of Australia pursuant to statute or otherwise in the exercise of executive power including, but not limited to, rights and interests granted or recognised pursuant to the *Crown Land Management Act 2009*



- (SA), *Crown Lands Act 1929* (SA), *Native Vegetation Act 1991* (SA), *Fisheries Management Act 2007* (SA), *Landscape South Australia Act 2019* (SA), *Mining Act 1971* (SA), and *Petroleum and Geothermal Energy Act 2000* (SA), all as amended from time to time;
- (e) rights or interests held by reason of the force and operation of the laws of the State or of the Commonwealth;
- (f) the rights to access land by an employee or agent or instrumentality of the State, Commonwealth or other statutory authority as required in the performance of his or her statutory or common law duties where such access would be permitted to private land;
- (g) the Global Navigation Satellite System base station known as GNSS Ground Station Saltia, located within the external boundaries of Section 287, Hundred of Woolundunga in the area named Saltia (being Crown Record Volume 5756 Folio 580, Parcel Identifier H331400S287);
- (h) the rights and interests of all parties to the ILUA;
- (i) the rights and interests of Telstra Corporation Limited (ACN 051 775 556):
- (i) as the owner or operator of telecommunications facilities within the Native Title Land;
- (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, occupy 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 Native Title Land in performance of their duties; and



- (iv) under any lease, licence, permit, access agreement or easement relating to its telecommunications facilities within the Native Title Land;
- (j) the rights and interests of BHP Billiton Olympic Dam Corporation Pty Ltd:
 - (i) in the Indenture (as amended) and ratified by the *Roxby Downs (Indenture Ratification) Act 1982* (SA), and rights, powers, privileges and interests comprised in, conferred under or in accordance with or pursuant to that Indenture and the *Roxby Downs (Indenture Ratification) Act 1982* (SA);
 - (ii) in the Variation Deed amending the Indenture and ratified by the *Roxby Downs (Indenture Ratification) (Amendment of Indenture) Amendment Act 2011* (SA), and rights, powers, privileges and interests comprised in, conferred under or in accordance with or pursuant to that Variation Deed amending the Indenture and the *Roxby Downs (Indenture Ratification) (Amendment of Indenture) Amendment Act 2011* (SA); and
 - (iii) for its employees, agents or contractors to enter the Determination Area to access BHP Billiton Olympic Dam Corporation Pty Ltd's rights and interests and to do all things necessary to exercise those rights and interests in the vicinity of the Determination Area in performance of their duties.
- (k) the rights, interests and entitlements of SA Power Networks (a partnership of Spark Infrastructure SA (No.1) Pty Ltd, Spark Infrastructure SA (No.2) Pty Ltd, Spark Infrastructure SA (No.3) Pty Ltd, CKI Utilities Development Limited and PAI Utilities Development Limited) and its related and successor entities, including its rights, interests and entitlements:
 - (i) to exercise its entitlements and discharge its obligations as the owner and/or operator of electricity infrastructure (as defined in the *Electricity Act 1996* (SA)) and telecommunications facilities and infrastructure within the Native Title Land including but not limited to the existing infrastructure identified in Schedule 7 (**Existing Infrastructure**);



- (ii) to exercise its entitlements and discharge its obligations as the holder of a licence under the Electricity Act and/or as an electricity entity under the Electricity Act;
 - (iii) to exercise its entitlements and discharge its obligations as the holder of a carrier licence under the *Telecommunications Act 1997* (Cth);
 - (iv) to install new electricity and telecommunications infrastructure on the Native Title Land (**New Infrastructure**) and modify, maintain and repair Existing Infrastructure;
 - (v) under easements, leases or licences (whether registered, unregistered, statutory or otherwise) relating to Existing Infrastructure or New Infrastructure on the Native Title Land identified in Schedule 7 (**Easements**);
 - (vi) to provide its employees, agents or contractors with access to Existing Infrastructure, New Infrastructure and the Easements on the Native Title Land; and
 - (vii) to the extent permitted by law, to restrain any person from performing any act, or compel any person to perform any act, for the purposes of ensuring that SA Power Networks complies with its obligations under any law, including, but not limited to, excluding any person from entering an area containing Existing Infrastructure or New Infrastructure for the purposes of maintaining the safety of any person and the security and protection of such infrastructure;
- (l) the rights and interests of each of The Flinders Ranges Council, District Council of Mount Remarkable and Port Augusta City Council in their relevant local government area in the Native Title Land:
- (i) under the *Local Government Act 1934* (SA) and the *Local Government Act 1999* (SA);
 - (ii) as an entity exercising statutory powers in respect of land and waters within the Native Title Land; and



(iii) in relation to dedicated land placed under its care, control and management pursuant to the *Crown Lands Act 1929* (SA) or the *Crown Land Management Act 2009* (SA).

18. The relationship between the native title rights and interests in the Native Title Land that are described in paragraph 13 and the other rights and interests that are described in paragraph 17 (the **Other Interests**) is that:

- (a) to the extent that any of the Other Interests are inconsistent with 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 the native title rights and interests have no effect in relation to the Other Interests to the extent of the inconsistency during the currency of the Other Interests;
- (b) the existence and exercise of the native title rights and interests do not prevent the doing of any activity required or permitted to be done by or under the Other Interests, and the Other Interests, and the doing of any activity required or permitted to be done by or under the Other Interests, prevail over the native title rights and interests and any exercise of the native title rights and interests, but, subject to any application of the NTA or the *Native Title (South Australia) Act 1994* (SA), do not extinguish them.

19. For the avoidance of doubt, the relationship between the Aboriginal-held interests listed in Schedule 4 and the native title rights and interests in the Determination Area that are described in paragraph 14 is governed by the non-extinguishment principle as defined in s 238 of the NTA.

AND THE COURT MAKES THE FOLLOWING FURTHER ORDERS

20. The native title is not to be held on trust.



21. The Nukunu Wapma Thura (Aboriginal Corporation) is to:
- (a) be the prescribed body corporate for the purposes of s 57(2) of the NTA; and
 - (b) perform the functions mentioned in s 57(3) of the NTA after becoming the registered native title body corporate in relation to the Native Title Land.

Date that entry is stamped: 8 February 2022

Sia Lagos
Registrar