

FEDERAL COURT OF AUSTRALIA

Sansbury v State of South Australia (Narungga Nation Native Title Claim)

[2023] FCA 196

File number: SAD 88 of 2022

Judgment of: CHARLESWORTH J

Date of judgment: 14 March 2023

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

Legislation: *Australian Maritime Safety Act 1990* (Cth) s 6
Australian Telecommunications Corporation Act 1989 (Cth)
Native Title Act 1993 (Cth) ss 3, 13, 24EBA, 47A, 47B, 47C, 57, 66, 87, 94A, 223, 225, 238
Navigation Act 2012 (Cth) s 190
Post and Telegraph Act 1901 (Cth)
Telecommunications Act 1975 (Cth)
Telecommunications Act 1991 (Cth)
Telecommunications Act 1997 (Cth)

Crown Land Management Act 2009 (SA)
Crown Lands Act 1929 (SA)
Electricity Act 1996 (SA)
Fisheries Management Act 2007 (SA)
Harbors and Navigation Act 1993 (SA) ss 4, 15
Landscape South Australia Act 2019 (SA)
Local Government Act 1934 (SA)
Local Government Act 1999 (SA)
Mining Act 1971 (SA)
National Parks and Wildlife Act 1972 (SA)
Native Title (South Australia) Act 1994 (SA) s 32B
Native Vegetation Act 1991 (SA)
Petroleum and Geothermal Energy Act 2000 (SA)

Cases Cited: *Cox on behalf of the Yungngora People v State of Western Australia* [2007] FCA 588

Lovett on behalf of the Gunditjmarra People v State of Victoria [2007] FCA 474
Mabo v Queensland (No 2) (1992) 175 CLR 1
Munn (for and on behalf of the Gunggari People) v Queensland (2001) 115 FCR 109
Nelson v Northern Territory (2010) 190 FCR 344

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The Sixteenth Respondent did not appear

ORDERS

SAD 88 of 2022

NARUNGA NATION NATIVE TITLE CLAIM

BETWEEN: **TAUTO SANSBURY, JOHN BUCKSKIN, KAY LAWRENCE
and NAOMI HICKS**
Applicant

AND: **STATE OF SOUTH AUSTRALIA**
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

COPPER COAST COUNCIL (and others named in the Schedule
of Parties)
Third Respondent

ORDER MADE BY: **CHARLESWORTH J**

DATE OF ORDER: **14 MARCH 2023**

THE COURT NOTES THAT:

- A. Native Title Determination Application No SAD 88 of 2022 was first lodged with the Federal Court of Australia on 25 March 2013.
- B. The Applicant wishes to record its acknowledgement of Tauto Sansbury (deceased) as a former Applicant to this Determination Application and his contributions towards achieving the Orders set out hereunder.
- C. The Applicant and the First Respondent (State) have negotiated with a view to agreeing to settle 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 and experts, and have reached a compromise which is set out in an Indigenous Land Use Agreement (ILUA) called the Narungga Nation Determination ILUA and in this determination of native title. This determination will take effect upon the registration of the ILUA as an Area Agreement under Subdiv C of Div 3 of Pt 2 of the *Native Title Act 1993* (Cth) (NTA).

- D. The parties, including the Applicant, the State, the Commonwealth and the other respondents have now reached an agreement as to the terms of a determination of native title to be made in relation to land and waters covered by the Application and as to the terms of proposed orders.
- E. The Applicant and the State have carried out an analysis of the historical tenure records within the claim area. The tenure position reflected in this Determination represents a compromise that has been agreed between the parties for the purposes of settlement.
- F. 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 Applicant and the State to be included in the ILUA.
- 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.
- H. Having regard to the need to balance the limited availability of public resources with the competing need to resolve applications for a determination of native title in an efficient, cost effective and timely manner, negotiations with respect to a potential agreement to be made pursuant to s 47C(1)(b) of the NTA will be addressed subsequent to this determination. Pursuant to s 13(5)(c) of the NTA the Applicant and the State will seek to revise this determination to reflect any such agreement.

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 respect of the Determination Area in the terms set out at paragraphs 6 to 26 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 (8) 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 the 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 9 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 boundary of the Determination Area.
- 8. To the extent that the Application covers land or waters outside the external boundary of the Determination Area, it is dismissed.

