

FEDERAL COURT OF AUSTRALIA

Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia [2019] FCA 30

File number: WAD 128 of 2018

Judge: **ROBERTSON J**

Date of judgment: 22 January 2019

Catchwords: **NATIVE TITLE** – consent orders – whether more appropriate to proceed under s 81 of the *Native Title Act 1993* (Cth) by adopting findings in other proceedings or under s 86G or s 87 where the application is unopposed or agreement is reached

Legislation: *Native Title Act 1993* (Cth) ss 47B, 81, 86, 86G, 87, 94A

Cases cited: *Kelly on behalf of the Byron Bay Bundjalung People v New South Wales Aboriginal Land Council* [2001] FCA 1479
Kennedy v Queensland [2002] FCA 747; 190 ALR 707
Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia [2017] FCA 1367
Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia [2018] FCA 275
Nelson v Northern Territory [2010] FCA 1343; 190 FCR 344

Date of hearing: Determined on the papers

Registry: Western Australia

Division: General Division

National Practice Area: Native Title

Category: Catchwords

Number of paragraphs: 35

Solicitor for the Applicant: Mr D Mavec of Kimberley Land Council

Solicitor for the Respondent: Mr M Pudovskis of State Solicitor's Office

ORDERS

WAD 128 of 2018

BETWEEN: **ERNEST DAMIEN MANADO AND OTHERS ON BEHALF
OF THE BINDUNBUR NATIVE TITLE CLAIM GROUP
(BINDUNBUR #2)**
Applicant

AND: **STATE OF WESTERN AUSTRALIA**
Respondent

JUDGE: **ROBERTSON J**

DATE OF ORDER: **22 JANUARY 2019**

THE COURT ORDERS THAT:

1. There be a determination of native title in the form attached as Attachment A to these orders.
2. By 2 May 2019, a representative of the common law holders of native title shall:
 - (a) indicate whether the common law holders intend to have the native title held in trust; and
 - (b) nominate, in writing given to the Federal Court, a prescribed body corporate:
 - (i) to be trustee of the native title rights and interests; or
 - (ii) otherwise perform the functions set out in section 57(3) of the Native Title Act,

 including within the nomination the written consent of the body corporate.
3. In the event that there is no nomination by 2 May 2019, or such later time as the Court may order, the matter is to be listed, in conjunction with proceeding WAD359/2013, for further directions.
4. Proceeding WAD359/2013 is dismissed, to the extent of its overlap with the area of this proceeding WAD128/2018.

ATTACHMENT A TO THE ORDERS – BINDUNBUR #2 DETERMINATION

WAD 128/2018

BETWEEN: **ERNEST DAMIEN MANADO AND OTHERS ON
BEHALF OF THE BINDUNBUR NATIVE TITLE CLAIM
GROUP (BINDUNBUR #2)**
Applicant

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

JUDGE: **ROBERTSON J**

DATE OF ORDER: **22 JANUARY 2019**

THE COURT DETERMINES THAT:

Existence of native title [s 225]

1. Native title rights and interests exist in the whole of the Determination Area.

Native title holders [s 225(a)]

2. The rights and interests comprising the native title are held by the Jabirr Jabirr/Ngumbarl people, being the people described in Schedule 2 (**native title holders**).

Nature and extent of native title [s 225(b) and (e)]

3. Subject to paragraphs 4 and 5, the nature and extent of the native title rights and interests in relation to the Determination Area (being wholly an area where any extinguishment must be disregarded) is the right of possession, occupation, use and enjoyment as against the whole world.
4. The native title rights and interests are exercisable in accordance with and subject to the:
 - (a) traditional laws and customs of the native title holders; and
 - (b) laws of the State and the Commonwealth, including the common law.
5. Notwithstanding anything in this determination, there are no native title rights and interests in or in relation to:
 - (a) pursuant to the *Mining Act 1904* (WA), gold, silver, other precious metals, precious stones and all other minerals; or

- (b) petroleum as defined in the *Petroleum Act 1936* (WA) (repealed) and in the *Petroleum and Geothermal Energy Resources Act 1967* (WA).

