AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

WHAT'S NEW IN NATIVE TITLE

JULY 2018

1. Case Summaries

Holborow on behalf of the Yaburara and Mardudhunera People v State of Western Australia (No 3) [2018] FCA 1108

27 July 2018, Consent Determination, Federal Court of Australia, – Western Australia, Barker J

In this matter the Court ordered that:

1. there be a determination of native title in WAD 127 of 1997 in the terms provided for in Attachment A
2. The Wirrawandi Aboriginal Corporation ICN: 8870 shall hold the determined native title in trust for the native title holders pursuant to section 56(2)(b) of the *Native Title Act 1993* (Cth).

[1] Pursuant to s 225 of the *Native Title Act 1993* (Cth) (NTA) the matter before the Court was the Yaburara & Mardudhunera native title claimant application (YM application) which covers an area of approximately 9530 square kilometres of land and waters in the Pilbara region of Western Australia. It was proposed by the parties that the Court should determine that the holders of native title in this area are the Mardudhunera People. The Determination Area largely relates to four pastoral leases, being Yalleen, Yarraloola, Mardie and Karratha Stations. There are also

several leases, roads, numerous small reserves and unallocated Crown land within the Determination Area. The procedural history of this proceeding is set out in paragraphs [11] – [17] of his Honour's written reasons for judgment.

[18] Pursuant to s 87 of the NTA, and having regard to the agreement they have reached, the parties requested that the Court determine the proceedings that relate to the Determination Area without holding a hearing. In support of the agreement reached, the first respondent (State of Western Australia) has filed a Minute of Proposed Consent Determination of Native Title which has been signed by each of the parties with an interest in the Determination Area.

Assessment of connection material

Barker J observed that: [25] It was apparent from the joint submissions, that the applicant provided the State with an anthropological report by Dr Michael O'Kane entitled Yaburara and Mardudhunera People Final Connection Report (dated 17 September 2015) (connection material) in support of the Mardudhunera People's connection with the claim area. [26] The State assessed the connection material in accordance with its Guidelines for the Provision of Connection Material (dated February 2012), with the State's response being informed by legal advice from the State Solicitor's Office. [27] In November 2016, representatives of the State met directly with representatives of the YM Applicant and members of the claim group, in Karratha. The joint submissions explain that this meeting provided an opportunity for direct and detailed discussions between the Mardudhunera People and the State about the nature and extent of the Mardudhunera People's ongoing connection to country and their acknowledgment and observance of traditional law and custom.

[28] The joint submissions provide the following information regarding the connection to country of the Mardudhunera People. [37] The applicant nominated Wirrawandi Aboriginal Corporation WAC pursuant to s 56(2)(a) of the NTA to hold the determined native title in trust for the native title holders. That nomination is in writing and WAC has given its consent to the nomination. His Honour was satisfied that the requirements of the NTA and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) have been met.

[42] Section 87(1A) of the NTA requires the Court to be satisfied that it is appropriate to make the determination sought by the parties. This is a discretion that must be exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose of the NTA. [50] Barker J was satisfied that it was appropriate and within the power of the Court under s 87 and s 94A of the NTA to make the determination and his Honour made orders to that effect.

Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corporation [2018] FCAFC 118

18 July 2018, Appeal, Federal Court of Australia, Court of Appeal – Western Australia, Besanko Barker and Colvin JJ

This was an appeal from the decision of McKerracher J in *Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd* [2017] FCA 1240 (see What's New in Native Title – October 2017). The Full Federal Court of Appeal ordered that:

1. The appeal be dismissed
2. The appellant pay the respondent's costs of and incidental to the appeal to be taxed in default of agreement.

[1] – [3] Buurabalayji Thalanyji Aboriginal Corporation (the Corporation) is the holder as trustee of native title rights on behalf of the Thalanyji people for an area to the south of Onslow in Western Australia. Under the terms of a state agreement, Onslow Salt Pty Ltd was granted a mining lease over an area located to the south west of Onslow and near the coast. The mining lease area is within the native title area. In July 2017, the Corporation commenced proceedings against Onslow Salt and the State of Western Australia concerning activities in the native title area.

[4] Onslow Salt complained that the proceedings had been commenced in breach of the requirements of a dispute resolution clause. It made an application for a stay of the proceedings on that basis. The application was refused (*Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd* [2017] FCA 1240) and leave was given for Onslow Salt to appeal against that decision.

[5] In the proceedings before the primary judge, the Corporation made 14 substantive claims. [6] – [8] There was also a claim under the terms of a Development Deed between the native title claimants for the Thalanyji people and Onslow Salt. It was said that pursuant to the *Native Title Act 1993* (Cth) (NTA), the Corporation had become a party to the Development Deed. The failure to notify the Corporation of the real purpose of Onslow Salt in its dealings with Chevron was alleged to be a breach of the Development Deed. The Corporation sought a declaration that the purported approval was void and of no effect and sought damages against the State and Onslow Salt. At the heart of the proceedings brought by the Corporation were claims that there were native title rights at the relevant time and that public law relief should be granted in respect of the purported approval.

[9] The recitals to the Development Deed record, amongst other things, that the native title claimants (now represented by the Corporation) and Onslow Salt 'wish to set out the terms upon which the Salt Project is to proceed' in the then native title claim area (of which the native title area forms part). The Salt Project is defined to mean the development and operation of solar salt production, harvesting, processing and shipping facilities within the native title claim area. The Deed includes a provision which states that the operation and enjoyment of native title rights and

interests over the Project Area is agreed to be suspended for the duration of the Salt Project.

[10] The Deed contains a dispute resolution clause which provides:

> If there is a dispute question or difference between the Parties with respect to any matter then the Parties shall forthwith confer in an effort to settle the dispute question or difference but if they fail to agree within thirty (30) days after first conferring or if a Party refuses to confer then the dispute question or difference shall be referred by either or both Parties to an independent expert.

[11] – [14] The clause further provides that the expert is to decide whether to receive written or oral submissions, provided that no more than a month will be allowed for submissions. The expert must then express an opinion 'within a reasonable period from the date of reference' and furnish the parties with a copy. The clause provides expressly that no party shall be entitled to commence or maintain any action or proceeding until the dispute, question or difference has been considered by the expert. After the provision of an opinion under the agreed mechanism, there is no further obligation expressed in the dispute resolution clause for the parties to meet to resolve or negotiate after the opinion has been provided. So, the clause provides for a form of advisory opinion. [14] It was common ground that the opinion, if and when provided, would not operate as a determination or adjudication of the dispute.

The Full Court set then out the relevant principles for a stay of proceedings. [15] The power of the Court to stay proceedings is discretionary. The discretion is wide. In considering whether to grant a stay, parties are to be held to their agreed dispute resolution procedures, unless good reason be shown. The onus of showing good reason is on the party opposing the stay. Each case is to be considered on its own facts and circumstances. [16] A stay will be refused if it would be unjust to deprive a party of its right to have its claim determined judicially. Matters that have been identified as reasons that may, in the particular circumstances, cause the Court to refuse to grant a stay include:

1. the agreed process would deal with only part of the dispute;
2. there would be duplication of effort if the agreed process was to be followed in the particular case;
3. the refusal of a stay would result in a multiplicity of proceedings;
4. in the case of an expert determination, the dispute is inapt for determination by an expert because it does not involve the application of specialist knowledge to matters to be observed or investigated by the expert or is outside the expert's field of expertise; and
5. the agreed procedures are inappropriate or inadequate for the nature of the dispute.

[17] To these matters the Court also added circumstances where there is a wider public interest in the dispute being dealt with in the courts.