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

- 9. Subject to Schedule 5, native title exists in the land and waters described in Schedules 3, 4 and 7.
- 10. Section 47A and 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, all extinguishment of native title rights and interests over those areas prior to 25 March 2013 is disregarded and native title exists in those parcels or parts of parcels.
- 11. For the avoidance of doubt, native title is recognised in the Adjacent land and the Subjacent land that lie within the Determination Area (excluding those areas identified in Schedule 5) which are identified on the maps at Schedule 2 and described in Schedule 7.

Areas within Determination Area where native title does not exist

- 12. 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.

13. Native title is extinguished in those areas described in Schedule 6, being areas in respect of which native title is surrendered pursuant to the ILUA.
14. But for extinguishing acts, the Native Title Holders would have held native title in the entire Determination Area.

Native Title Holders

15. The Native Title Holders are those living Aboriginal people who identify as Narungga and are recognised by the other Native Title Holders under Narungga traditional laws and customs as having rights and interests in the Determination Area who:
 - (a) are the descendants of the following Narungga apical ancestors:
 - (i) a “full-blooded Narungga woman of the Wallaroo area” married to Charlie Angie (of China);
 - (ii) King Tommy and “a full-blooded woman named Mary” (Queen Mary), married to King Tommy;
 - (iii) Ben Simms (of Wallaroo);
 - (iv) Maria (Aboriginal Narungga of Wallaroo), married to white jailer, surname “Hughes” at Wallaroo;
 - (v) S(t)ansbury “Narungga woman of Moonta”;
 - (vi) Maryanne mother of Lena, John and Louisa; or
 - (b) are the descendants of the following people incorporated into Narungga society:
 - (i) Claude Smith; or
 - (ii) Edward Chester Senior (born circa 1878).

(collectively, Native Title Holders).

Rights and Interests

16. Subject to paragraphs 17 to 21, 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 *Landscape South Australia Act 2019* (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 Narungga persons, are
 - (i) spouses of Narungga persons; or
 - (ii) people required by the traditional laws and customs for the performance of ceremonies or cultural activities.

General Limitations

17. The native title rights and interests set out at paragraph 16 are for personal, domestic and communal needs.
18. Subject to paragraph 19, the native title rights and interests described in paragraph 16 do not confer possession, occupation, use and enjoyment of the land and waters on the Native Title Holders to the exclusion of others.
19. The nature and extent of native title rights and interests in relation to Part A of Schedule 4 (being areas where extinguishment of native title rights and interests over the areas therein prior to 25 March 2013 is to be disregarded in accordance with s 47A of the NTA) are, an entitlement to possession, occupation, use and enjoyment of the land and waters of that part to the exclusion of all others.

20. The native title right to fish set out in paragraph 16(c) does not include the right to fish for marine mammals and is only exercisable in accordance with traditional laws and customs governing the conservation and sustainable fishing of fish stocks.
21. The native title rights and interests set out at paragraph 16 and 20 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 & Relationship with Native Title

22. 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 the *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 interests of the relevant interest holders in the parcels listed in Part A of Schedule 4 (s 47A land);
- (g) 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;
- (h) the rights and interests of the Australian Maritime Safety Authority (the Authority) as the owner, manager, or operator of aids to navigation pursuant to s 190 of the *Navigation Act 2012* (Cth) and in performing the functions of the Authority under s 6(1) of the *Australian Maritime Safety Act 1990* (Cth) including to be a national marine safety regulator, to combat pollution in the marine environment and to provide a search and rescue service;
- (i) the Automatic Weather System (AWS) known as Waberto Point AWS, located within the external boundaries of Allotment 50, Deposited Plan 35082.
- (j) the rights and interests of all parties to the ILUA;
- (k) the rights and interests of Telstra Corporation Limited (ACN 051 775 556), Amplitel Pty Ltd (ACN 648 133 073), any related bodies corporate and successors in title:
 - (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;
- (l) 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 8 (Existing Infrastructure);
 - (ii) to exercise its entitlements and discharge its obligations as the holder of a licence under the *Electricity Act 1996* (SA) and/or as an electricity entity under the *Electricity Act 1996* (SA);
 - (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 including but not limited to the easements identified in Schedule 8 (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;

- (m) the rights and interests of each of Yorke Peninsula Council, Wakefield Regional Council, Copper Coast Council and Barunga West 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).