Other interests [s 225(c) and 225(d)]

6. The nature and extent of other rights and interests in relation to the Determination Area are those set out in Schedule 3 (**other interests**).
7. The relationship between the native title rights and interests and the other interests is as follows:
- (a) the other interests co-exist with the native title rights and interests;
 - (b) the determination does not affect the validity of those other interests; and
 - (c) to the extent of any inconsistency, the native title rights and interests yield to the other interests.

Areas where extinguishment is disregarded [s 47B]

8. Section 47B of the *Native Title Act* applies to disregard any prior extinguishment in respect of the whole of the Determination Area.

Definitions and interpretation

9. In this determination, unless the contrary intention appears:

‘Determination Area’ means the land and waters described in Schedule 1;

‘land’ and **‘waters’** respectively have the same meanings as in the *Native Title Act*;

‘Native Title Act’ means the *Native Title Act 1993* (Cth) as amended as at the date of this Determination; and

‘State’ means the State of Western Australia.

In the event of an inconsistency between the written description of an area in Schedule 1 and an area depicted on the maps in Schedule 4, the written description prevails.

Schedule 1 – Determination Area

[See paragraphs 1 and 9 of the Determination]

All that land comprising that portion of Lot 851 as shown on Deposited Plan 66631 that is wholly within the external boundary of Mining Exploration Licence E04/2084 (as defined by The Department of Mines, Industry Regulation and Safety as at 17th July 2014).

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 29th June 2018.

Mining Tenements sourced from The Department of Mines, Industry Regulation and Safety as at 17th July 2014.

For the avoidance of doubt the application excludes any land and waters subject to:

Native Title Determination Application WAD359/2013 Bindunbur (WCD2018/005) as Determined in the Federal Court on the 2nd May 2018.

Datum: Geocentric Datum of Australia 1994 (GDA94)

Prepared By: Graphic Services (Landgate) 26th November 2018

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 – Native Title Holders

[See paragraph 2 of the Determination]

Jabirr Jabirr/Ngumbarl people

Jabirr Jabirr/Ngumbarl people are the living persons who are the descendants of one or more of the following ancestors, including by adoption in accordance with the traditional laws and customs of the native title holders:

Gadalargan; Murrjal; Dorothy Kelly; Liddy Kenagai; Liddy Skinner; Bornal; Wallai William & Mary Nelagumia; Senanus; Frank Walmandu; Sophie McKenzie; Frank Dixon (aka Frank Dinghi); Nabi; Appolonia; Dorothy (sister of Senanus); Agnes Imbarr; Deborah & Jacky; Ethyl Jacky; Alice Darada; Milare & Kelergado; Matilda; Louisa; Flora; Madeline; Fred/Friday Walmadang; and Walamandjin.

Schedule 3 – Other Interests

[See paragraph 6 of the Determination]

The nature and extent of other interests in relation to the Determination Area are the following as they exist as at the date of this determination:

Telstra

(1) The following interests of Telstra Corporation Limited:

- (a) rights and interests 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); and
- (b) rights of access by employees, agents or contractors of Telstra Corporation Limited to its telecommunications facilities in, and in the vicinity of, the Determination Area, in the performance of their duties.

Other

(2) The following rights and interests:

