



Extract from the National Native Title Register

Determination Information:

Determination Reference: Federal Court Number(s): WAD30/2019, WAD339/2018, WAD402/2018
NNTT Number: WCD2019/014

Determination Name: [Drury on behalf of the Nanda People v State of Western Australia \(No 3\)](#)

Date(s) of Effect: 4/11/2019

Determination Outcome: Native title exists in parts of the determination area

Register Extract (pursuant to s. 193 of the *Native Title Act 1993*)

Determination Date: 04/11/2019

Determining Body: Federal Court of Australia

ADDITIONAL INFORMATION:

Further to orders 5 and 6 made by the Federal Court of Australia on 4 November 2019 (set out in the **Matters Determined** section below), the Full Court of the Federal Court of Australia delivered its judgment *Drury on behalf of the Nanda People v State of Western Australia* [2020] FCAFC 69 on 21 April 2020. The judgment is attached to this extract. The Full Court ordered that:

1. The questions reserved for consideration be answered as follows:

Question (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 PBC is to perform the functions given to PBCs under the *Native Title Act* and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

Answer

Yes, but only where, as in this case, there has been an overall determination of the existence of separate and distinct native titles over the same land.

Question (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 PBC for the area in circumstances where each group nominates a separate PBC.

Answer

No.

REGISTERED NATIVE TITLE BODY CORPORATE:

Malgana Aboriginal Corporation RNTBC
Trustee Body Corporate
PO Box 132
Denham Western Australia 6537

Nanda Aboriginal Corporation RNTBC
Trustee Body Corporate
Level 8, 12-14 The Esplanade
Perth Western Australia 6000

Note: current contact details for the Registered Native Title Body Corporate are available from the Office of the Registrar of Indigenous Corporations www.oric.gov.au

COMMON LAW HOLDER(S) OF NATIVE TITLE:

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.

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.

MATTERS DETERMINED:

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):
 - (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.

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.

REGISTER ATTACHMENTS:

1. WCD2019/014 Schedule One - Determination Area, 2 pages - A4, 04/11/2019
2. WCD2019/014 Schedule Two - Maps of the Determination Area, 2 pages - A4, 04/11/2019
3. WCD2019/014 Schedule Three - Areas Where Native Title Does Not Exist, 1 page - A4, 04/11/2019
4. WCD2019/014 Schedule Four - Areas To Which Section 47B Of The Native Title Act Applies, 1 page - A4, 04/11/2019
5. WCD2019/014 Schedule Five - Other Interests, 2 pages - A4, 04/11/2019

6. WCD2019/014 Judgment: Drury on behalf of the Nanda People v State of WA 2020 FCAFC
69, 75 pages - A4, 21/04/2020

Note: The National Native Title Register may, in accordance with s. 195 of the Native Title Act 1993, contain confidential information that will not appear on the Extract.