23. The relationship between the native title rights and interests in the Native Title Land that are described in paragraph 16 and 20 and the other rights and interests that are described in paragraph 22 (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.

24. For the avoidance of doubt, the relationship between the Aboriginal-held interests listed in Part A of Schedule 4 and the native title rights and interests in the Determination Area that are described in paragraph 16 is governed by the non-extinguishment principle as defined in s 238 of the NTA.

AND THE COURT MAKES THE FOLLOWING FURTHER ORDERS:

25. The native title is not to be held on trust.
26. The Narungga Nation Aboriginal Corporation (ICN 3863) 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 The authorised applicant seeks a determination of native title on behalf of the Narungga People
in relation to an area of land and waters encompassing the whole of the Yorke Peninsula in
South Australia and part of the surrounding sea.

2 Section 87 of the *Native Title Act 1993* (Cth) (NT Act) confers power on this Court to make a
determination of native title with the consent of all the parties. The parties now seek a
determination of native title by consent with respect to the land and waters forming the subject
of the claim.

3 For the reasons that follow, I am satisfied that a determination of native title should be made
substantively in the terms sought by the parties.

THE DETERMINATION AREA

4 The outer boundaries of the determination area fall on a line 5 km seaward of the high water
mark off the shores of the Yorke Peninsula and its nearby islands. On the mainland, the
boundary extends northward from a point near Port Wakefield to a point near Redhill, then
westward to a point near Fisherman Bay where it meets the sea.

5 The British asserted sovereignty over the determination area in 1788. In 1802, the waters off
Yorke Peninsula were explored by Captain Matthew Flinders and Captain Nicolas Baudin.
From their ships they reported their observations of people and campfires. We now know those
people to form part of an Aboriginal society, the Narungga People. The present day claimants
include the descendants of those that Flinders and Baudin observed. This determination
recognises the rights and interests in the claim area that are possessed by them under and in
accordance with their laws and customs. Those laws and customs have been acknowledged
and observed since before sovereignty and have survived the onslaught of European settlement
in the area.

THE REQUIREMENTS FOR A CONSENT DETERMINATION

6 The objects of the NT Act are *inter alia* to provide for the recognition of native title and to
establish a mechanism for determining native title claims: NT Act, s 3. The preamble to the
NT Act sets out the considerations that were taken into account by Parliament when enacting
the provisions contained in it. As the preamble states, the High Court has rejected the doctrine

that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement and 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: *Mabo v Queensland (No 2)* (1992) 175 CLR 1. The NT Act establishes procedures for the just and proper ascertainment of native title rights and interests. As the preamble states, the object of the NT Act is to ensure that, if possible, that is done by conciliation and, if not, in a manner that has due regard to their unique character.

7 Section 87 is central to the conciliation processes established under the NT Act. In cases where an order is made under s 87 it is not necessary for the Court to resolve the claim upon a contested hearing. By their agreement the parties have avoided the expense and inconvenience of a trial and they are to be commended for resolving the claim in the conciliatory way.

8 The Court may make a determination by consent under s 87 of the NT Act provided that its essential conditions are satisfied.

9 It is first necessary that the period specified in the notice given under s 66 of the NT Act in relation to the native title claim has ended: NT Act, s 87(1). That condition is satisfied here.

10 Next, there must be an agreement reached between the parties on the terms of an order in relation to the proceedings (NT Act, s 87(1)(a)(i)) and the terms of the agreement must be in writing, signed by or on behalf of the parties and filed in the Court (NT Act, s 87(1)(b)). Those conditions were met by the filing of the parties' agreement on 6 February 2023.

11 The Court must also be satisfied that it has the power to make an order in, or consistent with, the terms of the agreement (NT Act, s 87(1)(c)) and that it is appropriate to make the orders sought (NT Act, s 87(1A)). I will now explain how those remaining requirements are satisfied.

The Court has power to make the order

12 The expressions "native title" and "native title rights and interests" are defined in s 223 of the NT Act to mean 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.

13 A determination of native title must set out the detail of the matters mentioned in s 225 of the NT Act: NT Act, s 94A. It defines the expression “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.

