

FEDERAL COURT OF AUSTRALIA

Farrer on behalf of the Ngarrawanji Native Title Claim Group v State of Western Australia [2019] FCA 655

File number: WAD 41 of 2019

Judge: **MORTIMER J**

Date of judgment: 21 May 2019

Catchwords: **NATIVE TITLE** – consent determination – agreement of the parties – where interlocutory application brought prior to determination seeking orders under s 66B of the *Native Title Act 1993* (Cth) to replace the applicant – where newly constituted applicant duly authorised by claim group – requirements of s 66B of the *Native Title Act 1993* (Cth) satisfied – requirements of s 87A of the *Native Title Act 1993* (Cth) satisfied – appropriate to make orders

Legislation: *Native Title Act 1995* (Cth) ss 47B, 55, 56, 57, 61, 66, 66B, 87, 87A, 225
Federal Court of Australia Act 1976 (Cth) ss 37M, 37N

Cases cited: *Drury on behalf of the Nanda People v State of Western Australia* [2018] FCA 1849
Lander v South Australia [2012] FCA 427
Lovett on behalf of the Gunditjmarra People v State of Victoria [2007] FCA 474
PC on behalf of the Njamal People v State of Western Australia [2016] FCA 462
Stock v State of Western Australia [2014] FCA 179
Tjungarrayi v Western Australia; KN (deceased) and Others (Tjiwarl and Tjiwarl #2) v Western Australia [2019] HCA 12
Weribone on behalf of the Mandandanji People v State of Queensland [2013] FCA 255

Date of hearing: Determined on the papers

Date of last submissions: 8 March 2019

Registry: Western Australia

Division: General Division

National Practice Area:	Native Title
Category:	Catchwords
Number of paragraphs:	49
Solicitor for the Applicant:	Ms Justine Toohey of the Kimberley Land Council Aboriginal Corporation
Solicitor for the State of Western Australia:	Ms Sheila Begg of the State Solicitor's Office
Solicitor for Telstra Corporation Limited:	Mr Scott Evan Singleton of King & Wood Mallesons
Solicitor for the Shire of Halls Creek:	Mr Peter Wittkuhn of McLeods

ORDERS

WAD 41 of 2019

BETWEEN: **JOSEPHINE FARRER, MATT DAWSON, PHYLLIS
WALLABY, MARTY STEVENS, MARK BIN BAKAR AND
GREGORY DONALD TAIT**
Applicant

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

TELSTRA CORPORATION LIMITED
Second Respondent

SHIRE OF HALLS CREEK
Third Respondent

JUDGE: **MORTIMER J**

DATE OF ORDER: **21 MAY 2019**

THE COURT NOTES THAT:

- A. Pursuant to section 87A(2) of the *Native Title Act 1993* (Cth) the parties have filed with the Court the attached Minute of Consent Determination of Native Title which reflects the terms of an agreement reached by the parties in relation to these proceedings.
- B. The terms of the agreement involve the making of consent orders for a determination of native title in relation to the land and waters the subject of this proceeding pursuant to section 87A(4) and 94A of the *Native Title Act 1993* (Cth).

In these circumstances and with the consent of the parties, THE COURT DETERMINES, DECLARES AND ORDERS THAT:

1. An order in the terms proposed in the attached Minute of Consent Determination of Native Title is within the power of the Court and is appropriate to be made pursuant to section 87A of the *Native Title Act 1993* (Cth).
2. There be a determination of native title in the terms of the Minute of Consent Determination of Native Title attached. The determination is to take effect immediately upon the making of a determination under section 56(1) or 57(2) of the *Native Title Act 1993* (Cth), as the case may be.

3. Within twelve months of the date upon which these orders are made, a representative of the common law holders of the native title rights and interests shall indicate whether they intend to have the native title rights and interests held in trust and, if so, by whom. They are to do so by:
 - (a) nominating in writing to the Federal Court a prescribed body corporate to be trustee of the native title rights and interests; and
 - (b) including within the nomination the written consent of the body corporate.
4. If a prescribed body corporate is nominated in accordance with order 3, it will hold the native title rights and interests described in order 1 in trust for the common law holders of the native title rights and interests.
5. In the event that there is no nomination within the time specified in order 3, or such later time as the Court may order, the matter is to be listed for further directions.
6. There be no order as to costs.

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

ATTACHMENT A

DETERMINATION

THE COURT ORDERS, DECLARES AND DETERMINES THAT:

Existence of native title (s225)

1. The Determination Area is the land and waters described in Schedule 1 and depicted on the maps comprising Schedule 2.
2. Native title exists in those parts of the Determination Area identified in Schedules 3 and 4 (**Native Title Area**).
3. Native title does not exist in those parts of the Determination Area identified in Schedule 5.

Native title holders (s225(a))

4. The native title in the Determination Area is held by the native title holders. The native title holders are the people referred to in Schedule 6.

The nature and extent of native title rights and interests (s225(b)) and exclusiveness of native title (s225(e))

Exclusive native title rights and interests

5. Subject to paragraphs 8, 9 and 10 the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule 3 (being areas where any extinguishment must be disregarded) is the right to possession, occupation, use and enjoyment of that part of the Determination Area as against the whole world.

The nature and extent of native title rights and interests (s225(b)) and exclusiveness of native title (s225(e))

Non-exclusive rights and interests

6. Subject to paragraphs 7, 8, 9 and 10 the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule 4 (being areas where there has been a partial extinguishment of native title and where any extinguishment is not required to be disregarded) are that they confer the following non-exclusive rights on the Native Title Holders.

(a) The right to have access to, remain in and use that part, which includes but is not limited to the following activities:

(i) to access and move freely through and within that part;

(ii) to live, being to enter and remain on, camp and erect temporary shelters and other structures for those purposes on that part;

(iii) to light controlled contained fires but not for the clearance of vegetation;

(iv) to engage in cultural activities in that part, including the transmission of cultural heritage knowledge; and

(v) to hold meetings in that part.

(b) The right to access and take for any purpose the resources on that part, which includes but is not limited to the following activities:

(i) to access and take water, other than water which is lawfully captured or controlled by the holders of pastoral leases.