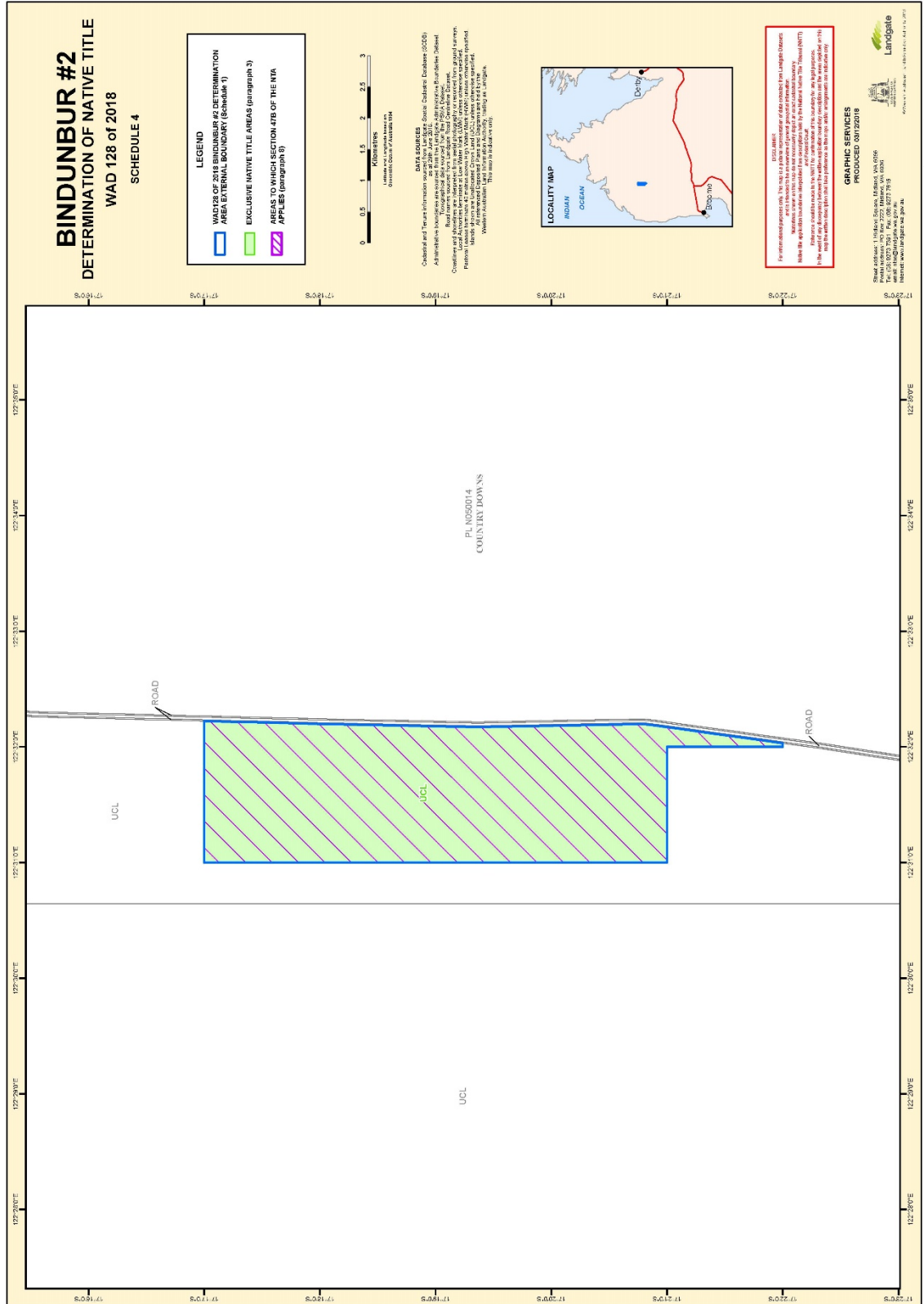
- (a) rights and interests, if any, held under valid and validated grants from the Crown pursuant to statute or in the exercise of its executive power or otherwise validly conferred by legislation (whether an Act or a Regulation);
- (b) rights or interests, if any, held by reason of the force and operation of the laws of the State or of the Commonwealth including the force and operation of the:
 - (i) *Rights in Water and Irrigation Act 1914* (WA); and
 - (ii) *Aboriginal Communities Act 1979* (WA);
- (c) the right to access the Determination Area by:
 - (i) an employee or agent or instrumentality of the State;
 - (ii) an employee or agent or instrumentality of the Commonwealth; or
 - (iii) an employee or agent or instrumentality of any local government authority;

as required in the performance of his or her statutory or common law duty where such access would be permitted to private land; and

- (d) rights or interests comprised in or conferred under or in accordance with the Canning-Kimberley Groundwater Area, proclaimed by proclamation published in the Western Australian Government Gazette on 2 May 1997.

Schedule 4 – The Maps

5. [See paragraph 9 of the Determination]



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

REASONS FOR JUDGMENT

ROBERTSON J:

