



Federal Court of Australia

District Registry: Western Australia

Division: General

No: WAD339/2018

JOHN THOMAS OXENHAM, SARAH LOUISE BELLOTTIE, TERRENCE GORDON MCKIE, BIANCA ELISE MCNEAIR, DENISE CHARMAINE MITCHELL, LESLIE ANTHONY O'NEILL, ALBERT DARBY WINDER
Applicant

STATE OF WESTERN AUSTRALIA, SHIRE OF SHARK BAY
Respondent

ORDER

JUDGE: JUSTICE COLVIN

DATE OF ORDER: 04 November 2019

WHERE MADE: Perth

THE COURT NOTES THAT:

- A. The Applicant in proceeding WAD 30 of 2019 has made a native title determination application (**Nanda Application**).
- B. The Applicant in proceeding WAD 339 of 2018 has made a native title determination application (**Malgana #2 Application**).
- C. The Applicant in proceeding WAD 402 of 2018 has made a native title determination application (**Malgana #3 Application**).
- D. On 28 November 2018 the Federal Court of Australia made a determination of native title pursuant to s 87A of the *Native Title Act 1993* (Cth) (**Native Title Act**) in respect of part of the land and waters the subject of the Nanda Application: *Drury on behalf of the Nanda People v State of Western Australia* [2018] FCA 1849 (**Drury**). That part of the Nanda Application which was not the subject of the determination of native title in *Drury* included that portion of the Nanda Application which was geographically overlapped by the Malgana #2 Application and native title determination application WAD 6119 of 1998 (**Mullewa Wadjari Community Application**).
- E. Pursuant to s 64(1B) of the *Native Title Act*, following the determination in *Drury*, the Nanda Application was deemed to be amended to remove the area of the



determination and, accordingly, the area of the Nanda Application currently comprises only those portions of the Nanda Application which is overlapped by the Malgana #2 Application and the Mullewa Wadjari Community Application.

- F. On 4 December 2018 the Federal Court of Australia made a determination of native title pursuant to s 87A of the *Native Title Act* in respect of part of the land and waters the subject of native title determination application WAD 6236 of 1998 (**Malgana Application**): *Oxenham on behalf of the Malgana People v State of Western Australia* [2018] FCA 1929 (**Oxenham**). That part of the Malgana Application which was not the subject of the determination of native title in *Oxenham* was that portion of the Malgana Application which was geographically overlapped by the Malgana #3 Application. The Malgana #3 Application was made to take advantage of the application of s 47B of the *Native Title Act*.
- G. Pursuant to s 64(1B) of the *Native Title Act*, following the determination in *Oxenham*, the Malgana Application was deemed to be amended to remove the area of the determination and, accordingly, the area of the Malgana Application is currently the same as the area of the Malgana #3 Application.
- H. The Applicants in the Nanda Application, the Malgana #2 Application, the Malgana #3 Application, the State of Western Australia and the other Respondents to those Applications (**the parties**) have reached an agreement as to the terms of the determination which is to be made in relation to an area that comprises the whole of the land and waters covered by the Malgana #2 Application and the Malgana #3 Application (**the Determination Area**). The external boundaries of the Determination Area are described in Schedule One to the determination.
- I. The Applicant in the Malgana Application has agreed to the dismissal of the Malgana Application in order to facilitate the determination sought in respect of the Malgana #3 Application.
- J. The parties have agreed that, in respect of the balance of the land and waters the subject of the Nanda Application (being that portion of the Nanda Application which is overlapped by the Mullewa Wadjari Community Application), no determination is to be made at present.
- K. Pursuant to s 87A(1)(d), (2) and (4) of the *Native Title Act* (in respect of the Nanda Application) and s 87(1), (1A) and (2) of the *Native Title Act* (in respect of the Malgana #2 Application and the Malgana #3 Application) the parties have filed with



the Court this *Minute of Proposed Consent Determination of Native Title* setting out the terms of the agreement reached by the parties in relation to those applications.

- L. The terms of the agreement involve the making of consent orders for a determination pursuant to s 87A (in respect of the Nanda Application) and s 87 (in respect of the Malgana #2 Application and the Malgana #3 Application) and s 94A of the *Native Title Act* that native title exists in relation to the land and waters of the Determination Area.
- M. The parties acknowledge that the effect of the making of the determination is that the members of the relevant native title claim groups, in accordance with the traditional laws acknowledged and the traditional customs observed by them, should be recognised as the native title holders for part or all of the Determination Area as set out in the determination.
- N. Pursuant to s 87(2) and s 87A(4) of the *Native Title Act*, the parties have requested that the Court determine the proceedings that relate to the Determination Area without holding a hearing.