(c) The right to protect places, areas and sites of traditional significance on that part, which includes but is not limited to the following activities:

(i) to conduct and participate in ceremonies in that part;

(ii) to conduct burials and burial rites and other ceremonies in relation to death in that part; and

- (iii) to visit, maintain and protect from physical harm, areas, places and sites of importance in that part.
 - (d) The right to be accompanied onto the Determination Area by, any persons who, though not native title holders pursuant to paragraph 4, the native title holders may invite pursuant to traditional law and custom, being:
 - (i) spouses or partners of the native title holders; and
 - (ii) persons who may assist with the performance of ceremonies or cultural activities, including sharing of knowledge about country.
7. The native title rights and interests referred to in paragraph 6 do not confer:
- (a) possession, occupation, use and enjoyment of those parts of the Determination Area on the Native Title Holders to the exclusion of all others, nor
 - (b) a right to control the access of others to the land or waters of those parts of the Determination Area.
8. Notwithstanding anything in this Determination there are no native title rights and interests in the Determination Area in or in relation to:
- (a) minerals as defined in the *Mining Act 1904 (WA)* (repealed) and the *Mining Act 1978 (WA)*;
 - (b) petroleum as defined in the *Petroleum Act 1936 (WA)* (repealed) and the *Petroleum and Geothermal Energy Resources Act 1967 (WA)*;
 - (c) geothermal energy resources and geothermal energy as defined in the *Petroleum and Geothermal Energy Resources Act 1967 (WA)*; or
 - (d) water lawfully captured by the holders of Other Interests,
- except the right to take and use ochre to the extent that ochre is not a mineral pursuant to the *Mining Act 1904 (WA)*.
9. Native title rights and interests are subject to and exercisable in accordance with:

- (a) the laws of the State and the Commonwealth, including the common law; and
 - (b) the traditional laws and customs of the Native Title Holders.
10. For the avoidance of doubt, the nature and extent of native title rights and interests in relation to water in any watercourse, wetland or underground water source as defined in the *Rights in Water and Irrigation Act 1914* (WA) as at the date of this determination is the non-exclusive right to take, use and enjoy that water.

Areas to which s47B of the Native Title Act applies

11. Section 47B of the Native Title Act applies to disregard any prior extinguishment in relation to the areas described in Schedule 7.

The nature and extent of any other interests

12. The nature and extent of other rights and interests in relation to the Determination Area are those set out in Schedule 8.

Relationship between native title rights and other interests

13. The relationship between the native title rights and interests described in paragraphs 5 and 6 and the other interests set out in Schedule 8 is as follows:
- (a) the determination does not affect the validity of those other interests;
 - (b) to the extent of any inconsistency between the other interests and the 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; and
 - (c) otherwise the other interests co-exist with the native title rights and interests. To avoid doubt, existence and exercise of native title rights and interests do not prevent the doing of any activity required or permitted to be done by or under the other rights and interests, and the doing of an activity required or permitted under those other interests prevails over the native title rights and interests and their exercise, but does not extinguish them.

Definitions and interpretation

14. In this Determination, unless the contrary intention appears:

“Determination Area” means the land and waters described in Schedule 1 and depicted on the maps at Schedule 2;

“land” and **“waters”** respectively have the same meanings as in the *Native Title Act*;

“Native Title Act” means the *Native Title Act 1993* (Cth);

In the event of any inconsistency between the written description of an area in Schedule 1 or Schedules 3 to 5 and the area as depicted on the maps at Schedule 2, the written description prevails.

SCHEDULE 1

DETERMINATION AREA

The **Determination Area**, generally shown as bordered in blue on the maps at Schedule 2, comprises all that land and waters bounded by the following description:

Area 1

All those lands and waters commencing at the southwestern corner of the southern severance of Reserve 1592 and being a point on the southern boundary of the southwestern severance of Pastoral Lease N050141 (Moola Bulla) and extending westerly, northerly, generally northeasterly, easterly, generally southeasterly and southerly along the boundaries of that pastoral lease to the intersection of a northern boundary of the Great Northern Highway; Then onwards to the intersection of the southern boundary of the Great Northern Highway and the northeasternmost corner of Lot 360 as shown on Deposited Plan 76780; Then generally southwesterly along the boundaries of that lot to its westernmost southwestern corner being a northern boundary of the Reserve 23136; Then easterly to the intersection of a western boundary of the Great Northern Highway and a southern boundary of Pastoral Lease N050141 (Moola Bulla); Then westerly, generally southerly and easterly along the boundaries of that pastoral lease to the intersection of a western boundary of the Great Northern Highway; Then easterly to the intersection of the eastern boundary of the Great Northern Highway and the northwesternmost corner of Lot 361 as shown on Deposited Plan 76779; Then generally southwesterly along the boundaries of that lot the intersection of the a northern boundary of the eastern severance of Pastoral Lease N049860 (Koongie Park); Then westerly to the intersection of the western boundary of the Great Northern Highway and a northern boundary of the northern severance of Pastoral Lease N049860 (Koongie Park); Then westerly northerly, westerly and generally southwesterly along the boundaries of that pastoral lease to the intersection of the northernmost northeastern corner of Pastoral Lease N049432 (Lambo) being a point on Native Title Determination WAD45/2012 Jaru (WCD2018/013); Then westerly, southerly and westerly along the boundaries of that native title determination back to the commencement point.

Area 2

All that land and water comprising Lot 129 as shown on Deposited Plan 93288.

For the avoidance of doubt, the above description does not include UCL 23 (Lot 360 on DP 76780) or UCL 24 (Lot 361 on DP 76779) which will be the subject of the Part B determination.

Note: **Geographic Coordinates provided in Decimal Degrees.**

All referenced Deposited Plans and Diagrams are held by the Western Australian Land Information Authority, trading as Landgate.

Cadastral boundaries sourced from Landgate's Spatial Cadastral Database dated 04th December 2018.

Rivers and Creek data sourced from Commonwealth of Australia (Geoscience Australia) 2006

For the avoidance of doubt the application excludes any land and waters already claimed by:

Native Title Determination Application WAD45/2012 Jaru (WCD2001/001) as Determined in the Federal Court on the 6th December 2018.

Native Title Determination Application WAD6157/1998 Koongie-Elvire (WC1999/040) as Registered in the Federal Court on the 15th November 1999.

Native Title Determination Application WAD6182/1998 Malarngowem (WC1999/044) as Registered in the Federal Court on the 4th February 2000.

Native Title Determination Application WAD268/2010 Yurriyngem Taam (WC2010/013) as Registered in the Federal Court on the 29th October 2010.