- 1 These reasons concern the resolution on the papers of the present proceeding, WAD 128/2018 – **Bindunbur #2**, by way of an agreed minute of proposed orders and determination filed on 7 December 2018. The only parties to the claim are the applicant and the State of Western Australia (the **State**).
- 2 The determination application was filed on 4 April 2018. An amended application was filed on 24 April 2018.
- 3 The proposed orders and determination are intended to fully and finally resolve native title issues in relation to the Bindunbur #2 claim area by the making of a determination of native title, and dismissing the extant Bindunbur application to the extent of its overlap with the Bindunbur #2 claim.
- 4 The only issue left unresolved by the proposed orders and determination is the nomination of a prescribed body corporate. That matter is proposed to be case managed in conjunction with the nomination of the Bindunbur prescribed bodies corporate, and in the same timeframe.
- 5 Although the parties agreed that the proposed orders and determination of native title should be made, they disagreed as to the appropriate or preferable source of power in the *Native Title Act 1993* (Cth).
- 6 The applicant's position was that the Bindunbur #2 proceeding should be resolved principally by the adoption of the findings made by North J in relation to the earlier Bindunbur native title determination application in *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia* [2017] FCA 1367 and *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia* [2018] FCA 275 (WAD359/2013 – **Bindunbur**).
- 7 It was contended that resolution of the matter arose not from a substantive agreement between the parties but from the rulings made by North J on various disputed issues which were directly relevant to the determination to be made in the Bindunbur #2 claim area. Therefore, the applicant contended, the Court should adopt the relevant findings and determine the matter pursuant to its powers under ss 81 and 94A of the *Native Title Act 1993* (Cth). The applicant

submitted that the Court should act under s 86 to “adopt any recommendation, finding, decision or judgment” of the Court.

8 The Bindunbur #2 application was filed at a late stage in the Bindunbur proceedings in order that the Bindunbur native title claimants could have the benefit of s 47B of the *Native Title Act*, which would otherwise be unavailable. The area of the Bindunbur #2 claim was excluded from the Bindunbur determination, and was entirely overlapped by the still-extant Bindunbur claim.

9 The position of the State was that s 86G or s 87 of the *Native Title Act* provided a sound and preferable basis for the resolution of the claim. The State submitted that s 81 ordinarily contemplated a hearing and was most suited to contested matters.

10 The State has notified the Court that it does not oppose an order in, or consistent with, the terms sought by the applicant.

11 Section 47B relevantly provides:

47B Vacant Crown land covered by claimant applications

When section applies

- (1) This section applies if:
 - (a) a claimant application is made in relation to an area; and
 - (b) when the application is made, the area is not:
 - (i) covered by a freehold estate or a lease; or
 - (ii) covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose; or
 - (iii) subject to a resumption process (see paragraph (5)(b)); and
 - (c) when the application is made, one or more members of the native title claim group occupy the area.

Prior extinguishment to be disregarded

- (2) For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by the creation of any prior interest in relation to the area must be disregarded.

Note: The applicant will still need to show the existence of any connection with the

land or waters concerned that may be required by the common law concept of native title.

Effect of determination

- (3) If the determination on the application is that the native title claim group hold the native title rights and interests claimed:
- (a) the determination does not affect:
 - (i) the validity of the creation of any prior interest in relation to the area; or
 - (ii) any interest of the Crown in any capacity, or of any statutory authority, in any public works on the land or waters concerned; and
 - (b) the non extinguishment principle applies to the creation of any prior interest in relation to the area.

...

12 Section 86 relevantly provides:

86 Evidence and findings in other proceedings

- (1) Subject to subsection 82(1), the Federal Court may:
- (a) receive into evidence the transcript of evidence in any other proceedings before:
 - (i) the Court; or
 - (ii) another court; or
 - (iii) the NNTT; or
 - (iv) a recognised State/Territory body; or
 - (v) any other person or body;and draw any conclusions of fact from that transcript that it thinks proper; and
 - (b) receive into evidence the transcript of evidence in any proceedings before the assessor and draw any conclusions of fact from that transcript that it thinks proper; and
 - (c) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (v).

...

13 Section 86G provides:

86G Unopposed applications

Federal Court may make order

- (1) If, at any stage of a proceeding in relation to an application under

section 61, but after the end of the period specified in the notice given under section 66:

- (a) the application is unopposed; and
- (b) the Federal Court is satisfied that an order in, or consistent with, the terms sought by the applicant is within the power of the Court;

the Court may, if it appears appropriate to do so, make such an order without holding a hearing or, if a hearing has started, without completing the hearing.

Note: If the application involves making a determination of native title, the Court's order would need to comply with section 94A (which deals with the requirements of native title determination orders).