[18] As to the significance of the court proceedings involving parties who had not joined in the agreed dispute resolution mechanism, the Court stated that some care must be taken. In cases where one of the matters raised before the Court is dependent upon the determination of other matters required to be submitted to arbitration, even though all parties before the Court are not parties to the arbitration agreement, the Court may stay the whole proceedings until that matter is determined. It may also stay the court proceedings where they are ancillary to the matters to be arbitrated. Or, it may form the view that the arbitral claims should be held in abeyance pending the determination of the court proceedings on the basis that the issues to be submitted to arbitration are subsidiary or less substantial: see *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170 at [333]-[334]. Similarly, in cases where the agreed mechanism provided for something other than arbitration, the Court should give consideration to whether it is appropriate for the court proceedings to be stayed while an agreed dispute resolution mechanism is carried into effect even though it may not be a process in which all parties have agreed to participate or are otherwise willing to participate.

[19] In all cases, against the refusal of a stay is the weighty consideration that the parties should be held to their bargain. The Court will respect the terms of any agreement between the parties committing to alternative processes for the resolution of disputes. This means that the Court should not lightly refuse to grant a stay in circumstances where the clause relied upon is enforceable. In most cases the existence of an enforceable agreement to submit to a dispute resolution process will be a weighty consideration against the refusal of a stay.

As Dixon J stated in *Huddart Parker Ltd v The Ship Mill Hill* [1950] HCA 43 at 509, there is 'a strong bias in favour of maintaining the special bargain'. This reflects the importance of giving effect to the terms of any enforceable contract the parties have made. However, the onus remains the same in any case where a stay is sought and falls upon the party opposing the stay.

[21] A stay may be granted until an agreed process of conciliation, mediation or good faith negotiation has been completed even if the outcome will not be a binding determination of the dispute.

[22] Finally, the approach on an application for a stay by reason of an agreed dispute resolution mechanism may need to accommodate relevant statutory provisions such as the *Commercial Arbitration Act 2010* (Cth) where, for example, parties who claim 'through or under' entities who are parties to an arbitration agreement may be referred to arbitration: *Hancock Prospecting* at [289]-[323].

Alleged errors

[28] On the appeal, Onslow Salt accepted that *House v The King* [1936] HCA 40 applies and it must demonstrate that the primary judge's discretionary decision was guided by a wrong principle or irrelevant material or was unreasonable in result. [29] Onslow Salt raised two matters in support of the appeal:

3. The primary judge formed an incorrect view as to the scope of the agreed dispute mechanism by finding that it was limited to simpler, more specific issues arising under the Development Deed
4. The primary judge found it to be fundamentally important that the agreed dispute mechanism did not produce a determination or any binding outcome which was said to be in error because it was an irrelevant matter when it came to considering whether to grant a stay.

The scope of the agreed dispute mechanism

The Full Court held at [33] that 'it is evident that his Honour decided the case on the basis that the clause applied, but the Court's discretion should be exercised against the grant of a stay.' At [35] the Full Federal Court of Appeal concluded that 'therefore, there was no error by the primary judge as to the scope of the dispute resolution clause.'

The Full Court stated at [40] that

> as the primary judge correctly found, the mechanism chosen by the parties is entirely inapposite for the dispute the subject of the proceedings. The issues in the proceedings require a detailed consideration of complex factual issues to determine the actual purposes of Onslow Salt and Chevron. The expert will receive only submissions within a strict timeframe and then be required to provide an opinion. There is no procedure by which there will be disclosure of relevant documents or examination of witnesses. There is no procedure by which documents or submissions might be obtained from Chevron. Further, the proceedings raise novel questions about tortious interference with native title rights about which an opinion would carry little authoritative value.
>
> [41] The claim against the State is a public law claim which arises from factual circumstances that are interwoven with those relied upon for the claim against Onslow Salt. There is no basis for a stay of proceedings against the State. Even if the State may be willing to participate in the expert process, there are public interest reasons why the whole of a dispute of that character should be addressed by Development Deed have been advanced to frustrate the rights of Onslow Salt under the dispute resolution clause.

[44] The Court held that the primary judge was correct to refuse to grant a stay. As the appeal was unsuccessful, and no submission was advanced to support a different exercise of discretion, the Court held that costs should follow the event.

Boney v Attorney General of New South Wales [2018] FCA 1066

18 July 2018, Interlocutory Application for Summary Dismissal of an Application for Leave to Appeal, Federal Court of Australia – New South Wales, Robertson J

The Court ordered that:

1. Subject to order 3, leave be granted to amend the application for leave to appeal and the draft notice of appeal in accordance with the forms accompanying the letter of Jarratt Webb & Barrett dated 15 June 2018 to the Registry.
2. The interlocutory application dated 13 February 2018 was dismissed, without prejudice to the Current Applicant, if so advised, raising the issues of the 14 applicants' standing and the futility of the application for leave before the Full Court hearing the application for leave to appeal and, if leave be granted, the appeal.
3. Within 14 days from the date of these orders, the Current Applicant file and serve written submissions on the issue of costs, limited to 4 pages. Within a further 14 days, the 14 applicants file and serve written submissions in reply, limited to 4 pages. The submissions on each side should state the parties' views on whether the costs question may be determined on the papers.

[1] These reasons concerned an interlocutory application for summary dismissal of an application for leave to appeal from the judgment of Rangiah J in *Gomeroi People v Attorney General of New South Wales* [2017] FCA 1464.

[2] The principal proceeding was an application, made in 2011, for a determination of native title brought by 19 persons, referred to by Rangiah J as the Current Applicant, on behalf of the Gomeroi People. [3] On 7 December 2017, Rangiah J determined an interlocutory application pursuant to s 66B of the *Native Title Act 1993* (Cth). His Honour made an order that 19 persons, referred to in that judgment as the Replacement Applicant, replace the Current Applicant.

[5] The parties before the Court in this matter referred to the party Rangiah J called the Current Applicant as the Former Applicant. Robertson J adopted that practice. In these reasons for decision, when his Honour refers to the Former Applicant, he refers to the applicant for leave to appeal from the orders of Rangiah J. When His Honour refers to the Current Applicant, he refers to the moving party on the interlocutory application for summary dismissal.

[6] The active parties before the Court were the Current Applicant and, originally, the Former Applicant. As will later appear, the status in the proceedings of the individuals making up the Former Applicant was the subject of an application to amend. [7] No other parties took an active role in the interlocutory application.

[8] On 22 December 2017, the Former Applicant purportedly filed an application, in its unamended form, for leave to appeal from the 7 December 2017 judgment of

Rangiah J. [9] In response, the present interlocutory application was brought, dated 13 February 2018, by the Current Applicant, in the following terms:

1. Pursuant to rule r [sic] 26.01 of the *Federal Court Rules 2011* (Cth), the Application for Leave to Appeal from the judgment of the Honourable Justice Rangiah in *Gomeroi People v The Attorney General of New South Wales* [2017] FCA 1464 be dismissed.
2. The applicant to the Application for Leave to Appeal pay the costs of this application.

[11] The Former Applicant before Rangiah J comprised Maureen Suiter, Lyall Munro Jnr, Alf Boney, Clifford Toomey, Norman McGrady, Madeline McGrady, Leslie 'Jacko' Woodridge, Jason Wilson, Michael Anderson, Alfred Priestly, Ray Tighe, Greg Griffiths, Burrul Galigabali, Susan Smith, Richard Green, Raymond Welsh Snr, Elaine Binge, Bob Weatherall, Anthony Munro. There is some inconsistency in the spelling of the names of some of these people in various places in the papers.

Procedural history

[12] In the course of case management, particularly at the case management hearing on 7 March 2018, the common position was that the application for leave to appeal and the appeal be heard together, necessarily by a Full Court. [13] The position of the Current Applicant was that the interlocutory application for summary dismissal of the application for leave to appeal was essentially going to deal with the retainer between the Former Applicant and its solicitors.