Datum: **Geocentric Datum of Australia 1994 (GDA94)**

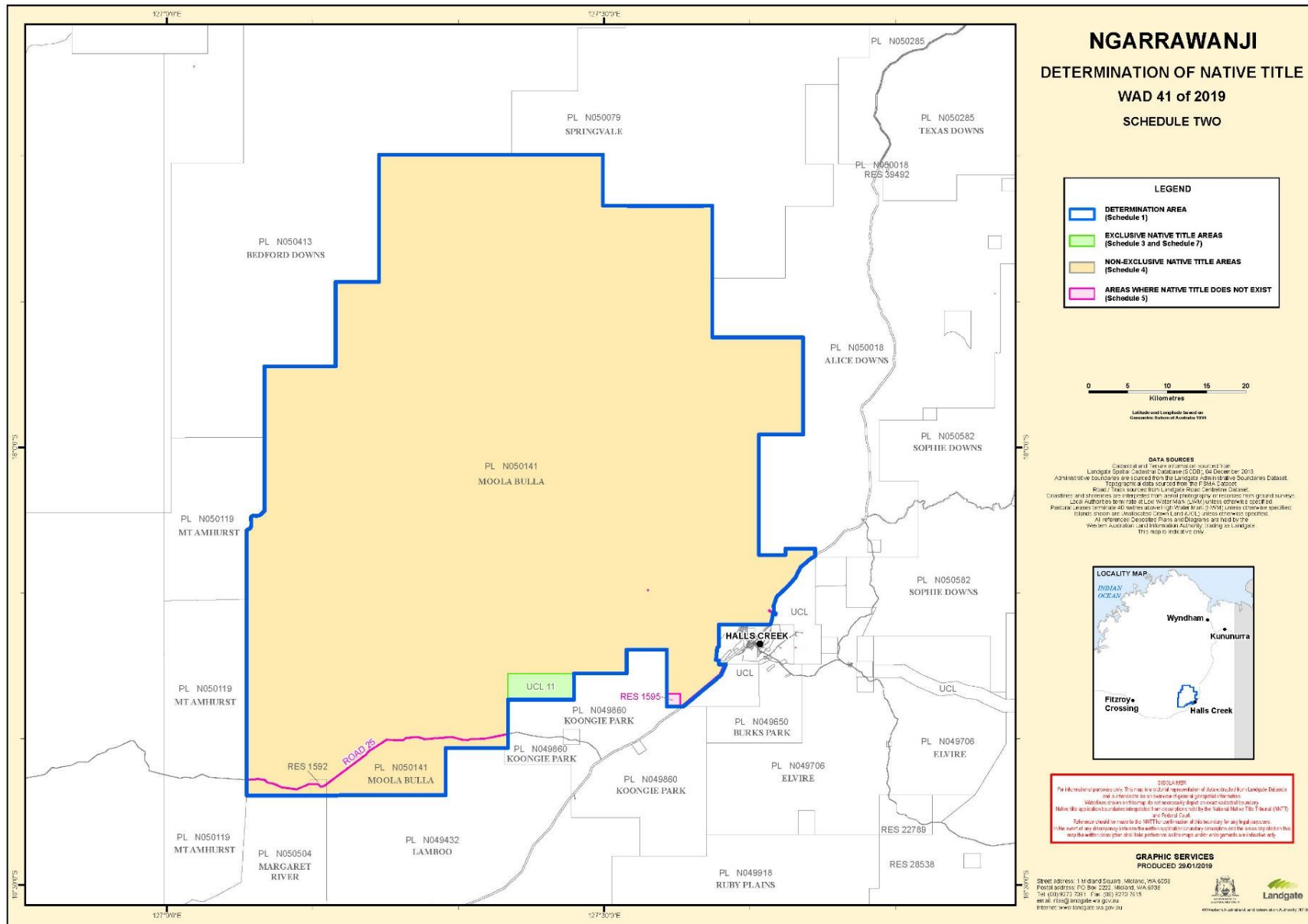
Prepared By: **Graphic Services (Landgate) 17th January 2019**

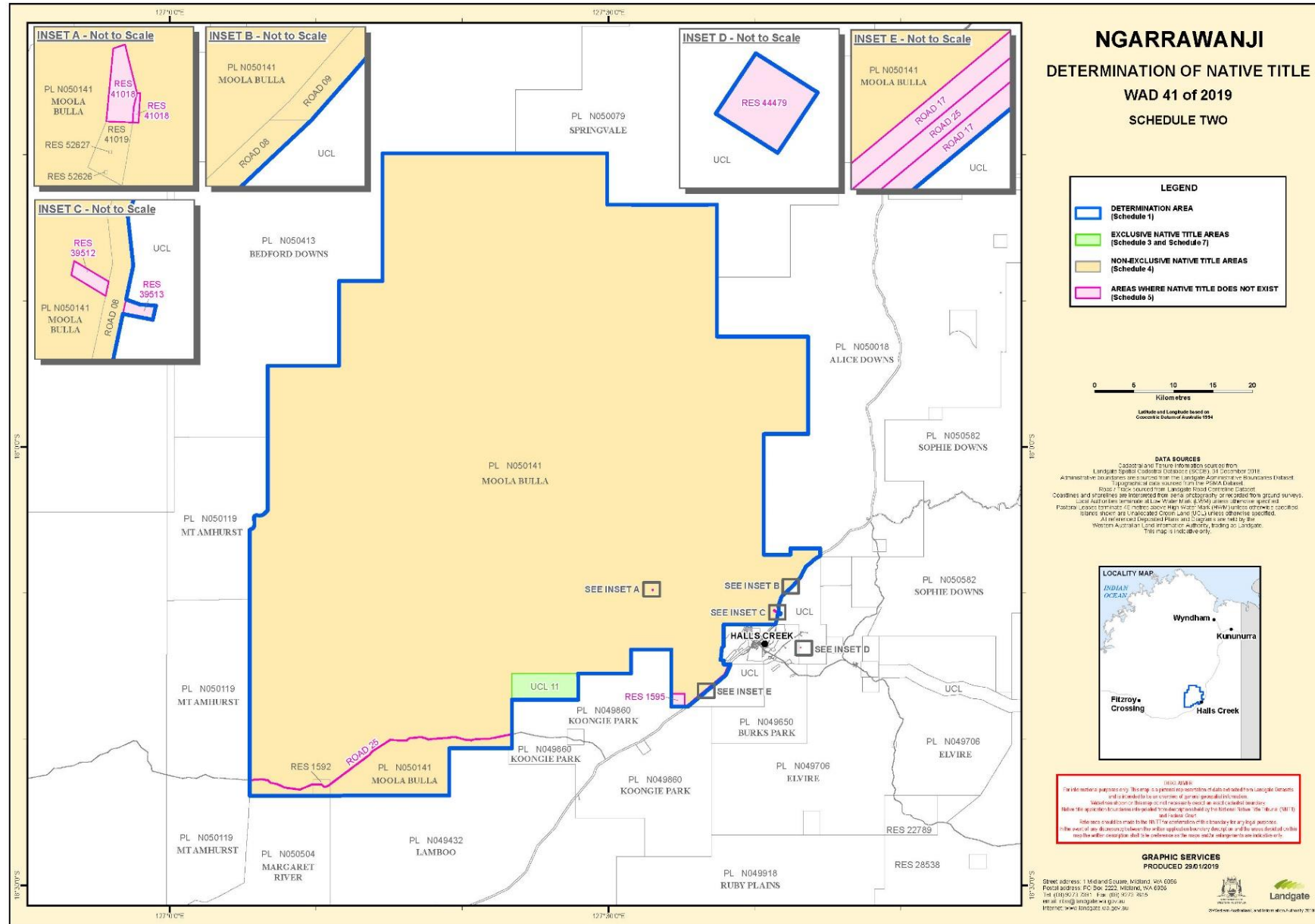
Use of Coordinates:

