

## FEDERAL COURT OF AUSTRALIA

**Turner on behalf of the Nukunu People v State of South Australia [2019] FCA**

**863**

File number: SAD 6012 of 1998

Judge: **CHARLESWORTH J**

Date of judgment: 17 June 2019

Catchwords: **NATIVE TITLE** – Determination as to whether or not native title exists in an area – determination by consent pursuant to s 87A of the *Native Title Act 1993* (Cth)

Legislation: *Australian Telecommunications Corporation Act 1989* (Cth)  
*Post and Telegraph Act 1901* (Cth)  
*Telecommunications Act 1975* (Cth)  
*Telecommunications Act 1991* (Cth)  
*Telecommunications Act 1997* (Cth)  
*Native Title Act 1993* (Cth) ss 13, 47A, 47B, 57, 61A, 66, 67, 87, 87A, 94A, 223, 225, 238, 251D, Pt 2 Div 3  
*Crown Land Management Act 2009* (SA) s 70  
*Crown Lands Act 1929* (SA) s 5  
*Electricity Act 1996* (SA)  
*Fisheries Management Act 2007* (SA)  
*Harbors and Navigation Act 1993* (SA) s 15  
*Local Government Act 1934* (SA)  
*Local Government Act 1999* (SA)  
*Mining Act 1971* (SA) s 6  
*National Parks and Wildlife Act 1972* (SA)  
*Native Title (South Australia) Act 1994* (SA)  
*Native Vegetation Act 1991* (SA)  
*Natural Gas Authority Act 1967* (SA) s 16  
*Natural Resources Management Act 2004* (SA)  
*Petroleum Act 1940* (SA)  
*Petroleum Act 2000* (SA)  
*Petroleum and Geothermal Energy Act 2000* (SA) s 4  
*Pipelines Authority (Sale of Pipelines) Amendment Act 1995* (SA) s 9

Cases cited: *Cox on behalf of the Yungngora People v State of Western Australia* [2007] FCA 588  
*Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474  
*Munn (for and on behalf of the Gunggari People) v Queensland* (2001) 115 FCR 109  
*Risk v Northern Territory* [2006] FCA 404  
*Sumner v State of South Australia (Ngarrindjeri Native Title Claim Part A)* [2017] FCA 1514

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Solicitor for the Applicant: Sykes Bidstrup

Counsel for the State of South Australia: Ms K Rain

Solicitor for the State of South Australia: Crown Solicitor's Office

Counsel for the Fishing Licence holders and Local Government interests: Mr T Mellor

Solicitor for the Fishing Licence holders and Local Government interests: Mellor Olsson

Counsel for the Commonwealth of Australia: The Commonwealth of Australia did not appear

Counsel for the Adnyamathanha People: The Adnyamathanha People did not appear

## ORDERS

**SAD 6012 of 1998  
(Nukunu Area 1)**

**BETWEEN:**            **ROSALIE ELIZABETH TURNER** (and others named in  
Schedule 9)  
Applicant

**AND:**                **STATE OF SOUTH AUSTRALIA** (and others named in  
Schedule 9)  
Respondent

**JUDGE:**             **CHARLESWORTH J**

**DATE OF ORDER:**   **17 JUNE 2019**

### **PREAMBLE**

- A. Native Title Determination Application No. SAD 6012 of 1998 was first lodged with the Federal Court of Australia on 16 December 1998.
- B. The Application was amended in the form of the document titled Further Amended Application filed on 25 September 2012.
- C. The Application is overlapped by both the Kokatha No 3 claim (SAD 83 of 2016) and the remainder of the Barngarla claim (SAD 6011 of 1998) in the area of the Port Augusta Overlap Proceeding and by Kokatha No 3 in the north east.
- D. The non-overlapped area of the application (Area 1) was listed for trial to commence on 8 October 2018 to determine whether native title exists in relation to any and what land and waters of Area 1 and, to the extent that it does, who are the persons, or each group of persons, holding the common or group rights comprising the native title and the nature and extent of the native title rights and interests.
- E. The Applicant approached the First Respondent (State) with a view to agreeing to settle Area 1 of the Application without the need to proceed with the trial. Both parties 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 1) 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 Nukunu Area 1 (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 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 22 below.
2. The Determination will 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 six (6) months of 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 six (6) 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 & Declaration**

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 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 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 and 4.
- 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. 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. Pursuant to the ILUA, native title exists in Adjacent land and Subjacent land within the Determination Area that is vested in the Minister under s 15(1)(a) of the *Harbors and Navigation Act 1993* (SA), including the areas identified in Schedule 7 but excluding those areas identified in Schedule 5.