[13] It was said that the question was in substance about the retainer and a question that went to the ability of an applicant to provide instructions when it was apparent that not all of the individuals that made up the applicant agreed. It was also intimated that there could be an appeal from the Court's decision on the interlocutory application for summary dismissal. A substantial reason why the interlocutory application for summary dismissal could not be referred to a Full Court for determination, together with the application for leave to appeal and, if granted, the appeal itself, was a question about liability for costs, turning on the retainer question.

The parties were unable to agree as to an order protecting the solicitors for the Former Applicant in relation to costs such that the interlocutory application for summary dismissal could also be referred to the same Full Court.

The Parties agreed on the following facts: [16] The Former Applicant was the applicant/appellant in these proceedings. The Court noted that as originally filed, the application for leave to appeal stated:

> Part A - persons jointly comprising the Applicant
>
> Alfred Boney, Maureen Sulter, Clifford Toomey, Lyall Munro Junior, Norman McGrady (dec'd), Madeline McGrady, Leslie Woodbridge, Jason Wilson, Michael Anderson, Alfred Priestly, Ray Tighe, Greg Griffiths, Burrul Galigabali

(dec'd), Susan Smith, Richard Green, Raymond Welsh Senior, Elaine Binge, Bob Weatherall and Anthony Munro

[17] The Former Applicant was duly authorised under the *Native Title Act* at an authorisation meeting on 10 and 11 May 2013. The resolutions to authorise the Former Applicant at the authorisation meeting on 10 and 11 May 2013 were annexed to the agreed statement of facts. [18] As already indicated, before this action commenced, two members of the Former Applicant died: Burrul Galigabali died on 8 May 2014 and Norman McGrady died on 6 July 2016. [19] After this action commenced, another two members of the Former Applicant died: Raymond Welsh Snr died on 17 January 2018 and Ray Tighe died on 13 March 2018. [20] Mr Jason Wilson is a member of both the Former Applicant and also, pursuant to orders made by Rangiah J on 7 December 2017, a member of the Current Applicant in that action.

No solicitor acting for the Former Applicant (nor their agents) ever contacted Mr Wilson regarding his instructions in relation to the application under s 66B before Rangiah J (s 66B application). [21] Mr Wilson never gave instructions to any solicitor acting for the Former Applicant in relation to the s 66B application.

[22] No solicitor acting for the Former Applicant (nor their agents) ever contacted Mr Wilson in relation to the commencement or continuation of the present proceedings. [23] Mr Wilson has never provided instructions to any solicitor acting for the Former Applicant in relation to the commencement or continuation of the proceedings.

[24] If Mr Wilson had been contacted by solicitors acting for the Former Applicant, he would in no circumstances have given instructions:

1. to contest the s 66B application; and
2. to commence or continue these proceedings.

[25] Notwithstanding the facts agreed above, no party to the proceedings before Rangiah J challenged the validity or competency or propriety of the instructions held by the solicitors for the Former Applicant to defend the s 66B application. [26] The Former Applicant's solicitors hold instructions from all members of the Former Applicant to commence and continue this action, save for instructions from Mr Galigabili; Mr N McGrady; Mr Welsh Snr; and Mr Wilson. The list excludes Mr Ray Tighe, but the reason for that is not apparent.

[27] The Court found that at the authorisation meeting on 10 and 11 May 2013, which authorised the Former Applicant, there was no express resolution that the persons who were authorised to be the applicant were directed or authorised to make decisions by a majority vote. This is in contrast to the decision-making contemplated by Resolution 2 in relation to the native title claim group itself.

[28] The Court also found that at the authorisation meeting on 10 and 11 May 2013, resolution 7 provided that the Gomeroi People native title claim group wished to have 19 individuals as the applicant, each one drawn from one of the 19 regions which

comprise Gomeroi traditional country. Resolutions 8 and 9 confirm that there was to be regional representation.

[29] Further, the Court found that at least since the authorisation meeting on 19 and 20 July 2016, which Rangiah J held removed the Former Applicant and authorised the Current Applicant, there has been disagreement and discord within the native title claim group in terms of the way the Former Applicant was acting.

Issues in the parties' submissions

[35] The Current Applicant submitted that the application for leave to appeal was an abuse of process and it had no reasonable prospects of success because:

1. the applicant for leave (the Former Applicant) had no authority to file the application for leave to appeal when it did, in circumstances where two of the 19 individuals who comprised the applicant were then deceased (two more having subsequently died) and another two of those 19 individuals did not provide instructions to the solicitor to file the application for leave to appeal;
2. the reinstatement as applicant in proceedings NSD2308/2011 of the 19 individuals who were formerly authorised as the applicant in NSD2308/2011 would be futile, as four of those persons were deceased and one did not provide instructions to appeal and opposed the reinstatement: the applicant as authorised by the claim group no longer exists;
3. unrelated to anything under the *Native Title Act*, the solicitor acting for the Former Applicant was acting without a retainer and without instructions.

Each of these was said to be a separate and distinct basis.

[36] The Current Applicant submitted that it was clear that as at the date when the application for leave to appeal was filed, two of the 19 persons who comprised the Former Applicant were deceased and one of those persons (Mr Jason Wilson) opposed that course. The Former Applicant's solicitor had filed an affidavit in which he stated that his instructions to pursue the appeal were obtained from only 15 of the 19 persons who comprised the Former Applicant (two were then deceased) and those instructions were received before the primary judge delivered his judgment. Specific authority was required to institute proceedings. An authority to institute proceedings extended to final judgment and execution but it did not authorise institution of an appeal without further express instructions.

[37] The Current Applicant submitted that the authority that was conferred upon those 19 individuals by the native title claim group was conferred on them jointly not severally: ss 61(2)(c), 62A and 251B of the *Native Title Act*. The 19 individuals could not therefore have been authorised to commence appeal proceedings in circumstances where at least one of their number (Mr Jason Wilson) did not agree with that decision and another (Ray Welsh Snr) did not attend the meeting at which that decision was made. Secondly, four of the 19 individuals were deceased and there was disagreement within the claim group. In those circumstances, the 19

individuals were not authorised to bring the application for leave to appeal without first making an application under s 66B.

[38] The Current Applicant submitted there was undisputed authority in this Court that the persons who comprise an applicant must act collectively in the sense that they must make decisions unanimously. The decision to bring this application for leave to appeal was not made unanimously by those living members of the applicant.

[39] There was authority, the Current Applicant submitted, to suggest that in circumstances where some persons who comprised the applicant have passed away, in certain circumstances the remaining persons who comprised the applicant may continue to act. But that was not the case if there was disagreement within the group as to how the claim should proceed, or if the persons who were appointed as applicant were appointed to represent particular interests within the claim group.

[40] The Former Applicant, the submission went, could not proceed in circumstances where two of the persons who comprised the Former Applicant did not give instructions for this proceeding to continue or to be commenced. One of those, Mr Welsh Senior, had subsequently passed away, but one of them, Mr Jason Wilson, was still alive. He was ready, willing and able to continue acting. In those circumstances the application for leave to appeal could not have been properly brought, because there was at least one of the living members of the applicant, ready, willing and able to continue acting as an applicant, who not only did not make that decision, but had indicated that, if he had been asked, he would have not made that decision.

[41] Similarly, where, as here, there was disagreement within the group and the individual members of the applicant had been appointed as representatives of particular subgroups, this Court has said that there must be reauthorisation and there must be a s 66B meeting. [42] The Current Applicant submitted there was no authority to support the proposition that persons comprising the applicant may decide amongst themselves that they were going to make decisions by majority: all of the authorities were directly contrary to that proposition.