14 The determination sought by the parties specifies those parts of the determination in which native title exists (Schedules 3, 4 and 7) and those parts in which native title has been extinguished (Schedules 5 and 7). In respect of those areas of land and sea where native title exists, the determination:

- (1) identifies (at [15]) 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 [16]) the nature and extent of the native title rights and interests in relation to the area and (at [17] to [21]) the limitations on their exercise;
- (3) sets out (at [22]) the nature and extent of other interests in the positive determination area;
- (4) describes (at [23]) the relationship between the native title rights and interests described at [16] to [20] and the other interests described at [22]; and
- (5) states (at [18]) that the native title rights and interests area do not confer possession, occupation, use and enjoyment of the land and waters to the exclusion of all others.

15 I am satisfied that the requirements of s 94A are complied with and that the Court has the power to make the order substantially in the form sought by the parties.

It is appropriate to make the orders

16 In *Lovett on behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474 North J said, of s 87 of the NT Act (at [36]):

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.

17 His Honour went on to say that the primary consideration for the Court is to determine whether there is an agreement and whether it was freely entered into on an informed basis: at [37]. The Court should be satisfied that the State party has taken steps to satisfy itself that there is a credible basis for the orders to be made: *Munn (for and on behalf of the Gunggari People) v Queensland* (2001) 115 FCR 109. The State's task assumes critical importance for, as French J said in *Cox on behalf of the Yungngora People v State of Western Australia* [2007] FCA 588 (at [3]), a determination as to whether or not native title exists binds not only the parties to the proceedings, but is good against all of the world.

18 In *Nelson v Northern Territory* (2010) 190 FCR 344 Reeves J said:

12 It is appropriate to make some comments about the difficult balance a State party needs to strike between its role in protecting the community's interests, including the stringency of the processes it follows in assessing the underlying evidence going to the existence of native title, and its role in the native title system as a whole, to ensure that it, like the Court and all other parties, takes a flexible approach that is aimed at facilitating negotiation and achieving agreement. In *Lovett* North J commented:

... There is a question as to how far a State party is required to investigate in order to satisfy itself of a credible basis for an application. One reason for the often inordinate time taken to resolve some of these cases is the overly demanding nature of the investigation conducted by State parties. The scope of these investigations demanded by some States is reflected in the complex connection guidelines published by some States.

The power conferred by the Act on the Court to approve agreements is given in order to avoid lengthy hearings before the Court. The Act does not intend to substitute a trial, in effect, conducted by State parties for a trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application. The Act

contemplates a more flexible process than is often undertaken in some cases.

13. I respectfully agree with North J in these observations. In my view, it would be perverse to replace a trial before the Court with a trial conducted by the State party respondent and I do not consider that is what is intended by the provisions of s 87 of the Act.

- 19 On the material before me I am satisfied that all of the parties to the consent determination have had independent and competent legal advice in the proceedings and that the agreement now before the Court has been reached on an informed basis. It is the culmination of years of investigation and negotiation. As a part of that process, the State and the authorised applicant have agreed upon measures for the payment of compensation for the loss of native title brought about by extinguishing acts. This determination will come into effect upon the registration of that agreement. I am satisfied that it is appropriate to condition the Court's orders in that way.
- 20 I am also satisfied that the State has thoroughly assessed the claim so as to establish that there is a credible basis for it. To that end, the State considered reports of an archaeologist, an anthropologist and an historical genealogist, commissioned by the applicant. The State then commissioned independent anthropological and historical assessments before forming a view that the determination was justifiable on all of the materials.
- 21 The State accepts that the Narungga People continue to acknowledge and observe traditional laws and customs giving rise to rights and interests in the land and waters. It is those laws and customs that define the Narungga People as a society. Their observance of their laws and customs in the determination area has continued substantially uninterrupted since sovereignty. Members of the claim group provided evidence supporting their continuing connection with the determination area by activities undertaken in accordance with their traditional laws and customs: speaking for and taking responsibility for country, camping and visiting, hunting, fishing and other sea based activities, sharing cultural knowledge about sites, spiritual practices including smoking ceremonies and the continued teaching of dreaming stories relating to the to the area.
- 22 The rights and interests set out at [16] of the determination are consistent with the rights and interests that would have been possessed traditionally, for generations before Flinders and Baudin surveyed the shores.
- 23 As the settlers' "stock runs" traversed the Yorke Peninsula, Aboriginal populations were disrupted and dislocated. In 1867, the Point Pearce Mission was established. The majority of

Aboriginal people located at the mission were Narungga. Point Pearce is now run by the Narungga People and remains a significant location for them in ensuring the survival of their cultural identity. The Court sits at Point Pearce today for the purpose of delivering this determination of native title.