**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.
12. Native title is extinguished in those areas described in Schedule 6 over which native title rights and interests are surrendered under the ILUA.

**Native Title Holders**

13. 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 Grahamand 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**

14. Subject to paragraphs 15, 16 and 17, 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**

- 15. The native title rights and interests set out at paragraph 14 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.
- 16. The native title rights and interests described in paragraph 14 do not confer possession, occupation, use and enjoyment of the land and waters on the Native Title Holders to the exclusion of others.
- 17. The native title rights and interests set out at paragraph 14 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**

- 18. 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), *Natural Resources Management Act 2004* (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 rights and interests of all parties to the ILUA;
- (h) 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:
    - 1. to inspect land;
    - 2. to install, occupy and operate telecommunications facilities; and



3. 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;
- (i) 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) (Electricity Act)) and telecommunications facilities and infrastructure within the Native Title Land including but not limited to the existing infrastructure identified in Schedule 8 (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 (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;
- (j) the rights and interests of each of The Flinders Ranges Council, District Council of Mount Remarkable, Port Augusta City Council, Port Pirie Regional Council, District Council of Orroroo/Carrieton, District Council of Barunga West and Northern Areas Council in their relevant local government areas 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);
- (k) the rights and interests of Epic Energy South Australia Pty Ltd (formerly Tenneco Gas South Australia Pty Ltd) (Epic):
  - (i) as:
    1. holders of Pipeline Licence No. 1 (PL1) issued pursuant to the *Petroleum Act 1940* (SA) on 12 March 1969 and renewed on 27 March 1990 pursuant to the *Petroleum Act 1940* (SA) and continuing in force by the operation of cl 2 of the Schedule to the *Petroleum Act 2000* (SA);
    2. owner of the pipeline the subject thereof by virtue of having been a purchaser of the pipeline (as purchaser is defined in s 16 of the *Natural Gas Authority Act 1967* (SA) as amended by the *Pipelines Authority (Sale of Pipelines) Amendment Act 1995* (SA) (Sale Legislation) from the former Pipeline Authority of South Australia

- (now the Natural Gas Authority of South Australia) pursuant to a Sale Agreement dated 30 June 1995 under the Sale Legislation; and
3. the holders of a statutory easement established by s 9 of the Sale Legislation;
- (ii) the statutory easement entitles Epic, inter alia, to install, maintain and operate the pipeline and to carry out authorised purposes including the installation, operation, inspection, extension, alteration, repair and removal of the pipeline or associated equipment and the carrying out of maintenance work on the pipeline or associated equipment;
- (iii) for Epic, its employees, agents and contractors (or any of them) to enter the Native Title Land to access Epic's rights and interests and to do all things necessary to exercise those rights and interests and perform all obligations in the vicinity of the Native Title Land in performance of their duties;
19. The relationship between the native title rights and interests in the Native Title Land that are described in paragraph 14 and the other rights and interests that are described in paragraph 18 (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.
20. 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:**

21. The native title is not to be held on trust.
22. 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.

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

## REASONS FOR JUDGMENT

### CHARLESWORTH J:

- 1 This is an application for a determination of native title by consent under s 87A of the *Native Title Act 1993* (Cth) (NT Act).
- 2 The action has its genesis in an application lodged in the Native Title Tribunal by the Nukunu People in 1996 (Nukunu Claim). The application concerned a large area of land situated in the mid north of South Australia. It was referred to this Court in 1998 and has since been amended to reflect events that have occurred over its long history.
- 3 Now before the Court is an agreement reached by the parties for a determination of native title in relation to a part of the land to which the Nukunu Claim relates (the determination area). The determination made today is to the effect that native title exists in part of the determination area (positive determination area) but does not exist in the remaining part (negative determination area).
- 4 The NT Act establishes a procedure by which the parties to a native title proceeding may apply for orders by agreement and so avoid the delay, expense, inconvenience and conflict associated with a contested trial of the issues. A draft determination of native title signed by the parties was filed in the Court on 8 May 2019, together with joint written submission in support of the orders sought. Minor amendments to the agreement were made by consent minutes dated 5 June 2019.
- 5 It is fair to say that arriving at the agreement has involved considerable and commendable effort by the parties, particularly by the Nukunu People and the State of South Australia as the first respondent.
- 6 For the reasons that follow I am satisfied that orders should be made substantively in terms of the draft determination.