[43] The Former Applicant submitted that resolution of the present controversy relating to whether an applicant may only act by unanimous decision of its members was a matter of construction of the *Native Title Act* as a whole. That Act did not state expressly how an applicant is to make decisions. Nor did that Act identify whether ‘the applicant’ had a separate legal personality from those persons which jointly constituted the applicant. Sections 61(1)(1), 61(2)(c), 66B(1) and 84D(1)(a) did no more than preclude a member of an applicant from acting severally, and implied that any liability an applicant incurred was likewise joint (and not several). The use of the word ‘jointly’ in ss 61(2)(c) and 66B did not mean that those constituting the applicant must act jointly, but that jointly they were the applicant. There was nothing which implied that a multi-member body must make all decisions unanimously. If anything, the words ‘are jointly the applicant’ suggested that each member should have an

equal say (i.e. an equal vote) not that any one member might veto any decision on any basis. An individual right of veto is a several right, not a joint right.

Robertson J stated at [44]: It should not be overlooked, the Former Applicant's submission went, that, under the *Native Title Act*, the applicant became the body legally responsible for a vast array of decisions. 'It was notorious, at least now, that a claim group rarely spoke with one voice and often contained numerous competing interests. Unless one faction or subgroup 'has the numbers', applicants were often authorised on a 'least worst' basis, and individual members were often looked to by parts of the claim group to represent sectional interests. It would produce, in practice, intolerable delay and gridlock if every member of a multi-person applicant held a right of veto over every decision. In this respect ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) should not be forgotten. A requirement of unanimity was not productive of efficiency. Minority interests would hold progress hostage.

[45] The Former Applicant submitted that the concept of the identification of the applicant (or the registered native title claimant) should not be conflated with the manner of the decision-making of the applicant. The reasoning of Mortimer J in *McGlade v Native Title Registrar* [2017] FCAFC 10 at [379] should not be followed. Because the applicant was construed by her Honour as a group of individuals acting jointly, her Honour considered (at [379]) that an action could not be taken merely by some of the individuals. However, that overlooked the possibility, as occurred here, that all members of the applicant may agree to make decisions by majority, with any subsequent majority vote being binding on all members of the applicant who must (all) then take the action decided upon.

[46] The Former Applicant submitted the preferable view was that, if the persons comprising the applicant so decided, decisions could be made by a majority of those persons comprising the applicant, except where the applicant's authorisation under s 251B is subject to an express condition, imposed by the claim group, that it must make decisions unanimously. There was no such condition imposed here. To require a particular group of people to make decisions in the best interests of a larger group unanimously defied human nature and was spectacularly inefficient. There were a number of authorities to the effect that where one or more of those persons constituting the applicant in a native title claim died or was no longer willing to act in such capacity, the remaining persons constituting the applicant may continue to deal with all matters arising under the *Native Title Act* in relation to the applicant, that is, the remaining persons so authorised will continue to be 'the applicant' for that purpose.

[47] The Former Applicant submitted that if it was accepted that an applicant had no distinct legal personality, then it must follow that each of the 15 members of the Former Applicant:

1. were parties in their individual capacity in the primary claim; and

2. have given instructions to appeal in an individual capacity.

[48] Once an order under s 66B had been regularly entered to replace an applicant, the Former Applicant submitted, the members of the Former Applicant were no longer obliged to act jointly. No longer were they, jointly, the applicant. It followed that the application for leave to appeal was regularly brought (or could be amended so as to regularise any deficiency), save in respect of those three persons who did not give instructions on account of illness or death, and in respect of Mr Wilson. There may also be an issue as to whether a person dying during the pendency of an appeal is, by their estate, entitled to maintain the appeal. The 14 members did not oppose the four deceased persons and Mr Wilson being removed as applicants; however, that would leave their application for leave to appeal (as applicants 1-14 inclusive) on foot.

[49] The Former Applicant submitted that relevant decisions of the Court appeared to proceed on the basis that the applicant did not have a legal personality which was distinct from its members. However, those decisions should not be regarded as authoritative. The Former Applicant submitted that the *Native Title Act* did create a distinct legal personality at least because:

1. Only 'the applicant' may commence and prosecute a claim (including favourable or adverse costs orders);
2. The applicant must act jointly and has a single address for service;
3. Although the membership of the applicant may change, 'the applicant' has an existence which transcends the tenure of any of its members; and
4. The applicant may, by s 62A, deal with all matters arising in relation to the claim; not only did that embrace prosecution of the litigation and all its exigencies, but also the applicant may make a registration application under s 69(1) and s 190F(1); carry out the right to negotiate under subdivision P; enter into Indigenous Land Use Agreements and future act agreements; and possibly, represent the claim group's interests in other litigation.

[51] The Current Applicant submitted that the leave application was a futility because the collective 'applicant' that was authorised to act for the native title claim group at the May 2013 authorisation meeting no longer existed. Four of them, each appointed to represent a particular region, were deceased and the circumstances were such that there was disagreement within the group. There was nothing the remaining members of the Former Applicant could do. They needed fresh authorisation.

[52] The Former Applicant submitted that there were three reasons why success on the appeal would not be a futility. First, if the Former Applicant's contention concerning majority decision-making was accepted, the 14 remaining members could outvote Mr Wilson, and then require him to act in concert with them. If he refused to act in concert, that would be grounds for a s 66B application to remove him from the ranks of the applicant (without the need for a claim group meeting).

Second, if the Former Applicant's contention concerning majority decision-making were rejected, the 14 remaining members would simply have to work with Mr Wilson to find a unanimous basis to progress the claim (which may or may not have, as its first step, an application to remove the deceased persons as members of the Former Applicant). Third, if the second scenario proved impossible in practice, a further claim group meeting could be held. The Former Applicant submitted that 'all of the 14 appellants' had a legitimate interest in restoring the 'status quo' in any of the above three scenarios. In each scenario they would have at least a real chance to participate in carrying out all the tasks 'with which the *Native Title Act* charges the applicant'.

[53] In oral submissions the Former Applicant said that when Rangiah J handed down judgment on 7 December 2017, those constituting the Former Applicant ceased to be members of the applicant so that they could no longer jointly do anything. So those 14 people since that time had had no role or status within the Gomeroi native title claim group, beyond being members of the Gomeroi native title claim group. In drawing the application for leave and the notice of appeal, the Former Applicant had not properly appreciated the corporate character of the Former Applicant and the effect of Rangiah J's decision, which was that the Former Applicant thereafter had no corporate character. In the result it was necessary to amend the application for leave to appeal to show that the persons there named sought to appeal in their personal capacity.

[54] If that amendment were successful, it was submitted, the Court need go no further to consider the controversial issue of unanimity or majority of those constituting the applicant being required in the decision-making process.

[55] The futility argument, it was submitted, must be tested against the background of both the application for leave and the appeal proper being successful, because in those circumstances Rangiah J's order of 7 December 2017 would be set aside and in lieu thereof the s 66B application that was before his Honour would be dismissed. Those people would then resume being the applicant in these proceedings. The issues arising from the four deaths and from the position of Mr Wilson could then be overcome by s 66B or by a claim group authorisation meeting.

The application to amend: [56] In the course of the hearing of the interlocutory application, I directed that the Former Applicant file and serve a proposed amended application for leave to appeal, if so advised. This was to bring to a head the issues in the submissions Robertson J summarised at [47]-[48] and [53] above. Robertson J also made directions for the exchange of written submissions in relation to such application.

[57] The substance of the application to amend is best illustrated by marking up the terms of the part of the application for leave to appeal his Honour set out at [15] above, as follows:

> Part A persons jointly comprising the Applicant

> Alfred Boney, Maureen Sulter, Clifford Toomey, Lyall Munro Junior, Norman McGrady (dec'd), Madeline McGrady, Leslie Woodbridge, Jason Wilson, Michael Anderson, Alfred Priestly, Ray Tighe, Greg Griffiths, Burrul Galigabali (dec'd), Susan Smith, Richard Green, Raymond Welsh Senior, Elaine Binge, Bob Weatherall and Anthony Munro

The other proposed amendments were consequential. The substance of this change, and of the proposed change to the draft notice of appeal, was that each of the named applicants no longer asserted a joint right.