- 24 Consistent with the objectives of the NT Act, the determination now made provides certainty to all persons having rights and interests in the determination area, both in the present day and for generations to come. The parties are to be commended for the considerable effort in resolving the claim in a conciliatory way.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Charlesworth.

Associate:

Dated: 14 March 2023

SCHEDULE 1 – LOCATION OF AND AREAS COMPRISING THE DETERMINATION AREA

External Boundary Description

Part A

Commencing at the point being the intersection of a straight line between Longitude 137.869716 East, Latitude 33.518038 South and Longitude 137.893541 East, Latitude 33.531269 South with a line 100 metres seaward of mainland Lowest Astronomical Tide [being a point on the southern portion of the external boundary of native title determination SAD6012/1998 Nukunu Part A (SCD2019/001)].

Then generally south-easterly in straight lines through the following coordinate points:

Longitude East	Latitude South
137.893541	33.531269
137.895521	33.535857

then south-easterly along a straight line between Longitude 137.895521, Latitude 33.535857 South and Longitude 137.904681 East, Latitude 33.547279 South to its intersection with a line 100 metres seaward of mainland Lowest Astronomical Tide at Latitude 33.540156 South [being along a portion of the southern portion of the external boundary of native title determination SAD6012/1998 Nukunu Part A (SCD2019/001)].

Then generally westerly, generally north-westerly and generally north-easterly along a line 100 metres seaward of mainland Lowest Astronomical Tide to the point of commencement.

Part B

Commencing at the point being the intersection of a straight line between Longitude 137.895521, Latitude 33.535857 South and Longitude 137.904681 East, Latitude 33.547279 South with a line 100 metres seaward of mainland Lowest Astronomical Tide at Latitude 33.540323 South [being a point on the southern portion of the external boundary of native title determination SAD6012/1998 Nukunu Part A (SCD2019/001)].

Then generally south-easterly and generally easterly in straight lines through the following coordinate points:

Longitude East	Latitude South
137.904681	33.547279
137.915914	33.555441
137.930463	33.560768
137.934061	33.561752
137.940852	33.563610
137.948906	33.563614
137.961617	33.563620
137.970006	33.563624
137.981550	33.563630
137.998988	33.561866
138.033447	33.557626
138.055032	33.554090
138.068316	33.551614
138.080770	33.549847
138.101031	33.548751
138.125999	33.544788
138.132013	33.543834
138.147123	33.540524
138.169450	33.535919
138.199262	33.531781
138.207856	33.531515

[being along a portion of the southern portion of the external boundary of native title determination SAD6012/1998 Nukunu Part A (SCD2019/001)].

Then generally southerly in straight lines through the following coordinate points:

Longitude East	Latitude South
138.214460	33.536738
138.221562	33.560292
138.222025	33.612458
138.224561	33.621712

138.224534	33.653685
138.212948	33.687517
138.211275	33.692400
138.209193	33.748775
138.211715	33.773174
138.204747	33.783370
138.209841	33.797815
138.208828	33.808450
138.192564	33.843370
138.179856	33.865096
138.169189	33.900850
138.161561	33.908527
138.161567	33.922561
138.160553	33.931494
138.166152	33.940410
138.165647	33.948917
138.180512	33.962146
138.188038	33.968840
138.202797	33.984958
138.208907	33.999399
138.208409	34.024917
138.204850	34.030456
138.203837	34.040240
138.204860	34.053421
138.199274	34.076828
138.185042	34.104512
138.163699	34.156032
138.151493	34.163298
138.148451	34.184996

then south-westerly along a straight line between Longitude 138.148451, Latitude 34.184996 South and Longitude 138.125561 East, Latitude 34.204645 South to its intersection with a line 100 metres seaward of mainland Lowest Astronomical Tide.

Then generally north-westerly, generally southerly and generally south-westerly, along a line 100 metres seaward of mainland Lowest Astronomical Tide to its intersection with a line 100 metres seaward of Lowest Astronomical Tide northerly of a portion of land known as Chinamans Hat Island (Section 116, Hundred of Warrenben), then generally south-easterly, generally south-westerly and generally northerly along said line to its intersection with a line 100 metres seaward of mainland Lowest Astronomical Tide, then generally westerly, generally north-westerly and generally north-easterly along a line 100 metres seaward of mainland Lowest Astronomical Tide to the point Longitude 136.843902 East, Latitude 35.218353 South.