### HISTORY OF THE PROCEEDINGS

- 7 The boundary of the area originally covered by the Nukunu Claim was amended in 2012 to affect a settlement of an overlapping claim commenced on behalf of the Barngarla People in action SAD 6011/1998. Overlapping claims filed on behalf of the Adnyamathanha People were subsequently resolved and withdrawn.

8 On 21 March 2016, an application for a determination of native title was filed on behalf of the Kokatha People (Kokatha No. 3 Claim). The land subject to the Kokatha No. 3 Claim overlapped the western portion of the area covered by the Nukunu Claim and included the regional city of Port Augusta. On 21 August 2017, the Court made an order pursuant to s 67 of the NT Act to the effect that the area of the Kokatha No. 3 Claim which overlapped the Nukunu Claim be consolidated and dealt with in the same proceeding (the Nukunu Kokatha Overlap Proceeding). The Kokatha No. 3 claim has since been dismissed.

9 The area of the Nukunu Claim that was unaffected by the overlap became known as Nukunu Area 1. It is that area to which the present determination relates.

10 A trial of the issues in respect of the Nukunu Area 1 proceeding was set down for hearing to commence on 8 October 2018. The trial dates were vacated upon the State and the Nukunu People reaching an agreement, the terms of which now have the consent of the remaining parties to the Nukunu Area 1 proceeding.

#### **THE DETERMINATION AREA**

11 The determination area is depicted by the maps forming Schedule 2a to the determination. Its external boundaries run from Port Broughton in the west, to Spalding in the east and running north in a line through areas close to Orroroo, Carrieton, Cradock and Yourambulla then west to Warrakimbo in the north then south in a line east of Port Augusta and extending into the waters of Spencer Gulf down to Port Broughton. It covers an area of approximately 15,000 km<sup>2</sup>.

12 Much of the negative determination area is situated on the eastern side of the determination area and is identified in its entirety in Schedule 5. Areas within the positive determination area where native title has been extinguished are also identified in Schedule 5. Areas where native title has been surrendered pursuant to the terms of an Indigenous Land Use Agreement are identified in Schedule 6.

13 Subject to the areas identified in Schedules 5 and 6, the positive determination area runs from the Clements Gap Conservation Park, north to the Broughton River, which it follows to Spencer Gulf (at a line 50 metres seaward of the Lowest Astronomical Tide) following that line north to Winninowie Conservation Park, around what was the Kokatha No. 3 claim overlap, east to Yourambulla and south from there to a point to the east of Redhill (including the towns of

Booleroo Centre and Gladstone). It then follows the claim boundary back to Clements Gap. This area is completely described in Schedules 3 and 4 of the orders.

### **SECTION 87A**

14 As a result of the parties' agreement it is not necessary for the Court to resolve the merits of the claim upon a contested hearing: s 87A(4) of the NT Act. The Court must nonetheless be satisfied that the procedural and substantive requirements of s 87A are complied with: *Sumner v State of South Australia (Ngarrindjeri Native Title Claim Part A)* [2017] FCA 1514 (White J) at [10]. As French J observed in *Cox on behalf of the Yunggora People v State of Western Australia* [2007] FCA 588 at [3]:

... A determination of native title not only binds the parties to these proceedings, it is good against the whole world. So the Court must be satisfied that the orders sought are supportable and are in accordance with the law.

15 See also *Munn (for and on behalf of the Gunggari People) v Queensland* (2001) 115 FCR 109 at [22].

16 Section 87A of the NT Act applies if the requirements of s 87A(1)(a) to (d) are met. For the purposes of those provisions, I am satisfied that:

- (1) there is a proceeding in relation to an application for a determination of native title (s 87A(1)(a));
- (2) after the end of the period specified in the notice given under s 66 of the NT Act (which expired on 7 May 2001), agreement was reached on a proposed determination of native title in relation to an area included in the area covered by the application (s 87A(1)(b));
- (3) the persons described in s 87A(1)(c) of the NT Act are parties to the agreement; and
- (4) the terms of the agreement are in writing and signed by or on behalf of each of the parties (s 87A(1)(d)).

17 Section 87A(2) of the NT Act provides that a party to the agreement may file a copy of the terms of the proposed determination of native title with the Court. That was done on 8 May 2019. I am also satisfied that notice of the proposed determination has been given to the parties to the proceedings as required by s 87A(3) of the NT Act.

18 Section 87A(4) of the NT Act relevantly provides that the Court may make an order in, or consistent with, the terms of the proposed determination of native title without holding a hearing if the Court considers that:

- (1) an order in, or consistent with, the terms of the proposed determination would be within its power; and
- (2) it would be appropriate to do so.