[58] The application for leave to amend was opposed. The grounds of opposition were that the proposed amendments would cause substantial delay and cost and the appeal, if successful, would be futile and at best would require a further authorisation meeting of the Gomeroi People claim group. Further, no explanation had been given for the delay, it now being six months since the application for leave to appeal was lodged. It was also submitted that the 14 individuals were not parties to the proceedings at first instance and could not apply for leave to appeal unless they were made parties to the proceedings.

[59] In support of the application for leave to amend, it was submitted that applying the interests of justice test to the grant of leave to make the amendments meant that the amendments should be allowed. There would be no delay because the application for leave and any appeal had yet to be heard and the interlocutory application had now been heard, submissions now having concluded. There was no prejudice to any party because the application for leave to appeal had yet to be heard or prepared for hearing and no new grounds for leave or appeal had been added. No new arguments would arise. The amendments were no more than a correction to the names of the parties to the appeal and a correction of the misapprehension about the nature or capacity in which the 'appellants' brought the application to leave. There was no prejudice to any other litigants. The reason for the proposed amendment was explained candidly by senior counsel that, in settling the application for leave, there was a misapprehension that the appellants had a corporate or quasi-corporate character based upon their former role as, jointly, the applicant. That was a misapprehension on the part of legal advisers which ought not to penalise a client. As a matter of public policy, it was submitted, the Court should not proceed upon an erroneous basis where that error could be corrected without delay or prejudice.

[60] Subject to an order for costs thrown away by reason of the amendments, which his Honour reserved: Robertson J allowed the application to amend on the basis that the amendments tend to ensure that the real questions in the proceedings are properly agitated. Robertson J found that there had been sufficient explanation of the delay in applying to make the amendment which was foreshadowed in the written submissions. The 14 persons wish to apply for leave to contest the correctness of the interlocutory judgment of Rangiah J. The amendments will enable the real questions and controversy between the parties to be decided. Robertson J was not

persuaded that the proposed amendments were futile or that the amendments would cause substantial prejudice or injustice to the Current Applicant in a way that cannot be compensated by costs.

[61] The next question was whether what remains of the grounds of the Current Applicant's interlocutory application for summary dismissal of the application for leave to appeal may be determined on that application and by the Full Court.

Consideration

[62] The amendments which Robertson J allowed resolved the issue of the solicitors' retainer, that is, issue (c) listed in [35] above. [63] As to the other issues listed in [35] above, issue (a) was that the applicant for leave (the Former Applicant) had no authority to file the application for leave to appeal when it did, in circumstances where two of the 19 individuals who comprised the applicant were then deceased (two more having subsequently died) and another two of those 19 individuals did not provide instructions to the solicitor to file the application for leave to appeal. This issue of authority fell away in light of the amendment.

[64] Then the question of the standing of the 14 applicants arose, who no longer purported to act jointly as an applicant. This issue could be determined by the Full Court which hears the application for leave to appeal and, if leave be granted, the appeal itself (the substantive appellate hearing). It is established by authority that central to the question of standing is the relevant legislation, here the *Native Title Act*: see *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1 and, in a judicial review context, *Argos Pty Ltd v Minister for the Environment and Sustainable Development* [2014] HCA 50 at [76] per Gageler J, dissenting in the result. Further, the Court has a discretion when to determine the question of standing: *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53 at 532-533 per Gibbs J. In light of those considerations, Robertson J concluded that this issue should be left to the substantive appellate hearing.

[65] Similarly, the question of the futility of the application for leave, issue (b) listed in [35] above, could be determined by the Full Court which hears that application. That issue was whether the reinstatement as applicant in proceedings NSD2308/2011, the proceedings heard by Rangiah J, of the 19 individuals who were formerly authorised as the applicant in NSD2308/2011 would be futile, as four of those persons were deceased and one did not provide instructions to appeal and opposed the reinstatement: the applicant as authorised by the claim group no longer exists. Robertson J considered that this issue is also one that could and should be determined in the substantive appellate hearing.

[66] Where, as here, it is common ground that the earlier decisions of this Court do not speak with a single voice, in Robertson J's opinion it was not useful or appropriate for a single judge on an interlocutory application to add to those opinions and, if the application were successful, to strike out an application for leave to appeal on the same or a similar substantive issue. 'To take that course would be to add to

the fragmentation of the proceedings, whereas the course I prefer would enable the substantive issues to be decided in the substantive appellate hearing by a single Full Court and at the same time.'

[67] His Honour dismissed the interlocutory application but without prejudice to the Current Applicant, if so advised, raising the issues of the 14 applicants' standing and the futility of the application for leave before the Full Court.

[68] Robertson J said he would hear the parties on costs. His Honour directed that within 14 days from the date of these orders, the Current Applicant file and serve written submissions on that issue, limited to 4 pages. His Honour further directed that within a further 14 days, the 14 applicants file and serve written submissions in reply, limited to 4 pages. 'The submissions on each side should state the parties' views on whether the costs question may be determined on the papers.'

Henry v Western Downs Group Limited [2018] FCA 1168

13 July 2018, Corporations-native title-derivative Action, Federal Court of Australia, Queensland, Rares J

In this matter the Court held that:

1. The Attorney-General for the State of Queensland be granted leave to intervene in the proceeding for the purposes of making submissions pursuant to r 9.12 of the Federal Court Rules 2011.
2. The applicants on the amended originating application have leave to substitute Elizabeth Johnston, who acts on her own behalf and on behalf of the Kambuwal Family Group, for Matthew Queary as an applicant in the proceeding.
3. All parties have leave to inspect and, in accordance with the usual practice of the Registry, to make copies of any documents produced on subpoena unless there is currently an order prohibiting access to any particular document or documents.
4. Any requirement to file any defences that have not been satisfied be stayed until further order.

The matter was adjourned for case management on 30 October 2018.

[1] This was an application under s 237 of the *Corporations Act 2001* (Cth) (which concerns applying for and granting leave), by six individuals, being Beatrice Henry, Elizabeth Johnston, Gregory Emmerson, Patricia Conlon, Deidre Daylight and George Hopkins, to, in effect, convert Western Downs Group Limited, a company established as a charitable trust, from being the first respondent into being the seventh applicant, and to pursue the proceeding in its name. Some of the applicants, including Ms Henry and Mr Emmerson, became initial directors of Western Downs. The second, third and fourth respondents, Russell Doctor, Jason Jarro and Kerry-

Anne Lacey, were also initial, and remain, directors of Western Downs. Mr Doctor and Mr Jarro appear to have arranged for the sixth respondent, Sandlewood Aboriginal Projects Limited, to act as a service provider to Western Downs. The fifth respondent, Lucy Davis, allegedly assisted Mr Doctor in respect of his alleged misuse of trust money.

[3] On 10 December 2012 a number of individuals, including Ms Henry, Ms Conlon, Mr Emmerson, Mr Doctor, Mr Jarro and Ms Lacey, entered into an indigenous land use agreement (the ILUA) with Arrow Energy Pty Ltd on their own behalf and on behalf of persons who then understood themselves to comprise 11 native title, or potential native title, claim groups (that the ILUA defined as the 'Western Downs Unclaimed Area Native Title Group') with an interest in land and waters in south-east Queensland, in the Western Downs area, not then the subject of any determination of native title under the provisions of the *Native Title Act 1993* (Cth).