BEING SATISFIED that a determination of native title in the terms set out in Attachment A would be within the power of the Court and, it appearing to the Court appropriate to do so, pursuant to s 87, s 87A and s 94A of the *Native Title Act* and by the consent of the parties:

THE COURT ORDERS THAT:


1. Proceeding WAD 6236 of 1998 be dismissed.
2. Pursuant to s 67(1) of the *Native Title Act*, proceedings WAD 30 of 2019, WAD 339 of 2018 and WAD 402 of 2018 be determined together.
3. In relation to the Determination Area, there be a determination of native title in WAD 30 of 2019, WAD 339 of 2018 and WAD 402 of 2018 in the terms provided for in Attachment A.
4. In respect of the Malgana Area (as defined in paragraph 12 of the determination) the Malgana Aboriginal Corporation RNTBC (ICN 8935) shall hold the determined native title in trust for the Malgana People pursuant to s 56(2)(b) of the *Native Title Act*.
5. The following questions be reserved for consideration of a Full Court pursuant to s 26 of the *Federal Court of Australia Act 1976* (Cth):



- iv -

- (a) Whether, in an instance where the Court has determined that there are distinct groups of persons each of which hold common rights comprising native title over the same area of land, the Court has power, when making a determination of native title under the *Native Title Act 1993* (Cth), to determine that more than one prescribed body corporate is to perform the functions given to prescribed bodies corporate under the *Native Title Act* and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth); and
 - (b) If the answer to question (a) is in the affirmative, whether the Court has a discretion to determine that there should be only one prescribed body corporate for the area in circumstances where each group nominates a separate prescribed body corporate.
6. If the Full Court answers question (a) in the affirmative and question (b) in the negative then, in respect of the Shared Area (as defined in paragraph 12 of the Minute of Consent determination) the Court determines that the Malgana Aboriginal Corporation RNTBC (ICN 8935) shall hold the determined native title in trust for the Malgana People pursuant to s 56(2)(b) of the *Native Title Act* and the Nanda Aboriginal Corporation RNTBC (ICN 8871) shall hold the determined native title in trust for the Nanda People pursuant to s 56(2)(b) of the *Native Title Act*
7. If the Full Court answers question (a) in the negative, the matter be referred to a case management hearing to be held on a date to be fixed.
8. There be no order as to costs.

Date that entry is stamped: 5 November 2019


Registrar



ATTACHMENT A DETERMINATION

THE COURT ORDERS, DECLARES AND DETERMINES THAT:

Existence of native title: s 225 *Native Title Act*

1. Subject to paragraph 2, native title exists in the Determination Area in the manner set out in paragraph 5 of this determination.
2. Native title does not exist in those parts of the Determination Area that are identified in Schedule Three.

Native title holders: s 225(a) *Native Title Act*

3. The native title in the Malgana Area is held by the Malgana People.
4. The native title rights and interests in the Shared Area are held by each of the Malgana People and the Nanda People.

The nature and extent of native title rights and interests (s 225(b) and s 225(e) *Native Title Act*)

5. Subject to paragraphs 2, 6, 7, 8 and 11 the nature and extent of the native title rights and interests in relation to the Determination Area are that they confer the following non-exclusive rights, including the right to conduct activities necessary to give effect to them:
 - (a) the right to enter and remain on the Determination Area, camp, erect shelters and other structures for that purpose, and to travel over and visit any part of the Determination Area;
 - (b) the right to hunt, fish, gather, and use the traditional resources of the Determination Area;
 - (c) the right to take and use water;
 - (d) the right to engage in cultural activities on the Determination Area, including:
 - (i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity; and
 - (ii) conducting ceremony and ritual, including burial rites; and



- (e) the right to be accompanied on the Determination Area by those people who, though not native title holders and who (for the avoidance of doubt) cannot themselves exercise any native title right in the Determination Area, are:
- (i) spouses, parents or children of the native title holders; or
 - (ii) people required by, or entering in connection with, traditional law and custom for the performance of ceremonies or cultural activities on the Determination Area.