Then generally westerly in straight lines through the following coordinate points:

Longitude East	Latitude South
136.843298	35.217929
136.842757	35.217639
136.841970	35.217276
136.841246	35.217008
136.840569	35.216814
136.840141	35.216727
136.839708	35.216696
136.838942	35.216695
136.838288	35.216772
136.837636	35.216958
136.836760	35.217318
136.834884	35.218185
136.833859	35.218609

the latter being a point on a line 100 metres seaward of Lowest Astronomical Tide southerly of a portion of land known as Middle Island (Section 958, Out of Hundreds (Kingscote)), then generally westerly along said line to the point Longitude 136.826305 East, Latitude 35.216403 South.

Then generally north-westerly in straight lines through the following coordinate points:

Longitude East	Latitude South
136.825737	35.215389
136.825333	35.214419
136.825067	35.213875
136.824858	35.213592
136.824548	35.213307
136.824260	35.213115
136.823917	35.212942
136.823532	35.212793
136.823142	35.212685
136.822441	35.212595
136.821443	35.212587

the latter being a point on a line 100 metres seaward of Lowest Astronomical Tide southerly of an un-named portion of land permanently above Mean High Water Mark, then generally westerly, generally northerly and generally easterly along said line to the point Longitude 136.822028 East, Latitude 35.209537 South.

Then generally south-easterly in straight lines through the following coordinate points:

Longitude East	Latitude South
136.822558	35.209752
136.823271	35.209906
136.823833	35.209945
136.825536	35.209937
136.826578	35.210079
136.827163	35.210224
136.827763	35.210418
136.829060	35.210972

the latter being a point on a line 100 metres seaward of Lowest Astronomical Tide northerly of a portion of land known as Middle Island (Section 958, Out of Hundreds (Kingscote)), then

generally south-easterly along said line to the point Longitude 136.834394 East, Latitude 35.212501 South.

Then generally south-easterly and generally north-easterly in straight lines through the following coordinate points:

Longitude East	Latitude South
136.835290	35.213032
136.835867	35.213305
136.836272	35.213449
136.836615	35.213518
136.837038	35.213556
136.837642	35.213571
136.838166	35.213548
136.838763	35.213466
136.839376	35.213316
136.839810	35.213167
136.840691	35.212798
136.841095	35.212587
136.841494	35.212309
136.841609	35.212194
136.841804	35.211910

the latter being a point on a line 100 metres seaward of mainland Lowest Astronomical Tide, then generally northerly along a line 100 metres seaward of mainland Lowest Astronomical Tide to its intersection with a line 100 metres seaward of Lowest Astronomical Tide south-easterly of a portion of land known as Royston Island (Section 959, Out of Hundreds (Kingscote)), then generally south-westerly, generally westerly, generally northerly, generally easterly and generally south-easterly along said line to its intersection with a line 100 metres seaward of mainland Lowest Astronomical Tide then generally northerly and generally north-easterly along a line 100 metres seaward of mainland Lowest Astronomical Tide to the point Longitude 136.940841 East, Latitude 35.104642 South.

Then generally northerly in straight lines through the following coordinate points:

Longitude East	Latitude South
136.941198	35.103913
136.941481	35.103163
136.941698	35.102375
136.942013	35.100911
136.942108	35.100361
136.942168	35.099698
136.942162	35.098311

the latter being a point on a line 100 metres seaward of Lowest Astronomical Tide westerly of a portion of land known as Ella Rock (Section 115, Out of Hundreds (Kingscote)), then generally northerly and generally easterly along said line to the point Longitude 136.944378 East, Latitude 35.097030 South.

Then generally easterly and generally north-easterly in straight lines through the following coordinate points:

Longitude East	Latitude South
136.945091	35.096984
136.946640	35.096719
136.947239	35.096704
136.947551	35.096756
136.947876	35.096856
136.948940	35.097348
136.949386	35.097508
136.949885	35.097594
136.950377	35.097573
136.950670	35.097502
136.950957	35.097383
136.951241	35.097219
136.951521	35.097007
136.952070	35.096440
136.952616	35.095676

the latter being a point on a line 100 metres seaward of mainland Lowest Astronomical Tide, then generally north-easterly, generally north-westerly and generally north-easterly along a line 100 metres seaward of mainland Lowest Astronomical Tide to the point Longitude 136.968491 East, Latitude 34.970275 South.