[4] The ILUA recorded that there were no registered native title claims on the Register of Native Title Claims at the authorisation date over the ILUA area, and that Arrow was intending to conduct a project that would, first, involve physical disturbance to land and waters and, therefore, secondly, have the capacity to cause harm to Aboriginal cultural heritage and to the lands and waters of which the indigenous people are spiritual guardians. Under the ILUA, Arrow was to pay a total of $5.75 million (defined as 'the Benefits') to a 'Corporate Entity', that the ILUA defined as an entity established by the native title party (comprising those persons who had signed the ILUA) and that fulfilled the requirements prescribed in cl 7. It is common ground that Western Downs became the 'Corporate Entity' for the purposes of the ILUA.

[5] Clause 7.2 of the ILUA provided that the native title party had to ensure that Western Downs, as the Corporate Entity, have a constitution or other legally binding rules that provided that, among other matters:

1. only members of the broader native title claim group, that included the 11 identified native title claim groups, could be members, shareholders or directors of it; and
2. the Benefits received are distributed in a fair and equitable manner to the members of the Western Downs Unclaimed Area Native Title Group.

[6] Under cl 7.2, the native title party also had to ensure that Western Downs became the trustee of a trust established to distribute the benefits to the claim group, and that the trust deed had to contain similar requirements to Western Downs' constitution.

[7] Ultimately, Western Downs was incorporated as a company limited by guarantee. Its constitution provided that:

1. the distribution amounts would be the amounts that it received, pursuant to the ILUA, less a reasonable amount, as determined by its directors, to meet its expenses; and
2. there would be 11 identified groups comprising descendants of named apical ancestors, together with any innominate (but never formed) 'group of persons who hold or may hold native title (as defined in the *Native Title Act 1993* (Cth)), in the ILUA Area as determined by a resolution passed by more than 75% of the Directors'.

[8] The constitution excluded the replaceable rules under the *Corporations Act 2001* (Cth) by cl 4.1. Clause 5.1 defined the purposes for which Western Downs was established and would be maintained, namely to promote and benefit the beneficiaries by pursuing, substantively, charitable objects, to the extent that they comprised charitable purposes, as recognised by the law of equity, the Income Tax Assessment Act 1997 (Cth) and *Charities and Not-for-profits Commission Act 2012* (Cth) and any other applicable legislation.

[9] Importantly, cl 7 provided:

> 7.1 The income and property of the Company however derived shall be applied solely towards the promotion of its Purposes and no part shall be paid or transferred directly or indirectly to or among the Members (in their capacity as Members) PROVIDED HOWEVER that:
>
> i. nothing shall prevent the payment in good faith of interest to any such Member in respect of moneys advanced by him or of remuneration to any Directors, officers or servants of the Company or to any Member, or other person in return for any services actually rendered to the Company; and
>
> ii. nothing herein contained shall be construed so as to prevent the repayment to any Member of out-of-pocket expenses or interest on money lent, or rent for hire of goods or for premises demised to the Company.
>
> 7.2 In the promotion of its Purposes, the Company will pay or distribute the Distribution Amounts in equal shares to, or for the benefit of, the Groups within a reasonable time after receipt.
>
> 7.3 The Native Title Party signatories to the ILUA representing a Group or the Director appointed by that Group or other authorised representatives of that Group may nominate in writing to the Company a Group Representative Company, that they have been authorised by that Group to nominate, to receive a Group's share of the Distribution Amounts.
>
> 7.4 The Company may only pay or distribute a Group's share of the Distribution Amounts to a Group Representative Company if that Group Representative Company at the time of payment or distribution:

i. is a ‘not for profit’ entity whose constitution prohibits the payment or distribution of its income or property to its individual members;

ii. has a majority of members and directors who are members of the relevant Group or which agrees in writing to only use such payments to benefit the relevant Group;

iii. is not insolvent, the subject of a winding-up application or under the control of administrators, receivers, liquidators or controllers; and

iv. is not in material breach of financial reporting, audit and other requirements under the legislation regulating that company.

7.5 If a Group has not nominated a Group Representative Company or that Group Representative Company does not meet the requirements in Clause 7.4, the Company will pay or apply that Group’s share of the Distribution Amounts for the benefit of that Group as directed in writing by the Native Title Party signatories to the ILUA representing that Group, the Director appointed by that Group or by other authorised representatives of that Group or as reasonably determined by the Board.

[10] Clause 9 required Western Downs to keep records.

[11] In the event, Western Downs held some early directors’ meetings and established a bank account. After this occurred, it is common ground that, on about 10 January 2014, Arrow paid Western Downs $5.75 million.

[12] The applicants sought a declaration that Western Downs be joined as an additional applicant so that they could make a claim in its name against each of Mr Doctor, Mr Jarro and Ms Lacey, for breach of fiduciary duty in paying, or causing to be paid to themselves or their associates, very large amounts of the trust money, that were intended to be for the benefit of the native title claim groups and their members. The applicants also seek to bring claims, in Western Downs’ name against:

1. first, Sandlewood to recover over $1.6 million in trust money that it received and then, mostly, paid away; and
2. secondly, Ms Davis in respect of nearly $600,000 of trust money that she allegedly received, by reason that each of them allegedly knowingly assisted and participated in primarily, but not exclusively, Mr Doctor’s and Mr Jarro’s breaches of fiduciary duty owed to it.

[13] The applicants, through their solicitors, conducted extensive searches, aided by the use of subpoenas, to ascertain what became of the $5.75 million that Arrow paid to Western Downs. They asserted that four of the 11 native title claim groups to which cl 7.2 of the ILUA contemplated equal distributions (of about $520,000) of that sum should have been made, received either nothing or very little.

A number of allegations that the applicants wished Western Downs to make against Mr Doctor and Mr Jarro required consideration. The applicants alleged that Mr Doctor and Mr Jarro received $330,000 or more each, (and they do not appear to dispute) through payments made by Sandlewood in respect of fees for alleged meetings or consultancy work that they undertook for Western Downs during the course of 105 meetings with one another. The minimum rate of their remuneration was $2,500, and in some cases, $3,500 per meeting. In a number of instances, the alleged meetings occurred on sequential days.

[14] For example, on 29 August 2014, Mr Jarro sent an email to Sandlewood, asking it to pay, on that day, sitting fees to Mr Doctor by a deposit it into his bank account. He added: 'As for the other groups, Russell [Doctor] and myself have spoken and they aren't to receive anything'. Rares J found that: [15] 'Indeed, they did not.' On another occasion, on 14 January 2015, Mr Jarro emailed Sandlewood asking it to pay, first, fees of $2,500 to himself and to Mr Doctor for 6 and 7 January (a total of $10,000), secondly, fees of $3,500 for 'Consultancy Meeting 12 & 14' (a total of $14,000), and, thirdly, fees of $3,500 to Mr Jarro himself for 'Consultant meeting 9th, 10th, 11th' (a total of $10,500). Mr Jarro noted in that email that he would require another consultant fee to be paid to Mr Doctor the next day, but added that it could be paid on the same day 'if it is easier' (making a total of $38,000 in fees for the two men over eight days).

[16] Mr Doctor was associated with the Bigambul claim group, which was one of the 11 native title claim groups named in the ILUA and Western Downs' constitution as a beneficiary of the trust. It received its exact share of $522,727.27, being one-eleventh of the total payment paid by Arrow. But, Bigambul also received approximately another $1 million, much of which came to it through payments that Western Downs made to Sandlewood. Mr Doctor gave evidence that he had opened Bigambul's three bank accounts. Although he could operate them with another director, one signatory could effect any transactions. He admitted that he received from one Bigambul bank account about $465,000, and from another, about a further $486,500.