19 For the reasons that follow, each of these conditions is met.

### **THE ORDERS ARE WITHIN POWER**

20 An order in which the Court makes a determination of native title must set out details of the matters mentioned in s 225 of the NT Act: see s 94A. Section 225 defines the phrase “determination of native title” as follows:

#### **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.

21 Section 223 of the NT Act defines the terms “native title” and “native title rights and interests” relevantly in these terms:

#### **223 Native title**

*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.

22 The determination proposed by the parties complies with the requirements of s 225. It is a determination as to “whether or not native title exists in relation to a particular area”. Paragraph 11 of the determination is to the effect that native title does not exist in the area depicted in Schedule 5. Paragraph 8 of the determination states that, subject to Schedule 5, native title exists in the land and waters described in Schedules 3 and 4.

23 In respect of the positive determination area, I am satisfied that the requirements of s 225(a) to (e) are complied with. The determination:

- (1) identifies (at [13]) the persons, or each group of persons, holding the common or group rights comprising the native title in the positive determination area;
- (2) sets out (at [14]) the nature and extent of the native title rights and interests in relation to the positive determination area and (at [15] to [17]) the limitations on their exercise;
- (3) sets out (at [18]) the nature and extent of other interests in the positive determination area;
- (4) describes (at [19]) the relationship between the native title rights and interests described at [14] and the other interests described at [18]; and
- (5) states (at [16]) that the native title rights and interests recognised in the positive determination area do not confer possession, occupation, use and enjoyment of the land and waters to the exclusion of all others.

24 It is accordingly within the power of the Court to make the orders.

### **IT IS APPROPRIATE TO MAKE THE ORDERS**

25 Section 87A of the Act is to be exercised flexibly having regard to the purpose for which it was enacted. In *Lovett on behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474 (at [36]) North J said, of s 87 of the NT Act:

The focus of the section is on the making of an agreement by the parties. This reflects the importance placed by the Act on mediation as the primary means of resolving native title applications. Indeed, Parliament has established the National Native Title Tribunal with the function of conducting mediations in such cases. The Act is designed

to encourage parties to take responsibility for resolving proceedings without the need for litigation. Section 87 must be construed in this context. The power must be exercised flexibly and with regard to the purpose for which the section is designed.

26 The same may be said of s 87A.

27 When the Court is examining the appropriateness of an agreement for a determination of native title by consent, it is not necessary to examine whether the agreement is grounded on a factual or evidentiary basis of a kind that must be established at a trial of a contested claim. As North J went on to say in *Lovett* at [37]):

... The primary consideration of the Court is to determine whether there is an agreement and whether it was freely entered into on an informed basis: *Nangkiriny v State of Western Australia* (2002) 117 FCR 6; [2002] FCA 660, *Ward v State of Western Australia* [2006] FCA 1848. Insofar as this latter consideration applies to a State party, it will require the Court to be satisfied that the State party has taken steps to satisfy itself that there is a credible basis for an application: *Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229.

28 The present case is one in which it is necessary to be satisfied not only that it is appropriate to make a determination that native title exists in one part of the determination area, but also to make a determination that native title does not exist in another part of it. The effect of the negative determination is that no other native title claim may be brought in relation to the negative determination area, whether by the Nukunu People or by any other claim group: NT Act, s 13(1)(a) and s 61A(1). The making of a negative determination is a significant act. It is for this reason that the NT Act makes provision for notice to be given of a native title claim so as to ensure that those asserting native title interests in the same area have an opportunity for their own claims in respect of the area to be advanced and adjudicated. In light of the investigations and negotiations referred to below, I am satisfied that it is appropriate to make a determination that native title does not exist in the negative determination area, just as I am satisfied that it is appropriate to make the positive determination in terms consistent with that sought by the parties.

29 By their joint submission the State and the applicant outline the anthropological and historical evidence prepared over many years on behalf of the Nukunu People relating to the determination area. The submission also outlines the State's independent inquiries and the steps it has taken to assess the evidence against the requirements of the NT Act.

30 The State's processes are set out in the State's policy document titled *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports*. In undertaking that process, the State assessed that a consent determination would be appropriate in respect of the area now

identified as the positive determination area. The State did not consent to a positive determination in respect of the remaining part of the area subject to the Nukunu Area 1 proceeding and it was for that reason that the claim in respect of the whole of the determination area was set down for a contested trial. The agreement now before the Court is the result of further negotiation undertaken in light of further expert reports prepared and served in advance of the trial date.