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 to the custodians of cadastral and topographic 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 2

MAPS OF THE DETERMINATION AREA





SCHEDULE 3

EXCLUSIVE NATIVE TITLE AREAS

Areas where native title comprises the rights set out in paragraph 5

The following land and waters (generally shown as green on the maps at Schedule 2):

Section 47B

UCL 11	Centre of the southern boundary of Pastoral Lease N 50141 (Moola Bulla)
--------	--

SCHEDULE 4

NON - EXCLUSIVE NATIVE TITLE AREAS

Areas where native title comprises the rights set out in paragraph 6

The following land and waters (generally shown as orange on the maps at Schedule 2):

1 Pastoral Leases:

Lease number	Location
N 50141 Moola Bulla	Lot 1537 on DP 67137

2 Reserves

Reserve number/purpose	Location
Reserve 1592 for the purpose of Watering Place	Lot 147 on Deposited Plan 194243
Reserve 41019 for the purpose of Trigonometrical Station	Lot 102 on Plan 74144
Reserve 52626 for the purpose of Radio Repeater Site	Lot 101 on Plan 74144
Reserve 52627 for the purpose of Radio Repeater Site	Lot 100 on Plan 74144

SCHEDULE 5

AREAS WHERE NATIVE TITLE DOES NOT EXIST

The following land and waters (generally shown as red on the maps at Schedule 2):

1. Reserves

Reserve No/Purpose	Location	Vesting/Leasing
Reserve 1595 for the purpose of Recreation	Great Northern Highway, Bulara	Shire of Halls Creek
Reserve 39512 for the purpose of Quarry	Lot 65 on Plan 215893	Shire of Halls Creek
Reserve 39513 for the purpose of Quarry	Lot 66 on Plan 215893	Shire of Halls Creek
Reserve 41018 for the purpose of Satellite Ground Station Site	Lots 396 and 40 on Plan 216273	Airservices Australia
Reserve 44479 for the purpose of Bore Site	Lot 129 on Plan 93288	Water Corporation

2. Public Works

The areas the subject of the following works:

(a) Roads:

MapInfo Road Number	Description
17	Great Northern Highway
25	Road 296

- (b) Any other public works as that expression is defined in the *Native Title Act and the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) and to which section 12J of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) or section 23C(2) of the *Native Title Act* applies, within the external boundary of the Determination Area including the land and waters defined in section 251D of the *Native Title Act*.

SCHEDULE 6

DESCRIPTION OF THE NATIVE TITLE HOLDERS

1. The native title holders are those Aboriginal people who:
 - (a) are related through filiation (including by adoption) to one of the Apical Ancestors who held rights and interest in one of the local estate countries comprising the **Determination Area**; or
 - (b) are affiliated to an Ngarrawanji Apical Ancestor and who have spirit conception and/or birth sites in one of the local estate countries in the Determination Area; or
 - (c) are recognised by the persons described above as:
 - (i) holding rights and responsibilities for certain songs and ceremonies which make reference to important sites in the Determination Area; or
 - (ii) holding rights and interests in one of the local estate countries in the Determination Area under traditional law and custom.

2. The **Ngarrawanji Apical Ancestors** are:

1.	Djulbir / Dzulbir
2.	Jurrgi
3.	Linmarji
4.	Madangal (wife of Wolameri)
5.	Ngiliyayiny / Nyiliyang
6.	Ngowanderin

7.	Nigan and Kalkburreny
8.	Nirbrarir / Nirbarr
9.	Rosie Bulmaril
10.	Topsy Nanzili
11.	Unnamed Father of Ngularraji and Polly Gulungal

SCHEDULE 7

AREAS TO WHICH SECTIONS 47B OF THE NATIVE TITLE ACT APPLIES

UCL 11	Centre of the southern boundary of Pastoral Lease N 50141 (Moola Bulla)
--------	--

SCHEDULE 8

OTHER INTERESTS

1 Pastoral Leases

Lease Number	Location
N 50141 Moola Bulla	Lot 1537 on DP 67137

2 Reserves

The interests of persons who have the care, control and management of the following reserves and the interests of people entitled to access and use these reserves for the respective purposes for which they are reserved, subject to any statutory limitations upon those rights:

Reserve Number/Purpose	Location
Reserve 1592 for the purpose of Watering Place	Lot 147 on Deposited Plan 194243
Reserve 41019 for the purpose of Trigonometrical Station	Lot 102 on Plan 74144
Reserve 52626 for the purpose of Radio Repeater Site	Lot 101 on Plan 74144
Reserve 52627 for the purpose of Radio Repeater Site	Lot 100 on Plan 74144

3 Existing Interests under the *Mining Act 1978* (WA)

Tenement ID	Tenement Type	Date of grant
E 80/4709	Exploration Licence	15 August 2013
E 80/4753	Exploration Licence	11 April 2014
E 80/4793	Exploration Licence	3 November 2014
E 80/4795	Exploration Licence	10 December 2014
E 80/4858	Exploration Licence	6 May 2016

E 80/4934	Exploration Licence	12 April 2016
E 80/4960	Exploration Licence	24 March 2017
E 80/4983	Exploration Licence	4 May 2017
E 80/5081	Exploration Licence	3 April 2018
E 80/5112	Exploration Licence	31 August 2018
E80/5113	Exploration Licence	31 August 2018
E80/5127	Exploration Licence	27 November 2018
M 80/350	Mining Lease	22 January 1993
P 80/1814	Prospecting Licence	7 October 2014
P 80/1815	Prospecting Licence	7 October 2014
P 80/1816	Prospecting Licence	7 October 2014
P 80/1817	Prospecting Licence	7 October 2014
P 80/1818	Prospecting Licence	7 October 2014

4 Roads

The interests of persons who have the care, control and management of the following roads and the interests of persons entitled to use those roads, being roads to which the non-extinguishment principle applies:

MapInfo Road Number	Description
08, 09 and 10	Great Northern Highway (Road 295) between Halls Creek and Wyndham

5 Other Rights and Interests

- (a) Rights and interests, including licences and permits, granted by the Crown in right of the Commonwealth or the State pursuant to statute or otherwise in the exercise of its executive power and under any regulations made pursuant to such legislation.
- (b) Rights or interests held by reason of the force and operation of the laws of the State or of the Commonwealth including the force and operation of the *Rights in Water and Irrigation Act 1914* (WA).

