



Extract from Schedule of Native Title Applications

Application Reference: Federal Court number: WAD215/2017
NNTT number: WR2017/001

Application Name: Yindjibarndi Aboriginal Corporation RNTBC v State of Western Australia
(Yindjibarndi Aboriginal Corporation RNTBC)

Application Type: Revised Native Title Determination

Application filed with: Federal Court of Australia

Date application filed: 15/05/2017

Current status: Full Approved Determination - 02/10/2020

Applicants: Yindjibarndi Aboriginal Corporation RNTBC

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Additional Information

This is an application by Yindjibarndi Aboriginal Corporation RNTBC, a registered native title body corporate, which is asking the Federal Court of Australia (Federal Court) to vary the determination of native title in *Moses v State of Western Australia* [2007] FCAFC 78 (WAD6017/1996, WCD2005/001), made on 27 August 2007. The applicant seeks to vary the Determination by adding all or parts of six Unallocated Crown Land (UCL) parcels within the Yindjibarndi Native Title Area to the Schedule of parcels of land in which extinguishment would be disregarded, in accordance with s 47B of the Native Title Act 1993 (Cth). The variation, if determined by the Federal Court, would recognise the Yindjibarndi people as holding native title rights and interests in those areas which confer possession, occupation, use and enjoyment of that land or waters to the exclusion of all others.

The other substantive effects of the variation, if determined by the Federal Court, would be to recognise exclusive native title rights and interests in relation to Reserve 40617, which is listed in the Schedule of parcels of land in which extinguishment would be disregarded in accordance with s 47A of the Native Title Act, and [4(b)] of the existing determination (which subjects the determined non-exclusive native title rights and interests to the qualification that they are not exercisable otherwise than for personal, domestic and non-commercial communal purposes) would no longer apply to those areas which fall only within the Yindjibarndi Native Title Area.

Grounds for Varying/Revoking Determination:

Since the approved determination of native title was made in *Moses* the Full Federal Court's decisions in *Griffiths v Northern Territory of Australia* [2007] FCAFC 178; (2007) 165 FCR 391 (*Griffiths FFC*) and *Banjima People v State of Western Australia* [2015] FCAFC 84; 328 ALR 637 (*Banjima FFC*) were delivered and changed the law in relation to the nature of exclusive possession native title.

In *Griffiths FFC* the Full Court found at 429[127] that if control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can support a characterisation of the native title rights and interests as exclusive.

In *Banjima FFC* at [38] the Full Court stated "[t]he control of access to country, expressed by the need to obtain permission to enter under pain of spiritual sanction (which underpinned the conclusion in *Griffiths* ... and in the present case), is readily recognisable as a right of exclusive possession."

These decisions mark a fundamental change in the Court's approach to the question of what is required to establish exclusive possession native title rights and interests under traditional laws and customs. The spiritual basis of the Yindjibarndi people's claim to a native title right of exclusive possession in *Daniel* was not considered to be an element that was necessary to be proved before the Full Court's decision in *Griffiths FFC*, because the law did not yet recognise spirituality as capable of supporting a right of exclusive possession. As a result, in *Daniel* only one piece of evidence arose in cross-examination that suggested dangerous spirits in Yindjibarndi country would enforce sanctions on those who entered without asking for, and being granted, Yindjibarndi permission (see *Daniel* Transcript at Attachment F).

Previously, as was the case for the *Moses* determination, the law required that an applicant for exclusive possession native title must prove a right to control access that existed in a usufructuary or proprietary sense, that did not accommodate a right of exclusive possession premised by a spiritual imperative: see *Griffiths FFC* at [715].

The Applicant can adduce evidence of the Yindjibarndi people controlling access to the determination area.

The decisions in *Griffiths FFC* and *Banjima FFC* constitute the events that have taken place under s 13(5)(a) [of the *Native Title Act 1993* (Cth)] since the *Moses* determination was made, which cause the determination to no longer be correct.

In addition, the High Court's decision *Akiba v Commonwealth* [2013] HCA 33, the High Court held that qualifying native title rights and interests by reference to the various purposes for which those rights might be exercised represented a flawed approach. Their Honours Hayne, Kiefel and Bell JJ said the following at [66]:

"The relevant native title right that was found to exist was a right to access and to take resources from the identified waters for *any* purpose. It was wrong to single out taking those resources for sale or trade as an "incident" of the right that had been identified. **The purpose which the holder of that right may have had for exercising the right on a particular occasion was not an incident of the right; it was simply a circumstance attending its exercise.**" (emphasis added)

Accordingly, the qualification imposed on the non-exclusive Yindjibarndi native title rights by [4(b)] of the existing determination has been rendered anachronistic by the High Court's decision.

By virtue of the substantial legal developments that have taken place since the *Moses* determination, the interests of justice also requires that the determination be varied pursuant to s 13(5)(b) [of the *Native Title Act 1993* (Cth)].

Application Area:
State/Territory: Western Australia
Brief Location: Pilbara region
Primary RATSIB Area: Pilbara
Approximate size: 9150.2220 sq km
(Note: There may be areas within the external boundary of the application that are not claimed.)
Does Area Include Sea: No

Area covered by the claim (as detailed in the application):

See Attachment A

Attachments:

1. Attachment A Written Description of application area, 31 pages - A4, 27/12/2017
2. Attachment B Map of the application area, 1 page - A4, 27/12/2017
3. Attachment F Daniel Transcript, 1 page - A4, 27/12/2017
4. Attachment I Map showing proposed new 47B areas, 1 page - A4, 27/12/2017

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