[17] Mr Doctor claimed that Bigambul had employed Ms Davis at a salary of about $95,000 per annum, that it paid her for three years. He admitted that Bigamul also had paid him a total salary of over $260,000, which may have included director's fees, also that it had paid $94,000 in tax for him, and another $35,000 for his car to be repaired because he claimed that that car was part of his 'package'.

His Honour Justice Rares said: [18] One might be forgiven for thinking that these salaries and benefits reflected appropriate remuneration for executives of companies that had extensive businesses and dealings. However, there is nothing in the evidence to suggest in what way any of these payments, prima facie, benefited any of beneficiaries of the trust, being the native title claim groups, or achieved, or were directed to, the charitable purposes for which Western Downs was established. Mr Doctor, however, said that these payments were necessary for him to undertake

work on behalf of Bigambul. No doubt that will be a matter for trial. He also said in his affidavit of 3 May 2018 that:

> Bigambul did receive its benefits amount of $522,727.27 but also received the other money as a service provider for [Western Downs] and carried out that function in spending that extra money in a similar way as Sandlewood was employed by [Western Downs] as authorised by the board.

[19] Mr Doctor accepted that Bigambul had received in total $1.537 million from Western Downs, either directly or through Sandlewood. The statement of claim alleged that in total, Mr Doctor personally received over nearly $1.5 million out of the trust moneys paid by Arrow, and any interest those moneys may have earned in the brief time they appear to have remained in a bank account.

[20] Sandlewood, through its chairperson and director, John Leslie, opposed the applicants being granted leave under s 237(2). He said that Sandlewood is a charity, incorporated in 2001, that has done work for indigenous persons and assisted in dealing with cultural heritage issues. Mr Leslie said that, ordinarily, Sandlewood was entitled to invoice companies to which it provided services so as to reimburse it for outlays on their behalf and to receive an administration fee of 20%.

[21] Mr Leslie claimed, without producing any contract or other documents on the present application, that Sandlewood knew nothing about the ILUA or the constitution of Western Downs and:

> the only page that Sandlewood receives out of the ILUA or [Cultural Heritage Management Plan] is the Schedule of Rates which advises Sandlewood what payments it is required to pay for wages or meetings.

[22] Mr Leslie also said that the Western Downs' representatives were made up of persons from the nominated 11 Western Downs native title claim groups, which he accurately set out, both as to the representatives and the names of the claim groups. He deposed that the board of Western Downs had been made up of nine persons and that the executive board was comprised by Mr Doctor, as chairman, Mr Jarro, Ms Lacey and a fourth director, Susan Maytom, who dropped out of activity on the board in about mid-2014. Mr Leslie said that the executive directors were the persons who authorised Sandlewood to make all payments 'on their behalf for Western Downs'. He said that he knew all of the Western Downs representatives, as he had had dealings with each of them over the years, and that none had raised a concern with him about the executive board, and nor had Ms Maytom or Ms Lacey when each resigned from the executive committee. He said that if any of the Western Downs representatives had made a complaint, he would have stopped Sandlewood from making any further payments until there was a full board meeting that resolved the issues of conflict, and that 'they' could also have reported the matter to the police fraud unit. [23] He said that the executive had authorised and directed Sandlewood to pay 'the following items on behalf of the eleven Native Title representatives' and then described types of payments, including 'any other financial

matters that the Western Downs executive directed Sandlewood to carry out for each of the 11 representatives of the Native Title Group'.

[24] Mr Leslie said that Sandlewood denied participating in any deception, dishonesty or fraud. He said, somewhat confusingly, that Sandlewood had been paid a total of $317,425 for its fees, asserting that 10% of that had been paid in respect of GST (although that assertion appeared to have overlooked any input tax credits that Sandlewood may have been able to benefit from), and that Sandlewood had also received a further amount of $158,712.50. He said:

> There were no circumstances surrounding the authorisations or payments such that caused Sandlewood to make any inquiries as to the appropriateness or otherwise of the authorisation or payments, nor was Sandlewood required to make any such enquiries, if circumstances existed in view of the limited scope of its appointment.

[25] He explained that appointment in two somewhat potentially inconsistent ways, in paragraphs 17 and 19 of his affidavit as follows:

> 17 Sandlewood knew nothing concerning the dealings of the directors of Western Downs Group Limited and its only role was to pay the persons or groups authorised by the board for the matters referred to in paragraph 12. It was not Sandlewood's role to scrutinize or audit any of the authorisations or payments. Sandlewood was a conduit and nothing more, and at all material times acted on its instructions.
>
> …
>
> 19 Sandlewood was advised by Western Downs that Arrow Energy was approached for extra funds to set up an office to administer the funds from Arrow Energy but the request was refused. As there was a considerable amount of time and expertise required to act as a service provider and as the executive did not have the knowledge and expertise to carry out this expertise [sic] they therefore appointed Sandlewood as the service provider with its recognised expertise to carry out all of the functions necessary to administer the funds to the traditional owner groups. Some of the tasks Sandlewood was obliged to carry out were: Advertising, conference room hire, catering, accommodation, meals, flights, mileage payments, authorisation meetings, family group meetings, Yarrowair Sorry business, incorporation fees, consulation [sic] fees, to Dobson Finance and Pelkham Consultation, incorporation fees to set up trust funds, solicitors fees, facilitation fees for each of the 11 representative Native Title Groups.

[26] The Attorney-General for the State of Queensland has intervened, because of the charitable nature of the trust under which Western Downs received and dispersed the money, and her duty to safeguard and ensure the proper enforcement of charitable trusts in the public interest. The Attorney-General's intervention is appropriate in the circumstances. Rares J stated that:

> Hopefully, the Attorney General for the Commonwealth will give similar consideration to the importance of ensuring that the Court is assisted by submissions and or more active participation in cases of this nature, that are brought to clarify how, and in what ways, the distribution of the very substantial moneys that are often paid under indigenous land use agreements should occur.

The legislative context

[27] Section 237 of the *Corporations Act* governs the circumstances in which the Court must consider the grant of leave. [28] It appeared to be common ground between the parties that there is a serious question to be tried for the purposes of s 237(2)(d). That question involves the propriety of very large payments that Western Downs made by reason of the control that Mr Doctor, as chairman of directors and a member of its executive, and Mr Jarro, as another member of its executive with Ms Lacey and, while she was a director, Ms Maytom, exercised and whether Western Downs can recover any such payments.

[30] Thus, the substantial questions in contest between the parties are whether, for the purposes of each of s 237(2)(a), (b) and (c), it is probable that Western Downs would not itself bring the proceedings or properly take responsibility for them or for steps in them, the applicants are acting in good faith and that it is in the best interests of Western Downs that the applicants be granted leave to bring the proceedings in its name.

Consideration

[32] In *Huang v Wang* [2016] NSWCA 164 at [56]-[60], Bathurst CJ, with whom McColl JA and, with additional observations, Barrett AJA agreed, identified that if the five criteria in s 237(2) are made out, the court is required to grant leave. He said that the requirement of the best interests of the company in s 237(2)(c) required the applicant for leave to establish, on the balance of probabilities, that the action is in the best interests of the company, and that this fact that could only be determined by taking into account all relevant circumstances.

[33] Rares J noted that Bathurst CJ said that, ordinarily, the best interests of the company were those of the shareholders: *Huang* 114 ACSR at 597 [59]. But, Western Downs is a company limited by guarantee and established as a charitable trust. In my view, the relevant interests of Western Downs for the purposes of s 237(2)(c) are its interests as a trustee, with a duty to distribute what Arrow had paid, in accordance with cl 7 of its constitution, to the beneficiaries or potential beneficiaries in equal shares, being the 11 groups. There is a real and serious question as to whether that in fact has occurred and whether some of the trust money has been diverted from its proper destination of benefiting some of those nominated beneficiaries.