- (c) Rights and interests of members of the public arising under the common law including but not limited to:
- (i) the public right to fish;
 - (ii) the public right to navigate;
 - (iii) the right of any person to use any road in the Determination Area (subject to the laws of the State) over which, as at the date of this Determination, members of the public have a right of access under common law.
- (d) The right to access land by an employee or agent or instrumentality of:
- (i) the State;
 - (ii) the Commonwealth; or
 - (iii) any local Government authority;
- as required in the performance of his or her statutory or common law duties where such access would be permitted to private land.
- (e) So far as confirmed pursuant to section 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) as at the date of this determination, any existing public access to and enjoyment of:
- (i) waterways;
 - (ii) the beds and banks or foreshores of waterways;
 - (iii) stock routes; or
 - (iv) areas that were public places at the end of 31 December 1993.
- (f) The rights and interests of Telstra Corporation Limited (ACN 051 775 556):
- (i) as the owner or operator of telecommunications facilities within the Determination Area;
 - (ii) created pursuant to the *Post and Telegraph Act 1901* (Cth), the *Telecommunications Act 1975* (Cth), the *Australian Telecommunications Corporation Act 1989* (Cth), the *Telecommunications Act 1991* (Cth) and the *Telecommunications Act 1997* (Cth) including rights:
 - (A) to inspect land;
 - (B) to install, 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 Determination Area in performance of their duties; and
- (iv) under any lease, licence, permit, access agreement or easement relating to its telecommunications facilities in the Determination Area.

REASONS FOR JUDGMENT

MORTIMER J:

1 This application shares its name with an important site in the area covered by this determination of native title. Ngarrawanji (also known as Mount Barrett) is a large tabletop hill located behind the Moola Bulla station homestead, another significant location within the determination area, for reasons I later explain. Ngarrawanji is associated with the Eagle Hawk Dreaming. Ngarrawanji is visible from the town of Halls Creek. So too will Ngarrawanji be visible from the location on which the Court pronounces its orders in this application.

2 It has taken more than 20 years for this native title application to be resolved. One consequence is that many elders of the Ngarrawanji claim group have not lived to see the determination, although their accounts and descriptions of their country, and their connection to it by traditional law and custom, were important to establishing native title and securing agreement to this consent determination. They will be present in the minds of all those who listen to the making of the Court's orders, and their contribution will be acknowledged and remembered, but the tragedy of their absence remains.

3 Nevertheless, the strength of the Ngarrawanji claim group as a group united by their traditional law and custom remains evident. The parties' joint submissions record the description by Mr Greg Tait, a senior member of the Ngarrawanji claim group, of the ongoing transmission of knowledge of those laws and customs:

My grandfather grew me up. He was called Longfella. He was the main law singer in the area. He taught me how to sing when I was young. He taught me how to hunt and how track. He taught me those skills out on the Areas. He taught me how to paint country too. I teach my kids those things too. My eldest son is picking lots of that knowledge. [He] wants to get more involved in that learning.

4 For the reasons set out below, there will be a determination of native title pursuant to s 87A of the *Native Title Act 1995 (Cth)*, in favour of the Ngarrawanji claim group as described in Schedule 6 of the Minute of Consent Determination attached to the Court's orders.

The application, the determination area and the process towards consent determination

5 The application for consent determination was supported by a set of submissions, jointly prepared by the KLC on behalf of the applicant and the State Solicitor for Western Australia (SSO), on behalf of the first respondent. As is usually the case, the SSO prepared the proposed

orders and Minute of Consent Determination, and the Court is grateful for the State's continuing support in terms of making its resources available for this purpose.

6 The application was also supported by three main affidavits filed by the KLC on behalf of the applicant:

- a) an affidavit of Philip James Walton Ramsay, Senior Legal Officer of the KLC, affirmed on 6 March 2019, which described the process undertaken by the KLC to notify claim group members of the Ngarrawanji authorisation meeting held on 26 November 2018, and what occurred at that meeting;
- b) an affidavit of Dr William Henry Kruse, an anthropologist employed by the KLC, affirmed on 14 December 2018, which described work undertaken to prepare for the Ngarrawanji authorisation meeting, and in particular the registration process for claim group members attending the meeting; and
- c) an affidavit of Sarah Maree Mack, a Native Title Officer employed by the KLC, affirmed on 1 March 2019, which also described the process undertaken by the KLC to notify claim group members of the Ngarrawanji authorisation meeting (including copies of meeting notices the KLC caused to be published). Ms Mack also described the travel assistance arrangements made by the KLC for 18 claim group members who attended the meeting.

7 These documents, together with the original application, constitute the material on which the Court has relied in making the orders for a determination of native title. Although I refer below to the anthropological report of Dr Anthony Redmond, that is not a document which has been filed with the Court, or made available to the Court for the purpose of this application. I also refer to evidence from affidavits filed by claim group members in support of the application for registration of the Ngarrawanji native title claim. That evidence is referred to in the parties' joint submissions (and I reproduce it in these reasons in the form it appeared in those submissions), however these documents were not filed with the Court or made available to the Court for the purpose of this application.

8 The parties did not file any agreed statement of facts pursuant to s 87A(9) of the Native Title Act. As a result, the Court relies very much on the joint submissions made by the parties. This is a well-accepted approach. As the joint submissions recognise, the basis for the Court's orders under ss 87 and 87A is the agreement of the parties, and the Court does not need to make its own inquiries as to the merits of the claim for native title: see *Lander v South Australia* [2012]

FCA 427 at [11]-[12] (Mansfield J), quoting North J in *Lovett on behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474 at [36]-[37]. Recognition of this approach as permissible confers significant flexibility on parties to agreements for a consent determination: they may elect to agree on matters – not only of fact, but also of law – which, in a contested hearing, would favour one party or another because of the state of the law. However, in a negotiated outcome, the very nature of negotiation involves compromise, and parties may elect to compromise on facts and on their legal rights and interests, as long as the factual and legal pre-conditions exist for the Court to consider that a determination satisfies the requirements of the Native Title Act, so that the determination is within power, and is appropriate to make.

