

## FEDERAL COURT OF AUSTRALIA

### Nicholls on behalf of the Bundjalung People of Byron Bay and Attorney General of New South Wales [2019] FCA 527

File number: NSD 6020 of 2001

Judge: **ROBERTSON J**

Date of judgment: 30 April 2019

Catchwords: **NATIVE TITLE** – determination of native title by consent  
– exercise of powers under s 87 of the *Native Title Act 1993*  
(Cth)

Legislation: *Native Title Act 1993* (Cth) ss 56, 57, 87, 94A, 223, 225  
  
*Native Title (Prescribed Bodies Corporate) Regulations*  
*1999* (Cth)  
  
*Aboriginal Land Rights Act 1983* (NSW) s 36

Cases cited: *Bullen on behalf of the Esperance Nyungar People v*  
*Western Australia* [2014] FCA 197  
*Cashmere on behalf of the Jirrbal People #1 v Queensland*  
[2010] FCA 1090; 283 ALR 610  
*Doctor on behalf of the Bigambul People v Queensland*  
[2016] FCA 1447  
*Doyle on behalf of the Kalkadoon People #4 v Queensland*  
*(No 3)* [2011] FCA 1466  
*King on behalf of the Eringa Native Title Claim Group v*  
*South Australia* [2011] FCA 1386; 285 ALR 454  
*Members of the Yorta Yorta Aboriginal Community v*  
*Victoria* [2002] HCA 58; 214 CLR 422  
*Risk v Northern Territory* [2006] FCA 404  
*Western Australia v Ward* [2002] HCA 28; 213 CLR 1

Date of hearing: 30 April 2019

Registry: New South Wales

Division: General Division

National Practice Area: Native Title

Category:	Catchwords
Number of paragraphs:	51
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Solicitor for the Applicant:	NTSCORP Limited
Counsel for the First Respondent:	Ms T Jowett with Mr E Lee
Solicitor for the First Respondent:	Crown Solicitor
Solicitor for the Second Respondent:	Ms E Lewis of Australian Government Solicitor
Counsel for the Third Respondent:	The Third Respondent did not appear
Solicitor for the Fourth, Fifth and Sixth Respondents:	Mr J Behrendt of Chalk & Behrendt Lawyers & Consultants
Counsel for Arakwal Corporation, Trustee:	Mr C Athanasiou

## ORDERS

NSD 6020 of 2001

**BETWEEN:** **DULCIE NICHOLLS, NORMAN GRAHAM, STANLEY KAY,  
JUDITH DAVIES, BRIAN KELLY, AND YVONNE  
STEWART ON BEHALF OF THE BUNDJALUNG PEOPLE  
OF BYRON BAY**  
Applicant

**AND:** **ATTORNEY GENERAL OF NEW SOUTH WALES**  
First Respondent

**COMMONWEALTH OF AUSTRALIA**  
Second Respondent

**BYRON SHIRE COUNCIL** (and others named in the Schedule)  
Third Respondent

**JUDGE:** **ROBERTSON J**

**DATE OF ORDER:** **30 APRIL 2019**

### Contents

#### **Schedule One – Description of the Native Title Area**

- A. Description of Native Title Area
- B. Maps of Native Title Area (the “Schedule One Map”)

#### **Schedule Two – Extinguished Area**

- A. Description of Extinguished Area
- B. Map of Extinguished Area (the “Schedule Two map”)

#### **Schedule Three – External Boundary of the Application**

#### **Schedule Four – Agreements**

#### **Schedule Five – Other Interests in the Native Title Area**

**BEING SATISFIED** that a determination of native title in the terms sought by the parties is within the power of the Court and it appearing to the Court appropriate to do so, by consent of the parties and pursuant to sections 87(2) and 94A of the *Native Title Act 1993* (Cth):