Then generally westerly in straight lines through the following coordinate points:

Longitude East	Latitude South
136.968250	34.970031
136.967974	34.969822
136.967650	34.969633
136.967334	34.969504
136.966708	34.969344
136.966280	34.969304
136.965532	34.969296

the latter being a point on a line 100 metres seaward of Lowest Astronomical Tide southerly of a portion of land known as Swincer Rocks (eastern formation), then generally westerly along said line to the point Longitude 136.964295 East, Latitude 34.968975 South.

Then generally westerly in straight lines through the following coordinate points:

Longitude East	Latitude South
136.963918	34.968774
136.963558	34.968635
136.963173	34.968538
136.962776	34.968482
136.962022	34.968454
136.960578	34.968562
136.959921	34.968568
136.958874	34.968516
136.957902	34.968384
136.957037	34.968193
136.956049	34.967899

136.955498	34.967642
136.954991	34.967276

the latter being a point on a line 100 metres seaward of Lowest Astronomical Tide south-westerly of a portion of land known as Swincer Rocks (western formation), then generally northerly and generally easterly along said line to the point Longitude 136.957889 East, Latitude 34.965141 South.

Then generally south-easterly and generally north-easterly in straight lines through the following coordinate points:

Longitude East	Latitude South
136.959054	34.966204
136.959387	34.966442
136.959731	34.966602
136.960087	34.966719
136.960623	34.966849
136.961137	34.966929
136.961544	34.966959
136.961908	34.966951
136.962734	34.966805
136.963232	34.966648
136.964992	34.965949

the latter being a point on a line 100 metres seaward of Lowest Astronomical Tide northerly of a portion of land known as Swincer Rocks (eastern formation), then along said line to the point Longitude 136.966099 East, Latitude 34.965834 South.

Then generally easterly and generally north-easterly in straight lines through the following coordinate points:

Longitude East	Latitude South
136.966687	34.965830
136.967114	34.965752
136.967511	34.965631

136.968050	34.965414
136.968541	34.965181
136.968812	34.965014
136.969237	34.964687
136.969761	34.964192
136.970073	34.963773
136.970515	34.962968

the latter being a point on a line 100 metres seaward of mainland Lowest Astronomical Tide, then generally north-easterly, generally easterly, generally northerly and generally south-westerly along a line 100 metres seaward of mainland Lowest Astronomical Tide to the point Longitude 137.432056 East, Latitude 34.472987 South.

Then generally south-westerly in straight lines through the following coordinate points:

Longitude East	Latitude South
137.431938	34.474848
137.431744	34.476582
137.431471	34.478181
137.431111	34.479692
137.430654	34.481155
137.430085	34.482624
137.429384	34.484150
137.428535	34.485766

the latter being a point on a line 100 metres seaward of Lowest Astronomical Tide south-easterly of a portion of land known as Rocky Island (Section 916, Out of Hundreds (Maitland) and Allotment 3 of Deposited Plan 31588), then generally south-westerly along said line to the point Longitude 137.423593 East, Latitude 34.488323 South.

Then generally south-westerly and generally westerly in straight lines through the following coordinate points:

Longitude East	Latitude South
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137.421720	34.489933
137.419836	34.491453
137.417405	34.493307
137.415402	34.494723
137.413677	34.495825
137.411241	34.497229
137.409650	34.498051
137.408218	34.498675
137.406786	34.499166
137.405059	34.499633
137.402670	34.500168
137.400883	34.500469
137.398463	34.500706
137.396145	34.500847
137.393791	34.500899
137.391290	34.500866