9 As I have noted, this is an old claim. It was lodged, pursuant to s 61 of the Native Title Act, on 25 June 1996, almost 23 years ago. The claim was also entered on the Native Title Register on that date.

10 Eleven members of the Ngarrawanji claim group were originally nominated to constitute the applicant, and only two of them remain alive today. Since the joint submissions name all those people, including those who have passed away, the Court considers it is appropriate in these reasons also to name them, for their contribution to the conduct and finalisation of this claim should be publicly recognised. The people who constituted the applicant and who have passed away were:

- a) C. Jugarie;
- b) D. Fletcher;
- c) M. Hale;
- d) E. Walalgie;
- e) M. Wallaby;
- f) B. Duncan;
- g) G. Ngarnkal;
- h) E. Williams; and
- i) E. Cox.

11 Only Ms Josephine Farrer and Ms Felicity Smith remain as surviving members of the original applicant.

12 On 15 April 2019, an interlocutory application was filed seeking orders under s 66B of the Native Title Act to replace the current applicant with a newly constituted applicant, as a result of resolutions made at the November 2018 authorisation meeting. The interlocutory application was supported by affidavits from Mr Ramsay, Dr Kruse and Ms Mack. It was also supported by affidavits from all those who the claim group authorised at the November 2018 meeting to constitute the new applicant: namely Josephine Farrer, Matt Dawson, Phyllis Wallaby, Marty Stevens, Mark Bin Bakar and Gregory Tait. Thus, Ms Farrer, who is one of the originally named applicants, was proposed to remain as a member of the new constituted applicant, but Ms Smith was removed as a member on the terms of the resolution passed at the authorisation meeting.

13 The s 66B orders were proposed with the consent of all the parties to the application. In those circumstances, the orders were made on 1 May 2019. Subject to one matter to which I refer below, the Court was satisfied that the claim group members had adequate notice of the proposed substitution of the applicant, and the purpose of, and reasons for, the substitution: see generally *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 at [36]-[41] (Rares J). The Court was further satisfied that:

- a) Josephine Farrer, Matt Dawson, Phyllis Wallaby, Marty Stevens, Mark Bin Bakar and Gregory Tait are members of the claim group as described in the application;
- b) the current applicant is no longer authorised, given the resolutions passed at the November 2018 meeting (see s 66B(1)(a)(iii)); and
- c) those claim group members who made the application were authorised by the claim group to do so.

14 Those are the generally accepted matters of which the Court needs to be satisfied for orders to be made pursuant to s 66B: see *Stock v State of Western Australia* [2014] FCA 179 at [2]-[5] (Barker J); *PC on behalf of the Njamal People v State of Western Australia* [2016] FCA 462 at [3]-[4] (Barker J).

15 Properly, the KLC on behalf of the claim group identified for the Court a possible defect in the notification process. In the notices regarding the November 2018 authorisation meeting which were distributed to claim group members, and placed in various publications, there was no specific reference to the proposal to re-authorise the (then) current applicant, or make a s 66B application to replace that applicant with a new applicant, comprised mostly of different claim

group members. However, the claim group members were notified that an applicant needed to be authorised for the second part of the Ngarrawanji claim, as I describe below. In circumstances where all parties consent to the making of the s 66B orders, and where the matter is otherwise ready for determination by consent, it would not be appropriate to refuse to make orders under s 66B and require a further authorisation meeting, with all the cost, resources and delay such a process would involve. The evidence clearly indicates the same result is likely to be achieved if a second meeting were held: there is no suggestion in the evidence that claim group members did not attend the meeting, but would have attended if the notices had expressly said a new applicant would be appointed. It was clear a new applicant was needed for the second part of the claim, and those who attended were on notice of this fact. The same people were authorised to perform both statutory roles. To require a new authorisation process in these circumstances would not be consistent with the objectives of ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth), nor with the objectives of the Native Title Act.

16 The Ngarrawanji application area, of which the determination area forms part, comprises approximately 4,065 square kilometres in the central eastern and south-eastern Kimberley region of Western Australia. The determination area is located north and north-west of the town of Halls Creek. There have been, or are about to be, several other determinations of native title in the East Kimberley which border on the Ngarrawanji claim, bringing to final but very delayed resolution the recognition by Australian law of large tracts of the East Kimberley as the traditional country of a number of Aboriginal peoples.

17 It is also important to note that the parties have agreed, and the Court accepts it is appropriate, for the Ngarrawanji claim to be determined in two parts, due to the potential application of s 47B of the Native Title Act to two areas of unallocated Crown land (UCL), located close to Halls Creek:

- a) Lot 360 on DP 76780 (CLT 3164/221), identified on the State's MapInfo program as UCL 23; and
- b) Lot 361 on DP 76779 (CLT 3164/222), identified on the State's MapInfo program as UCL 24.

18 Both these areas are subject to petroleum and exploration tenements. It may be that these areas of UCL can be determined relatively quickly, given the recent decisions of the High Court in *Tjungarrayi v Western Australia; KN (deceased) and Others (Tjiwarl and Tjiwarl #2) v Western Australia* [2019] HCA 12.

19 At the November 2018 authorisation meeting held in Halls Creek, a newly constituted applicant was authorised to conduct this second part of the Ngarrawanji claim. Mr Ramsay deposes that the members of the applicant authorised to deal with all matters arising in relation to the second part of the claim are: Josie (Josephine) Farrer, Matt Dawson, Phyllis Wallaby, Marty Stevens, Mark Bin Barker and Greg Tait. The affidavits filed in support of the s 66B application to which I refer above also deposed to the authorisation of each of these individuals as a member of the applicant for the second part of the claim, and their willingness to act in that capacity.

20 Most of the determination area is now the subject of a pastoral lease, known as Moola Bulla. The joint submissions record evidence given by some claim group members about growing up on Moola Bulla, and being shown their country, now part of the station, by their elders. For example, E. Cox, one of the people who constituted the applicant until she passed away, said:

I am one of the people who can speak for this country. It's my mother's and my grandmother's country. I was born at Moola Bulla station in 1946 and spent the whole of my early life there until we were taken away in 1955.

21 The parties to the Ngarrawanji application and determination are:

- a) the applicant;
- b) the State of Western Australia;
- c) the Shire of Halls Creek; and
- d) Telstra Corporation Limited.