31 No doubt this has been a difficult process for the parties, and particularly for the Nukunu People. As with any mediated outcome, the agreement reflects some degree of compromise. It is by that compromise that the Nukunu People did not proceed to trial to establish the native title rights and interests they had previously asserted in what is now identified as the negative determination area.

32 At this juncture it is appropriate to summarise the effect and significance of some of the materials which have informed the parties' discussions and agreement. As Mansfield J said in *Risk v Northern Territory* [2006] FCA 404 at [8], had this matter proceeded to a contested hearing, it would have been necessary for the persons comprising the claim group to show:

- (1) that they are a society united in and by their acknowledgement and observance of a body of accepted laws and customs;
- (2) that the present day body of accepted laws and customs of the society, in essence, is the same body of laws and customs acknowledged and observed by the ancestors or members of the society adapted to modern circumstances; and
- (3) that the acknowledgement and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty and that the society has continued to exist throughout that period as a body united in and by its acknowledgment and observance of those laws and customs.

33 The expert evidence referred to in the joint submission is to the effect that the Nukunu People are a society in the relevant sense and that the society existed at sovereignty. The Nukunu People have a shared language, recorded by the linguist Luise Hercus in *A Nukunu Dictionary*. They continue to exist as a society today with remnant language, narratives and observable patterns of social organisation with normative rules. Their mythical narratives are recorded in historical sources.

34 The Nukunu People are a very small society, constituted by two extended families in the Bramfield family line, together with those claiming descent from the grandmother of Frederick Graham (a family that married into the Bramfield line). There is a genealogical connection between the claim group and these apical ancestors through cognatic descent. There is

evidence that key features of the society as it existed at sovereignty continue today across members of the group, including totemic identity. There is a strong identification by the extended Bramfield family with the lawgiver figure *Wapma* (snake). In undertaking its assessment, the State referred to land-based oral traditions (dreamings), particularly access rules and knowledge regarding sites in the positive determination area which continue to be observed. In the State's assessment, for the purposes of the positive determination, the traditional laws and customs of the Nukunu People have "continued existence and vitality and ... their observance has continued substantially uninterrupted since sovereignty".

35 The joint submission of the parties is that there is evidence of continued connection with the positive determination area, including travelling over and monitoring the land, visiting and camping, hunting and fishing, gathering natural resources and smoking ceremonies. The evidence of connection includes the telling and teaching of land related dreaming stories relating to the *Wapma*, the eaglehawk and crow, two wild dogs, the eagle and kangaroo. This ongoing connection especially arises in the areas around Baroota and Port Germein, through to the eastern side of Mount Remarkable and the Willochra Plain.

36 The joint submission contains an express recognition by the State that the negative determination area was "most likely Nukunu country at sovereignty". Had the matter proceeded to trial, it would have been necessary to determine whether there was sufficient evidence of ongoing connection for the purposes of the NT Act in respect of that part of the determination area. I am satisfied that this aspect of the claim has been resolved by negotiation and mediation and that to the extent that the Nukunu People have compromised their claim, the compromise has been based on rigorous but respectful discussion in which the named applicants on behalf the Nukunu People have been competently represented and well informed throughout.

## CONCLUSION

37 In conclusion it is appropriate to reflect on the objectives of the NT Act as an enactment made for the recognition and protection of native title.

38 By making a determination that native title exists in the positive determination area, the Court does not confer upon the Nukunu People rights and interests in land or waters for the first time. Rather, the Court recognises existing rights and interests in land or waters that are of a unique character. Those rights and interests arise under the traditional laws and customs of the Nukunu

People which were observed at the time of sovereignty and for an earlier expanse of time that is difficult to comprehend.

39 As the preamble to the NT Act states, Aboriginal peoples and Torres Strait Islanders have been progressively disposed of their lands largely without compensation and successive governments have failed to reach a lasting and equitable agreement with them concerning the use of their lands. The preamble continues:

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

...

The High Court has:

- (a) rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement; and
- (b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and
- (c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.

The people of Australia intend:

- (a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
- (b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

40 To give effect to these intentions, the NT Act establishes a special procedure for the just and proper ascertainment of native title rights and interests, including by conciliation. Section 87A of the NT Act forms an important part of those special procedures. Once again, the parties are commended for their efforts in arriving at an agreement whereby the native title rights and interests of the Nukunu People may be recognised and so protected for the whole of the claim group and their descendants to come.

41 I will now make the orders sought.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Charlesworth.

Associate:

A handwritten signature in blue ink, appearing to be 'V. B. Williams', written in a cursive style.

Dated: 17 June 2019