Qualifications on the native title rights and interests

6. The 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 Malgana People and/or the Nanda People (as the case may be) for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).
7. Notwithstanding anything in this determination, there are no native title rights and interests in the Determination Area in relation to:
 - (a) minerals as defined in the *Mining Act 1904* (WA) (repealed) and in the *Mining Act 1978* (WA), except to the extent that ochre is not a mineral pursuant to the *Mining Act 1904* (WA);
 - (b) petroleum as defined in the *Petroleum Act 1936* (WA) (repealed) and in 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 the Other Interests.
8. The native title rights and interests set out in paragraph 5 do not confer:
 - (a) possession, occupation, use and enjoyment on the Malgana People or the Nanda People to the exclusion of all others; or
 - (b) a right to control the access to, or use of, the land and waters of the Determination Area or its resources.

Areas to which s 47B of the *Native Title Act* applies

9. Section 47B of the *Native Title Act* applies to disregard any prior extinguishment in relation to those parts of the Determination Area identified in Schedule Four



The nature and extent of any Other Interests

10. The nature and extent of the Other Interests are described in Schedule Five.

Relationship between native title rights and Other Interests

11. Except as otherwise provided for by law, the relationship between the native title rights and interests described in paragraphs 5 and 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; and otherwise,
- (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 do not extinguish them.

Definitions and Interpretation

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

'Determination Area' means the land and waters described in Schedule One and depicted on the maps at Schedule Two;

'land' has the same meaning as in the *Native Title Act* and, for the avoidance of doubt, includes any natural collection of water found on the land which does not fall within the definition of 'waters';

'Malgana Area' means the land and waters of native title determination application WAD 402 of 2018 and those land and waters of native title determination application WAD 339 of 2018 which are not overlapped by native title determination WAD 30 of 2019;

'Malgana People' means the people described in Schedule Six;

'Nanda People' means the people described in Schedule Seven;

'Native Title Act' means the *Native Title Act 1993 (Cth)*;



'**Other Interests**' means the legal or equitable estates or interests and other rights in relation to the Determination Area described in Schedule Five and referred to in paragraph 10;

'**resources**' means flora, fauna, and other natural resources such as charcoal, stone, soil, sand, clay, gravel, timber, resin and ochre (except, for the avoidance of doubt, ochres for use in the manufacture of porcelain, fine pottery or pigments which are minerals pursuant the *Mining Act 1904* (WA) (repealed));

'**Shared Area**' means those land and waters of native title determination application WAD 339 of 2018 which are overlapped by native title determination application WAD 30 of 2019;

'**Titles Validation Act**' means the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA);

'**use**' does not include use by way of trade; and

'**waters**' has the same meaning as in the *Native Title Act*.

13. In the event of any inconsistency between the written description of an area in Schedules One, Three, Four or Five and the area as depicted on the maps at Schedule Two the written description prevails.



SCHEDULE ONE

DETERMINATION AREA

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

Area 1

All those lands and waters commencing at the intersection of a western boundary of Lot 3080 as shown on Deposited Plan 51350 with Latitude 26.065281 South (Approximate Longitude 113.363669 East) and extending generally northwesterly and generally northeasterly along the boundaries of that lot to Longitude 113.362498 East (Approximate Latitude 26.062110 South); then southeasterly back to the commencement point.

Area 2

All those lands and waters commencing at the southwesternmost corner of Native Title Determination WAD6236/1998 Malgana Part A (WCD2018/012); then extending easterly along the southern boundary of that native title determination to the intersection with Native Title Determination WAD30/2019 Nanda People and Nanda #2 (WCD2018/011); then southerly and generally southwesterly along the boundaries of that native title determination to the intersection with a point on the Lowest Astronomical Tide; then generally northwesterly along that lowest astronomical tide back to the commencement point.

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 04 December 2018.

Lowest Astronomical Tide is based on and sourced from Australian Maritime Boundaries data, 6th Edition released in February 2006.

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

- Native Title Determination WAD6236/1998 Malgana Part A (WCD2018/012) as Determined in the Federal Court on 04 December 2018.
- Native Title Determination WAD30/2019 Nanda People and Nanda #2 (WCD2018/011) as Determined in the Federal Court on 28 November 2018.