22 The State's agreement to the determination was based on a review of an expert report provided by Dr Redmond (*Anthropologist's Connection Report for three adjacent native title claims in the central east Kimberley region: Ngarrawanji WAD 6017 of 1998*), and an affidavit from Mr Greg Tait, a claim group member and a member of the newly constituted applicant for the Ngarrawanji claim, to whom I have earlier referred.

The native title holders

23 The joint submissions indicate that rights and interests according to the traditional law and custom of the Ngarrawanji claim group are acquired through several pathways:

- a) filiation (including by adoption) to one of the named apical ancestors who held rights and interests in one of the local estate countries within the determination area; or

- b) affiliation to a Ngarrawanji apical ancestor, with spirit conception and/or birth sites in one of the local estate countries within the determination area; or
- c) recognition by those described in a) or b) as a person who:
 - (i) holds rights and responsibilities for certain songs and ceremonies referable to important sites in the determination area; or
 - (ii) holds rights and interests in one of the local estate countries in the determination area under traditional law and custom,(that is, without the parent-child relationships or affiliation connections described in a) or b)).

24 This is confirmed by the following extract from Dr Redmond's report:

Filiation (parent-child) relationships and descent (extended lines of filiative relationships) provides the major modality through which claimants assert rights and interests in the country associated with their forebears.

Some degrees of responsibility for a local country or specific locale potentially ensues from *jarriny* spirit conception and/or birth in one or other *taam* countries which constitute the geographical extent of the Claim Area. However, this criterion for membership in a local estate group is generally only recognised as creating authoritative rights and interests in that country if it is part of a wider suite of connections which include filiative links and /or exists in combination with a long term association with the *taam* in question.

(Original emphasis.)

25 The apical ancestors who are named in Schedule 6(2) of the Minute of Consent Determination are those who were confirmed by the claim group members who attended the authorisation meeting at Halls Creek in November 2018, and by Dr Redmond. This represents a change in the claim group description, and in the named apical ancestors on the Ngarrawanji claim, from those who were identified in the original Form 1 application.

26 The apical ancestors originally identified in the Form 1 application were: Pompey Dalbunji and Maggie Ngurarriya; Sarah Nellie; Ngularraji and Polly Gulungul; Linmarji; Ginger Mick and Dora; Midmariya and Topsy Wungalarril; Nellie Warmala; and Old Duncan.

27 The apical ancestors authorised as correct at the November 2018 meeting, and who appear in Sch 6(2) of the Minute of Consent Determination are: Djulbir/Dzulbir; Jurrigi; Linmarji; Madangal (wife of Wolameri); Ngiliyayiny/Nyiliyang; Ngowanderin; Nigan and Kalkburreny; Nirbrarir/Nirbarr; Rosie Bulmaril; Topsy Nanzili; and Unnamed Father of Ngularraji and Polly Gulungul.

28 These are the people who the parties accept held rights and interests in one of the local estate countries comprising the determination area at effective sovereignty. Dr Redmond places effective sovereignty in the East Kimberley region as occurring in the period between 1885 and the early 1900s. In his report, Dr Redmond states that this period commenced with pastoralists first arriving in the region with large herds of cattle around the beginning of the (short-lived) Halls Creek Gold Rush, and ended approximately around the time at which the “Turkey Creek ration and police depot” was established by the Western Australian Government at the place now called Warmun.

29 The joint submissions contend, and the Court accepts, that an inference can be drawn that those people who held rights and interests in the determination area at the time of effective sovereignty held those rights under a system of law and custom which had been maintained and transmitted to them for generations, and from a time well before the British Crown asserted sovereignty in 1829 over the land now comprising the State of Western Australia. That inference is consistent with evidence given by claim group members in support of the application for registration of the Ngarrawanji claim, such as that given by C. Jugarie in 1999, and quoted in the joint submissions:

My country is inside Moola Bulla, from Dougal’s Well to Three Sister’s, straight down half way to Lily Hole. I’m following this country through my dad, Captain.

When I was younger, we lived in canvas tent with the old people behind the new station at Moola Bulla. This has been blackfella place long before the gardiya or non-Aboriginal people came.

A brief description of the connection of the Ngarrawanji native title holders to the determination area, through their traditional law and custom

30 In common with their neighbours in the East Kimberley such as the Gooniyandi and Bunuba Peoples, the Ngarrawanji native title holders see *Galaru*, the Rainbow Serpent, as the central being who, during the *Ngarranggarni* (the creative/ Dreaming epoch), shaped the world and all within it. *Galaru* made everything that occurs in the world, including human beings and their social institutions. Within the determination area are important *Ngarranggarni* story sites, and law grounds of various kinds. They must be protected by the native title holders. There may be various age and gender prohibitions operating in relation to important *Ngarranggarni* places, and Dr Redmond indicates that this emphasises the importance of transmitting cultural knowledge, and of having respect for traditions held by the senior generations of the group. Ms Josephine Farrer described how these laws and customs worked in a contemporary context:

In about 1992 Lachlan Mining came and spoke to people...We left it to the old people to talk. They say some areas you can drill here or not drill over that hill, like that. They said we wanted to protect some area because we had dreamtime stories attached to them.

The proper way for a stranger to enter the country is to ask permission of the Traditional Owners.

31 Failure to protect country as required by traditional law and custom has consequences.

C. Jugarie explained this:

Strange people cannot come to the waterholes in my country. Someone from this Moola Bulla country - the leader - must take strangers to the water.

The snake we call Kaleru is in the water at places on Moola Bulla. He know everybody for that country. He knows me. At Walu, there's Kaleru there all the time. You cannot touch the big bottle tree there. If someone chops it down then big rain will come. Maybe lightning strike and willy-willies will come from all over. It's really important for people to look after the water properly.

32 Although traditional law and custom was in the past, and continues to be, expressed in traditional language, speakers of more than one language may hold rights and interests in this determination area. The language generally associated with the country of the determination area is the Kija language, however Dr Redmond's opinion is that around the edges of the determination area, where there are boundaries with other neighbouring groups, there are people who may identify principally with other languages (for example, Bunuba and/or Gooniyandi in the west, Jaru in the south, or a mixture of those languages with Kija).

33 Dr Redmond points out, and the joint submissions note, that the traditional laws and customs of the Ngarrawanji native title holders accommodate such language differences, which are present in a category of Dreaming Story. In these stories, an ancestral being carries languages and social identities across the landscape, shaping and naming places within the landscape, until the being encounters an obstacle which renders the being immobile.