**THE COURT NOTES THAT:**

- A. On 5 December 2001, the Applicant made a native title determination application in accordance with sections 13(1) and 61 of the *Native Title Act 1993* (Cth) to the Federal Court of Australia (proceeding NSD 6020 of 2001) (the “Application”).
- B. The parties have reached an agreement as to the terms of a determination to be made by consent in relation to part of the land or waters within the external boundaries of the Application (the “Determination Area”), being that:
- (a) native title exists in relation to part of the Determination Area (the “Native Title Area”); and
  - (b) native title has been extinguished in relation to another part of the Determination Area (the “Extinguished Area”).
- C. The terms of the agreement involve seeking orders by consent for a determination pursuant to section 87, and in accordance with section 94A, of the *Native Title Act 1993* (Cth).
- D. Pursuant to section 87 of the *Native Title Act 1993* (Cth) the parties have filed a Minute of Proposed Consent Determination of Native Title which reflects the terms of the agreement.
- E. The Applicant has nominated Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) ICN 2663 pursuant to section 56(2) of the *Native Title Act 1993* (Cth) to hold the determined native title in trust for the common law native title holders.
- F. Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) ICN 2663 has consented in writing to hold the rights and interests comprising the native title in trust for the common law holders and to perform the functions of a registered native title body corporate under the *Native Title Act 1993* (Cth).

**THE COURT ORDERS THAT:**

1. There be a determination of native title in the terms set out below (the “Determination”).
2. The Determination shall take effect upon the date on which the agreement referred to in paragraph 1 of Schedule Four is registered on the Register of Indigenous Land Use Agreements, pursuant to the *Native Title Act 1993* (Cth).
3. In the event that the agreement referred to in paragraph 2 above is not registered on the Register of Indigenous Land Use Agreements on or before 30 January 2020 or at such later time as this Court may order, the matter is to be listed for further directions.

4. On the Determination taking effect, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) ICN 2663 shall hold the determined native title in trust for the common law holders pursuant to section 56(3) of the *Native Title Act 1993* (Cth) and is to:
  - (a) be the prescribed body corporate for the purposes of section 57(1) of the *Native Title Act 1993* (Cth); and
  - (b) perform the functions set out in section 57(1) of the *Native Title Act 1993* (Cth) and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).
5. There be no order as to costs.

**THE COURT DETERMINES THAT:**

1. Native title exists in the Native Title Area (including the land to which section 47B of the *Native Title Act 1993* (Cth) applies) described and depicted in the map attached to Schedule One to this Determination.
2. Native title is extinguished in the Extinguished Area described and depicted in the map attached to Schedule Two to this Determination.
3. To the extent of any inconsistency between the written description in Schedules One and Two and the corresponding maps attached to those Schedules, the written description prevails.

**Native Title Holders**

4. Native title in the Native Title Area is held by the Bundjalung People of Byron Bay who are those Aboriginal persons who:
  - (a)
    - (i) are the biological descendants of the apical ancestor Bobby Bray, also known as King Bobby of Bumberbin; or
    - (ii) are persons adopted in accordance with Byron Bay Bundjalung law and custom into the families of those persons described in (i), (including the biological descendants of any such adopted persons); and
  - (b) identify themselves as a Bundjalung person of Byron Bay; and
  - (c) are recognised as a Bundjalung person of Byron Bay by Bundjalung People of Byron Bay in accordance with their law and custom.

### **Nature and extent of Non-Exclusive Native Title Rights and Interests**

5. Subject to paragraphs 6, 7 and 8, the native title rights and interests in relation to the Native Title Area are the non-exclusive, non-commercial rights to:

- (a) enter, travel over and remain on the land or waters;
- (b) take and use, for personal, domestic and communal purposes (including cultural purposes), the natural resources (other than water);
- (c) take and use the water for personal, domestic and communal purposes (including cultural purposes), but not extending to a right to control the use and flow of the water in any rivers or lakes;
- (d) camp and erect temporary shelters and temporary structures for personal, domestic and communal purposes (including cultural purposes);
- (e) light fires for personal, domestic and communal purposes (including cultural purposes), but not for the clearance of vegetation;
- (f) engage in cultural activities, to conduct ceremonies, to hold meetings, and to participate in cultural practices relating to birth and death including burials where permitted by the laws of New South Wales on the land or waters;
- (g) have access to, to maintain and to protect from physical harm sites and places of importance which are of significance to the Bundjalung People of Byron Bay under their traditional laws and customs;
- (h) teach the physical, cultural and spiritual attributes of places and areas of importance;
- (i) hunt for personal, domestic and communal purposes (including cultural purposes);
- (j) fish for personal, domestic and communal purposes (including cultural purposes);
- (k) be accompanied by persons who, though not Native Title Holders, are:
  - (i) spouses, partners or parents of Native Title Holders, together with their children and grandchildren;
  - (ii) people whose presence is required under traditional laws and customs for the performance of cultural activities, practices or ceremonies; and
  - (iii) people requested by the Native Title Holders to assist in, observe or record cultural activities, practices or ceremonies.