the latter being a point on a line 100 metres seaward of Lowest Astronomical Tide easterly of a portion of land known as Wardang Island (Allotment 100 of Deposited Plan 88262) then generally south-westerly, generally westerly and generally northerly along said line (encompassing any un-named portions of land permanently above Mean High Water Mark immediately adjacent Wardang Island) to its intersection with with a line 100 metres seaward of Lowest Astronomical Tide southerly of portions of land known as Bikini Islets (Sections 1472 and 1473, Out of Hundreds (Maitland) and Allotments 4 and 5 of Deposited Plan 31588), then generally north-westerly, generally north-easterly and generally easterly along said line to its intersection with a line 100 metres seaward of Lowest Astronomical Tide westerly of a portion of land known as Wardang Island (Allotment 100 of Deposited Plan 88262), then generally north-easterly along said line to its intersection with with a line 100 metres seaward of Lowest Astronomical Tide south-westerly of a portion of land known as Boat Rock (Section 860, Out of Hundreds (Maitland) and Allotment 6 of Deposited Plan 31588), then generally north-westerly, generally north-easterly and generally easterly along said line to its intersection with a line 100 metres seaward of Lowest Astronomical Tide northerly of a portion of land known as Wardang Island (Allotment 100 of Deposited Plan 88262), then generally north-

easterly along said line to its intersection with with a line 100 metres seaward of Lowest Astronomical Tide south-westerly of portions of land known as Goose Island, Seal Rocks, White Rock Island and Little Goose Island (Sections 878, 879, 1037, 1038, 1039 and 1040 Out of Hundreds (Maitland) and Allotments 7, 8, 9, 10, 11 and 12 of Deposited Plan 31588), then generally westerly, generally north-westerly, generally north-easterly, generally easterly and generally south-easterly along said line to the point Longitude 137.374677 East, Latitude 34.466500 South.

Then generally easterly and generally north-easterly in straight lines through the following coordinate points:

Longitude East	Latitude South
137.375768	34.467166
137.376822	34.467738
137.377909	34.468257
137.379025	34.468724
137.380174	34.469137
137.381372	34.469504
137.382596	34.469818
137.383838	34.470076
137.385053	34.470273
137.386263	34.470411
137.387587	34.470504
137.389044	34.470551
137.390786	34.470553
137.392216	34.470510
137.393738	34.470395
137.394892	34.470255
137.395811	34.470084
137.396527	34.469916
137.397103	34.469737
137.397634	34.469516
137.398809	34.468908

137.399411	34.468555
137.399880	34.468193
137.400338	34.467729
137.400697	34.467262
137.400979	34.466742
137.401217	34.466120
137.401488	34.465195
137.401650	34.464492
137.401757	34.463778
137.401809	34.463054
137.401801	34.462223

the latter being a point on a line 100 metres seaward of mainland Lowest Astronomical Tide, then generally north-easterly, generally northerly, generally north-westerly, generally easterly and generally north-easterly along a line 100 metres seaward of mainland Lowest Astronomical Tide to the point of commencement.

Data Reference and source

Cadastral and Lowest Astronomical Tide data sourced from Department for Trade and Investment (17 June 2022).

Reference datum

Geographical coordinates are referenced to the Geocentric Datum of Australia 2020 (GDA2020), in decimal degrees.

Use of Coordinates

Where coordinates are used within the description to represent cadastral or topographical boundaries or the intersection with such, they are intended as a guide only. As an outcome of the custodians of cadastral and topographical data continuously recalculating the geographic position of their data based on improved survey and data maintenance procedures, it is not possible to accurately define such a position other than by detailed ground survey.

SCHEDULE OF PARTIES

SAD 88 of 2022

NARUNGA NATION NATIVE TITLE CLAIM

Respondents

Fourth Respondent:	BARUNGA WEST COUNCIL
Fifth Respondent:	BARTHOLOMEW BUTSON
Sixth Respondent:	JEFFREY WAIT
Seventh Respondent:	STEWART BUTSON
Eighth Respondent:	ROBERT BUTSON
Ninth Respondent:	YORKE PENINSULA FIELD DAYS INCORPORATED
Tenth Respondent:	RAYMOND LEONARD DUTSCHKE
Eleventh Respondent:	REX MINERALS (SA) PTY LTD
Twelfth Respondent:	YORKE PENINSULA COUNCIL
Thirteenth Respondent:	ADELAIDE BRIGHTON CEMENT LIMITED
Fourteenth Respondent:	TELSTRA CORPORATION LIMITED
Fifteenth Respondent:	WAKEFIELD REGIONAL COUNCIL
Sixteenth Respondent:	SA POWER NETWORKS (FORMERLY KNOWN AS ETSA UTILITIES)