The applicable requirements of s 87 and s 87A

34 It is not necessary to set out the statutory requirements in ss 87 and 87A. The basic requirements are similar as between ss 87 and 87A, although there are additional requirements in s 87A because it relates to determination of only part of a claim area, which is the case on this application. The joint submissions contend that it is appropriate for the Court to exercise its power under s 87A, rather than s 87, and I agree with that submission, which is expressed as follows:

... the balance of the Ngarrawanji Application will then be deemed to be amended to remove the area covered by the proposed determination (section 64(1B) of the *Native Title Act*) and will also be exempt from the re-application of the registration test (section 190A(1A) of the *Native Title Act*). The Ngarrawanji Application will remain registered following the amendment, and the Native Title Registrar will be obliged to amend the Register of Native Title Claims even though the registration test has not been re-applied (section 190(3)(a) of the *Native Title Act*).

35 I am satisfied, and the parties agree:

- a) the s 66 notice period has expired (s 87A(1)(b));
- b) there is agreement that the proposed determination relates to only part of the land and waters the subject of the application (s 87A(1)(b));
- c) the relevant parties have filed the terms of their written agreement, by providing a proposed Minute of Consent Determination, and subsequently, a revised Minute after the s 66B orders were made (ss 87A(1)(c), 87A(1)(d) and 87A(2));
- d) the Minute has been signed by all relevant and applicable respondent parties and by the applicant (s 87A(1)(c)). This means no further notice is required to be given under s 87A(3), and at the time of the preparation of these reasons for judgment, and the making of the Court's orders, there are no objections for the Court to take into account under s 87A(8) of the *Native Title Act*; and
- e) there are no other registered native title claimants or persons who claim to hold native title in relation to the determination area (s 87A(1)(c)(ii) and (vi)).

36 I am satisfied the orders sought are both consistent with the terms of the parties' agreement as reflected in the Minute of Consent Determination, and are within the Court's power to pronounce (s 87A(4)(a)).

Whether it is appropriate to make the orders sought

37 The requirement that the Court be satisfied that the order is "appropriate" is present in both ss 87 and 87A: see relevantly s 87A(4)(b). It is obviously a core requirement.

38 I set out my approach to the question of "appropriateness" and the Court's function in the recent consent determination reasons relating to the Nanda People: see *Drury on behalf of the Nanda People v State of Western Australia* [2018] FCA 1849 at [52]-[56], by reference to earlier authorities. I adopt those observations here.

39 It would not, for example, be appropriate to make the orders sought if there were significant problems with the authorisation process for the determination, which meant the Court could not be satisfied the applicant was authorised by the claim group to consent to the determination. Here, the affidavit evidence from Mr Ramsay, Dr Kruse and Ms Mack, read with the joint submissions, satisfies me the Ngarrawanji claim group authorised the members of the new applicant to consent to the determination of native title, in the form pronounced by the Court.

40 The State's public responsibility is to ensure any agreement made under s 87 or s 87A is one which is in the interests of the community it represents. That community includes the Indigenous peoples of Australia, and their particular interest in seeing the objects and purposes of the Native Title Act are achieved, so that the following intentions set out in the preamble to the Act can be acted upon:

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.

41 The community which the State represents is, of course, a broad one and includes non-Indigenous people, some of whom have their own proprietary rights and interests in the determination area. There are also what might be described as governmental and infrastructure interests of a proprietary nature which must be considered and may need to be accommodated, as the complex scheme of the Native Title Act contemplates. The State must weigh all these factors in reaching a position on an agreement for the purposes of ss 87 or 87A.

42 Thus, the State's responsibility is to satisfy itself there is a sufficient basis for concluding that the proposed determination is capable of meeting the requirements of s 225 of the Native Title Act. The way in which the State satisfies itself of that matter may vary considerably from case to case. No minimum requirements of proof can or should be set out. If the State embarks on such a course, and ultimately accepts it is appropriate to recognise the existence of native title in the determination area, then the Court is entitled to proceed on the basis the State has made a reasonable and rational assessment of the material to which it has been given access.

43 On this application, the joint submissions note the satisfaction of the State about the connection material, and that the material is sufficient to demonstrate that the Ngarrawanji application:

... has a credible basis and that the claimants and their ancestors have maintained a presence in the Ngarrawanji Application Area since the acquisition of British sovereignty. In addition, evidence of the claimants' and their ancestors' continuing physical or spiritual involvement in the Ngarrawanji Application Area was sufficient to enable the State to conclude that this connection had not been severed. Taken together, the State was satisfied that the material considered was sufficient to evidence the maintenance of connection according to traditional laws and customs in the Ngarrawanji Application Area. The State was also satisfied that the connection material was sufficient to establish that the claimants occupied the area to which section 47B is agreed to apply, as set out at Schedules 3 and 7 of the Minute.

44 I accept the State has carried out its responsibilities carefully and thoroughly and that in this sense it is appropriate to make the determination sought by the parties.

45 The joint submissions also state that the State has conducted "searches of land tenure, mining and petroleum registries to determine the nature and extent of 'other interests' within the proposed determination area", and contend the Court can be satisfied that the Minute of Consent Determination accurately describes the nature and extent of the non-native title rights and interests in relation to the determination area, as s 225 requires. I accept that submission.

46 It is appropriate to make the orders sought under s 87A of the Native Title Act.

Nomination of a prescribed body corporate

47 At the date of the Court's orders, no prescribed body corporate has been established to hold the native title recognised in the Ngarrawanji native title holders. Accordingly, there will be no determination under ss 55, 56 or 57 of the Native Title Act. In those circumstances, the Court's orders will provide that the determination of native title will take effect immediately upon the Court making a determination under ss 56(1) or 57(2) of the Native Title Act, on the basis of proper material filed by the Ngarrawanji applicant, such material to be filed within 12 months of the date of the Court's orders.

CONCLUSION

48 The legal representatives of the Ngarrawanji native title holders, and their representative body, the KLC, should be acknowledged for the support and assistance they have provided. So too the responsible and important role played by the State in this outcome, as well as the cooperation of the Shire of Halls Creek and Telstra Corporation Limited.

49 The Ngarrawanji claim group members deserve respect and admiration for their patience, determination and tolerance of the slow progress of the native title system in respect of their claim. It should not have taken this long. That is not to say the fault for the long period of time

lies in any one place. Rather, it is to recognise the tragic effects the passage of time has had, and the number of elders who did not survive to see the recognition by Australian law of their connection to their country, their right to be on their country, and to practise their traditional law and custom as their people always have. The tolerance and persistence of the Ngarrawanji claim group members in this respect comes on top of, or in addition to, the many other obstacles which have faced Aboriginal people and their communities since non-Indigenous people came to this land.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer.

Associate:



Dated: 21 May 2019