Datum: Geocentric Datum of Australia 1994 (GDA94)

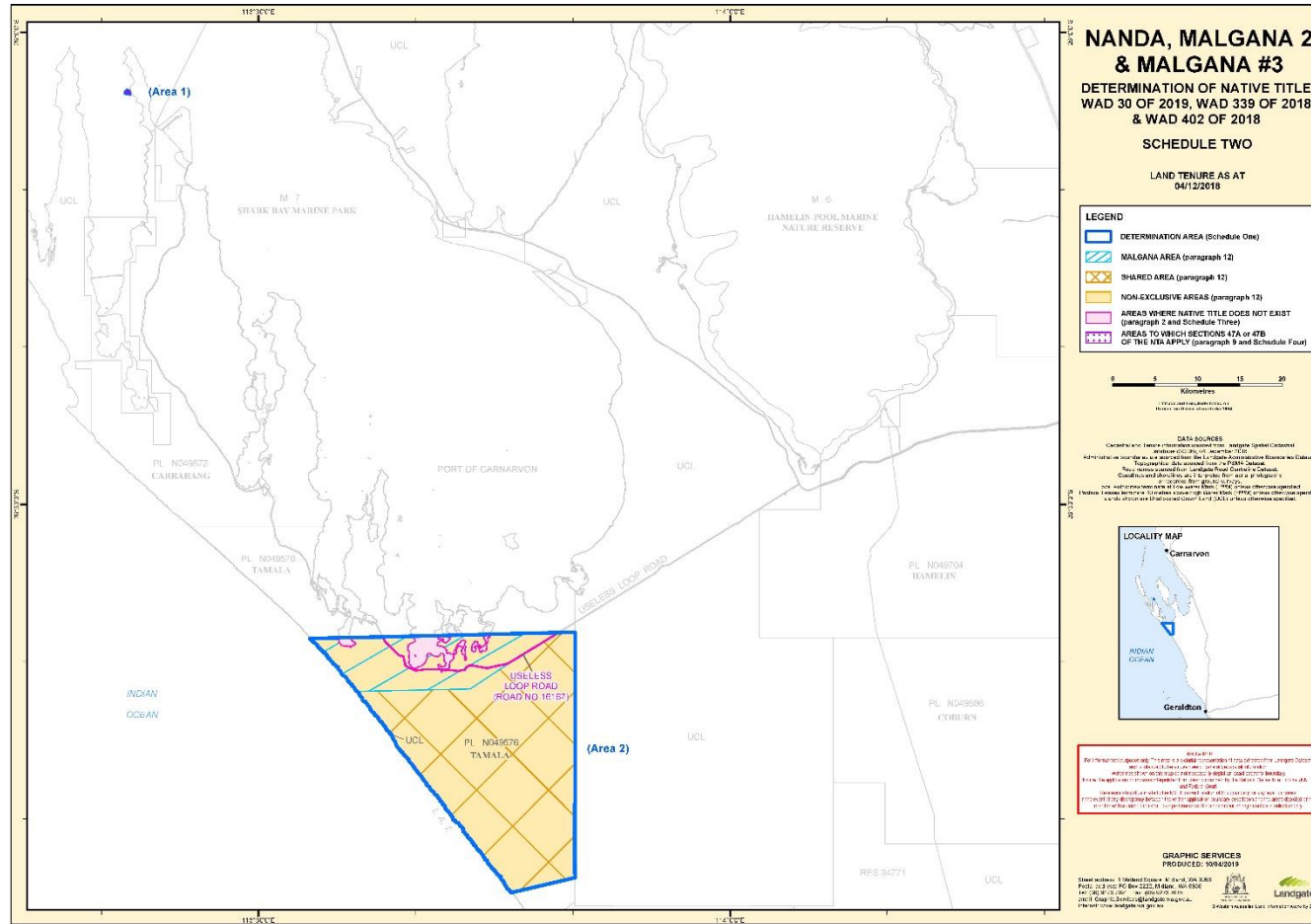
Prepared By: Graphic Services (Landgate) 10 April 2019



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 TWO MAPS OF THE DETERMINATION AREA





SCHEDULE THREE

AREAS WHERE NATIVE TITLE DOES NOT EXIST

Paragraph 2

Native title does not exist in relation to land and waters the subject of the following interests within the Determination Area which, with the exception of public works (as described in cl 3 of this Schedule), are generally shown as shaded in pink on the maps at Schedule Two.

1. Roads

The following dedicated roads, roads set aside, taken or resumed or roads which are to be considered public works (as that expression is defined in the *Native Title Act* and the *Titles Validation Act*):

Road	Description	Shown on / in
Useless Loop Road	Road No. 16167	DP 48608 & GG 12/12/1980

2. Port Area

The land and waters subject to the following port vested in the Minister for Transport pursuant to s 9 of the *Marine and Harbours Act 1981* (WA):

Port	Description
Port of Carnarvon	As described in the proclamation at page 410 of the Government Gazette WA dated 5 February 1982

3. Public Works

Any other public works as that expression is defined in the *Native Title Act* and the *Titles Validation Act* (including the land and waters on which a public work is constructed, established or situated as described in s 251D of the *Native Title Act*) and to which s 12J of the *Titles Validation Act* or s 23C(2) of the *Native Title Act* applies, which were constructed or established or commenced to be constructed or established on or before 23 December 1996.