### **General qualifications on native title rights and interests**

6. Native title does not exist in:
  - (a) minerals as defined in the *Mining Act 1992* (NSW) and the *Mining Regulation 2010* (NSW); and
  - (b) petroleum as defined in the *Petroleum (Onshore) Act 1991* (NSW) and the *Petroleum (Submerged Lands) Act 1982* (NSW).
7. The native title rights and interests described in paragraph 5 do not confer:
  - (a) possession, occupation, use and enjoyment to the exclusion of all others; and
  - (b) any right to control public access to, or use of, the Native Title Area.
8. The native title rights and interests in the Native Title Area are subject to and exercisable in accordance with:
  - (a) the laws of the State of New South Wales and of the Commonwealth;
  - (b) the traditional laws acknowledged and traditional customs observed by the Native Title Holders; and
  - (c) the terms and conditions of the agreements referred to in Schedule Four.

### **The nature and extent of any Other Interests**

9. The Other Interests in the Native Title Area are the interests described in Schedule Five (“Other Interests”).

### **Relationship between Native Title Rights and Other Interests**

10. Except as otherwise provided by law, the relationship between the native title rights and interests in the land or waters in the Native Title Area and the Other Interests described in Schedule Five, in relation to those areas, is that:
  - (a) the Other Interests continue to have effect;
  - (b) the Other Interests co-exist with the native title rights and interests;
  - (c) the Native Title Holders do not have the right to control access to or the use of the land or waters by the holders of the Other Interests; and
  - (d) to the extent of any inconsistency, the Other Interests and any activity that is required or permitted by or under the exercise of a right conferred or held under the Other Interests, while they are in existence, prevail over but do not extinguish the native title rights and interests and any exercise of those native title rights and interests.

## Definitions

11. In this consent determination, unless the contrary intention appears:

“**Aboriginal Land Council Interests**” means the rights and interests set out in item 1 of Schedule Five.

“**Application Area**” means the land or waters subject to native title determination application NSD 6020 of 2001.

“**Bundjalung of Byron Bay (Arakwal) Aboriginal Corporation**” means Aboriginal Corporation ICN 2663 incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

“**Bundjalung People of Byron Bay**” means the Native Title Holders as described in paragraph 4.

“**Determination Area**” means the Native Title Area together with the Extinguished Area.

“**external boundary of the Application**” means the boundary of the native title determination application filed by the Bundjalung People of Byron Bay in Federal Court of Australia proceeding NSD 6020 of 2001 which is described in Schedule Three.

“**Extinguished Area**” means the land or waters described in Schedule Two.

“**land**” has the same meaning as in the *Native Title Act 1993* (Cth).

“**laws of the State of New South Wales and of the Commonwealth**” include statutes, regulations and other subordinate legislation and the common law.

“**Native Title Area**” means the land and waters described in Schedule One.

“**Native Title Holders**” means the persons in the group described in paragraph 4.

“**native title rights and interests**” means the rights and interests described in paragraph 5.

“**Other Interests**” means the interests described in Schedule Five.

“**Unidentified CADID**” means the unique cadastre identifier of unidentified land or land which does not have a folio identifier.

“**waters**” has the same meaning as in the *Native Title Act 1993* (Cth).

12. If a word or expression is not defined in these orders or this Determination, but is defined in the *Native Title Act 1993* (Cth) or the *Native Title (New South Wales) Act*

*1994 (NSW)*, then it has the meaning given to it in the *Native Title Act 1993 (Cth)* or the *Native Title (New South Wales) Act 1994 (NSW)*, whichever is relevant.

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