Meaning of unopposed

- (2) For the purpose of this section, an application is *unopposed* if the only party is the applicant or if each other party notifies the Federal Court in writing that he or she does not oppose an order in, or consistent with, the terms sought by the applicant.

14 Section 87 relevantly provides:

87 Power of Federal Court if parties reach agreement

Application

- (1) This section applies if, at any stage of proceedings after the end of the period specified in the notice given under section 66:
 - (a) agreement is reached between the parties on the terms of an order of the Federal Court in relation to:
 - (i) the proceedings; or
 - (ii) a part of the proceedings; or
 - (iii) a matter arising out of the proceedings; and
 - (b) the terms of the agreement, in writing signed by or on behalf of the parties, are filed with the Court; and
 - (c) the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court.

Power of Court

- (1A) The Court may, if it appears to the Court to be appropriate to do so, act in accordance with:
 - (a) whichever of subsection (2) or (3) is relevant in the particular case; and
 - (b) if subsection (5) applies in the particular case—that subsection.

Agreement as to order

- (2) If the agreement is on the terms of an order of the Court in relation to the proceedings, the Court may make an order in, or consistent with, those terms without holding a hearing or, if a hearing has started, without completing the hearing.

Note: If the application involves making a determination of native title, the Court's order would need to comply with section 94A (which deals with the requirements of native title determination orders).

...

15 The following background and context was agreed by the parties.

16 The Bindunbur #2 native title determination application is located on the Dampier Peninsula north of Broome. It is wholly overlapped by one of two remaining areas of the Bindunbur application, and is surrounded on all sides by the Bindunbur determination. The area of the Bindunbur #2 claim is approximately 16 square kilometres; by comparison, the Bindunbur determination area is approximately 9,400 square kilometres. The State land tenure of the whole of the Bindunbur #2 claim area is unallocated Crown land.

17 The notification period for the Bindunbur #2 claim came to an end on 12 September 2018.

18 No parties were joined to the proceeding during the notification period.

19 The terms of the determination were derived from the terms of the Bindunbur determination. The parties were however agreed that substantive modifications to the determination were necessary to reflect the particular circumstances relevant to the Bindunbur #2 determination area. Those modifications were:

- a. the removal of references to non-exclusive or extinguished native title rights and interests (because the native title rights and interests are rights of exclusive possession in the whole area);
- b. the removal of references to s 47A (because only s 47B is relevant to the determination area);
- c. the removal of references to the high water mark (because the determination area does not include any coastal areas);
- d. the removal of all "Other Interests" which do not relate to the Bindunbur #2 determination area; and
- e. the native title holding group being only the members of the Jabirr Jabirr/Ngumbarl language group.

20 As to this last matter, the Bindunbur #2 claim area is located wholly within the area that North J determined was to be held exclusively by the Jabirr Jabirr/Ngumbarl language group.

21 I shall treat as before me the affidavits of Andrew David Pollard and Xavier Peter Marszal, both affirmed 17 April 2018 and filed 18 April 2018. They have been filed on the basis that they will be taken into account by me in this determination on the papers. They address the absence of disqualifying tenures as at 4 April 2018.

22 In terms of s 47B, I am satisfied that the relevant area was not covered by a disqualifying tenure when the Bindunbur #2 application was made on 4 April 2018 (s 47B(1)(b)), and that one or more members of the native title claim group were in occupation of the area as of that date (s 47B(1)(c)). In this second respect, the question of occupation was not in dispute between the parties. Indeed, the State submitted that the Bindunbur determination recognised the Jabirr Jabirr/Ngumbarl people as native title holders in respect of the area surrounding the claim area, and the factual foundation for that determination applied equally to the claim area.

23 In any event I adopt the findings made in *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia* [2017] FCA 1367 at [689] as follows:

The Bindunbur and Jabirr Jabirr applicants have established occupation of [unallocated Crown land]... 152 for the purposes of s 47B(1)(c) of the NTA.

I also infer that the extensive bush harvesting activities conducted by Jabirr Jabirr/Ngumbarl woman Ms Patricia Torres and her family over more than 20 years (up to and including 2016 when Ms Torres gave evidence) are an ongoing state of affairs.