SCHEDULE FOUR

AREAS TO WHICH SECTION 47B OF THE *NATIVE TITLE ACT* APPLIES

Paragraph 9

Save for any areas described in cl 3 of Schedule Three, s 47B of the *Native Title Act* applies in relation to the whole of the area of native title determination application WAD 402 of 2018 with the effect that any extinguishment over that area to be disregarded.



SCHEDULE FIVE OTHER INTERESTS

Paragraph 10

The nature and extent of the Other Interests in relation to the Determination Area are as follows.

Land tenure interests registered with the Western Australian Land Information Authority are current as at 11 April 2019. All other interests are current as at the date of the determination.

1. Pastoral Leases

The following pastoral leases and the rights and interests of the holders from time to time of those pastoral leases:

Lease No.	Description
N049576	Tamala Station

2. Other

The following rights and interests in the Determination Area:

- (a) Rights and interests, including licences and permits, granted by the Crown in right of the State or of the Commonwealth pursuant to statute or otherwise in the exercise of its executive power and any regulations made pursuant to such statutes;
- (b) Rights and interests held by reason of the force and operation of the laws of the State or of the Commonwealth including the *Rights in Water and Irrigation Act 1914* (WA);
- (c) Rights and interests of members of the public arising under common law, including but not limited to:
 - (i) the public right to fish;
 - (ii) the public right to navigate; and
 - (iii) the right of any person to use and enjoy any roads 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 the common law;



- (d) The right to access the Determination Area by:
- (i) an employee, agent or instrumentality of the State;
 - (ii) an employee, agent or instrumentality of the Commonwealth; or
 - (iii) an employee, agent or instrumentality of any local government authority,
- as required in the performance of his or her statutory or common law duty, including for the purpose of pest management control and fire hazard management on areas of unallocated Crown land;
- (e) So far as confirmed pursuant to s 212(2) of the *Native Title Act* and s 14 of the *Titles Validation Act* as at the date of this determination, any existing public access to and enjoyment of:
- (i) waterways;
 - (ii) beds and banks or foreshores of waterways;
 - (iii) coastal waters;
 - (iv) beaches;
 - (v) stock routes; and
 - (vi) areas that were public places at the end of 31 December 1993;
- (f) Any other:
- (i) legal or equitable estate or interest in the land or waters of the Determination Area; or
 - (ii) right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with:
 - (A) the land or waters of the Determination Area; or
 - (B) an estate or interest in the land or waters of the Determination Area; or
 - (iii) restriction on the use of the land or waters of the Determination Area, whether or not annexed to other land or waters.



SCHEDULE SIX

MALGANA PEOPLE

Paragraph 12

The Malgana People are those Aboriginal persons who:

- (a) are descended from one or more of the following ancestors
 - (i) Julia Sappie O'Dene (also known as Julia Thompson);
 - (ii) Hookey (also known as Angelick);
 - (iii) Withia; or
 - (iv) Nellie Peters;where descent can be by birth or adoption under traditional laws acknowledged and traditional customs observed by the Malgana People, and
- (b) identify themselves as Malgana and are accepted as Malgana by other Malgana People in accordance with the traditional laws acknowledged and the traditional customs observed by the Malgana People; and
- (c) have a connection with the land and waters in the Determination Area in accordance with the traditional laws acknowledged and the traditional customs observed by the Malgana People.



SCHEDULE SEVEN

NANDA PEOPLE

Paragraph 12

The Nanda People are those Aboriginal persons who:

- (a) are descended from at least one of the following Nanda apical ancestors:
 - (i) Jilba;
 - (ii) Venus;
 - (iii) Mary Jane Batt;
 - (iv) Brindy;
 - (v) Alice McMurray; or
 - (vi) Polly

Descent includes adoption in accordance with traditional Nanda laws and customs;

- (b) identify themselves as Nanda under Nanda traditional law and custom and are so identified by other Nanda People as Nanda; and
- (c) have a connection with the land and waters of the Shared Area in accordance with traditional Nanda laws and customs.