24 The second matter is whether any additional “other interests” have come into existence in the Bindunbur #2 claim area since the conclusion of the Bindunbur proceedings. In the absence of any such interests being raised as a matter of evidence or agreement, I infer that no new interests have arisen since the date of the affidavits of Mr Pollard and Mr Marszal.

25 I accept the submission by the State that proceeding under s 81 without recourse to s 86G or s 87 would most commonly be suited to contested matters. I take into account that in this matter there has been no exchange of pleadings or provision of substantive evidence or written submissions in relation to such evidence and there has been no trial or hearing. In my opinion the powers in s 86G and s 87 are both more specific and more apt in this case than s 81 and I proceed on that basis.

26 I do not accept the applicant’s submission that, considered in the light of agreed history, this was clearly not an ordinary matter (because the pleadings, evidence, written submissions and

trial which attend the ordinary operation of s 81 all occurred in the Bindunbur application) and that s 81 was the appropriate source of power.

27 In my opinion, the appropriate course is to proceed first under s 86G of the *Native Title Act* on the basis that after the end of the notice period under s 66 the application is unopposed, the Court is satisfied that an order in the terms sought is within the power of the Court, and it is appropriate to make the order without holding a hearing. I have used s 86 for the limited purpose set out in [22] above. In this respect I treat the judgments of North J in *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia* [2017] FCA 1367 and *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia* [2018] FCA 275 as the important background to or reason for the application in respect of the Bindunbur #2 claim being unopposed but take into account that a subsequent negotiation between the applicant and the State has led to the agreed form of draft determination.

28 As to matters of discretion, I take into account what Sackville J said in *Kennedy v Queensland* [2002] FCA 747; 190 ALR 707 at [28]-[31]. I find that it is appropriate to make the proposed order without holding a hearing.

29 In terms of s 87, I find that s 87(1)(a) is satisfied because, after the end of the period specified in the notice under s 66, agreement has been reached between the parties on the terms of orders in relation to the proceedings.

30 I find that s 87(1)(c) is satisfied because:

- a. the application was validly made, having been authorised by the claim group members according to a decision-making process agreed to and adopted by the claim group members that authorised the applicants to make the native title determination application (as required by s 251B);
- b. the application was for a determination of native title in relation to an area for which there is no approved determination of native title (s 13(1)(a)) and there remained no approved determination in relation to the areas the subject of the proposed determination (s 68);
- c. the only other proceeding before the Court relating to native title determination applications that covered any part of the area the subject of the proposed

determination (the Bindunbur proceeding) is the subject of a proposed order to be made under s 67(1); and

d. the form of the proposed determination complies with ss 94A and 225.

31 The State submitted ss 87(1A) and 87(2) were also satisfied because the Bindunbur determination recognised the Jabirr Jabirr/Ngumbarl people as native title holders in respect of the area surrounding the claim area, and the factual foundation for that determination applied equally to the claim area: see also [22] above.

32 The State noted there may be an issue as to whether s 87(1)(b) was strictly satisfied because there was not, formally, a signed Minute of Proposed Consent Determination, though the State had signed the submissions which endorsed the proposed determination, and the State said it was certainly willing to sign a Minute that included the proposed determination if necessary. In my opinion, s 87(1)(b) has been satisfied on the basis that the State has signed the submissions which endorse the proposed determination.

33 As to the Court's discretion under s 87, I find there are no discretionary reasons not to make an order without holding a hearing: see *Kelly on behalf of the Byron Bay Bundjalung People v New South Wales Aboriginal Land Council* [2001] FCA 1479. In *Nelson v Northern Territory* [2010] FCA 1343; 190 FCR 344 Reeves J listed the following non-exhaustive factors to which the Court will routinely have regard in this respect:

- (a) the objects of the Act, one of the most important being the resolution of disputes by negotiation and agreement, rather than litigation;
- (b) whether there is an agreement between the parties, and whether it was freely entered into on an informed basis;
- (c) whether the parties have independent and competent legal representation;
- (d) whether the terms of the proposed order are unambiguous and clear;
- (e) whether the agreement has been preceded by a mediation process.

34 In the present case I take into account factors (a)-(d) and find that each of them points to the discretion being exercised to make the order in the agreed terms without holding a hearing.

35 For these reasons, the Court makes orders under s 86G(1) and s 87(2) in the terms of the agreed minute of proposed orders.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson.

Associate:

Dated: 22 January 2019