[34] Rares J was satisfied that it was probable that Western Downs itself would not bring or properly take responsibility for the claims that the applicants wish to bring in

its name for the purposes of s 237(1)(a). It was not in dispute that the board of Western Downs has not effectively functioned since early 2014. Mr Doctor made three affidavits in one of which he said that, in May 2018, he found that it was impossible to call a meeting of directors of Western Downs because the directors who are aligned with the applicants were not prepared to attend. Moreover, Mr Doctor had explained in an earlier affidavit that he had been suffering, and later recovering from, treatment for cancer in 2017. As Mr Doctor argued, it is subject to a boardroom fight that is unlikely to be resolved, at least, in a way that would to enable the company itself to take the proceedings. On the evidence before Rares J, it was bereft of money, despite the applicants' allegations that four of the 11 claim groups have not received all, or much, of their equal shares of about $520,000, amounting in total to about $2 million. Much of the money allegedly unpaid to the four beneficiary groups appeared on the present evidence to have been paid to, or directed towards, Mr Doctor, Mr Jarro and Ms Davis for what they, no doubt, would contend they will be able to be establish, at a hearing, were appropriate purposes.

[35] Rares J was satisfied that the applicants were acting in good faith for the purposes of s 237(1)(b). There was a question, which Mr Doctor raised reasonably, as to Mr Emmerson's role. There was a reasonable basis to consider that he received around $21,000 in the nature of director's fees, paid at similar rates as those paid to Mr Jarro and Mr Doctor. Of course, the payments to Mr Emmerson were for such smaller amounts, but Mr Emmerson, while accepting that he was paid some fees, claims to have no current recollection of being paid the greater part of the $21,000. Rares J did not think that that indicated that the applicants were acting in bad faith, either as individuals or collectively.

[36] Section 237(1)(c), in one sense, the conduct of Mr Jarro, in sending and asking for payments to be made in the emails to referred to in [13]-[14] above, accurately could be characterised as making Sandlewood a conduit and nothing more. However that characterisation would not take account of Mr Leslie's other description of Sandlewood having 'recognised expertise to carry out all of the functions necessary to administer the funds to the traditional owner groups'.

[37] The circumstance that two members of Western Downs' executive board were giving directions on its behalf to its nominated service provider, Sandlewood, to pay them directors' and consultants' fees that Western Downs incurred to them, was, in Rares J's opinion, a factor that adds strength to the existence of a serious question to be tried.

That created, of itself, a reasonable basis to conclude that it is in the best interests of Western Downs that it be able to bring proceedings to assert that the substantial payments of Western Downs' money that Sandlewood made to Mr Doctor and Mr Jarro occurred in circumstances in which Sandlewood could become liable, on the basis that it had knowingly participated in Western Downs' directors' alleged breaches of fiduciary duty, because it had a state of mind amounting to one of the categories of knowledge that Gleeson CJ, Gummow, Callinan, Heydon and Crennan

JJ said, in *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89 at 162-164 [173]-[177] was necessary to make accessorily liable under the rule in *Barnes v Addy* (1874) LR 9 Ch App 244 at 254; see too: *Lewis Securities Ltd (In Liq) v Carter* (2018) 355 ALR 703 at 742-743) [183]-[187] per Emmett AJA.

[38] Rares J found that the circumstances supported a conclusion that there was a serious question to be tried, based on what Mr Leslie said, that it was not Sandlewood's role to scrutinise or audit any of the authorisations or payments of Western Downs' moneys because Sandlewood was a mere 'conduit and nothing more', as to whether it wilfully or recklessly failed to make such inquiries as an honest and reasonable man would make, or that it had knowledge of circumstances that would indicate the facts to an honest and reasonable man: *Farah* 230 CLR at 163 [174]. Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ observed that a person may have acted dishonestly, judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards. Rares J: 'They also said that the test did not allow the morally obtuse to escape by a failure to recognise an impropriety that would have been apparent to an ordinary person applying the standards of such persons.'

[39] The scenario that directors would be causing Western Downs, through Sandlewood as a 'conduit', to pay themselves rather than not directly, raised a real question as to why those directors were causing Western Downs to make those payments in that unusual way, at least on the material presently in evidence before Rares J. To an extent Mr Doctor has told some of his story. No doubt as Dixon CJ said in *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 20:

> The difficulty is that the Court itself can never be certain that it knows all the circumstances. More often than not, one may be sure that the Court knows few of them. Experience of forensic contests should confirm the truth of the common saying that one story is good until another is told…

[40] Rares J found that: there were serious questions to be tried as to what has become of the substantial sums of trust money that appear not to have been paid to four groups of beneficiaries of the trust, but instead, appear to have been paid to one or more of the respondents, the justification for why the contentious payments occurred, and the various respondents' accountability, if any, for the money that each received. There is also a serious question to be tried as to whether those sums have been applied for the charitable purposes for which Western Downs was established, and in respect of which it was bound to pay those trust moneys.

[41] There was also the potential for a constructive trust to be proved, if the applicants (or Western Downs) can trace money that was paid wrongly in breach of Mr Doctor's, Mr Jarro's or Ms Lacey's fiduciary duty.

[42] Mr Doctor argued that Western Downs' should be indemnified for its costs and exposure to orders for costs and, that without such an indemnity from the applicants

it would not be appropriate to make an order granting them leave under s 237(2). However, Rares J found that there was no reason to so require, in circumstances where the applicants, in any event, will bear the burden and costs of running the case, or if not they, then the Attorney-General, and in either case they would be jointly and severally liable to satisfy any adverse order for costs to the extent it might affect Western Downs.

[43] 'In addition, this proceeding relates to native title, being the rights claimed by persons under the ILUA to receive benefits paid to them in their capacity as persons who hold or claim to hold native title, for the purposes of s 80 of the *Native Title Act*. Section 85A(1) provides that unless the Court otherwise orders, each party to a proceeding of that kind must bear his or own costs. There is no suggestion at the moment that the exception to that prima facie position under s 85A(2) ought to apply. The subject matter of the proceedings are the benefits, being trust moneys, paid under the ILUA that exist only by reason of the provisions of the *Native Title Act*. Therefore, it is arguable that the proceeding may fall within the description in s 80 of the Act: *LNC Industries Limited v BMW (Australia) Limited* (1983) 151 CLR 575 at 581 582, per Gibbs CJ, Mason, Wilson, Brennan, Dean and Dawson JJ, with whom Murphy J agreed. However, it may be that because the proceeding is under the *Corporations Act*, s 85A of the *Native Title Act* may not apply or the court might otherwise order: *Burrabugga v Queensland* (2016) 236 FCR 160.' However, this was unlikely to arise for the reason Rares J gave in [42] above.

[44] Rares J was satisfied for the purposes of s 237(2)(c) that it was in the best interests of Western Downs that the applicants be granted leave to bring the proceedings in its name at this point of the proceedings. However, because of the intervention of the State Attorney-General today and the issue as to what, if any, further role she may play in the proceedings and whether, if at all, the Commonwealth Attorney General would also wish to intervene, consideration should be given as to whether the State Attorney-General, as the proper person to enforce charitable trusts, may wish to assume the role of prosecuting Western Downs' case. The parties may wish to make submissions as to any conditions that should be imposed on the applicants or the Attorney-General, depending on what position she ultimately adopts for that purpose.

[45] His Honour found that it was in the best interests of Western Downs in order to fulfil its duties as trustee and to use its position to recover any of the trust moneys or compensation for their wrongful misapplication from any of the respondents if he, she or it acted in breach of fiduciary duty or was knowingly concerned in another respondent's breach of such a duty in respect of any such misapplication. The Court was satisfied that the serious question to be tried was whether, in fact, it has been not able to do so because of the alleged wrongdoing of some of its directors and/or executive and those whom they engage, namely Sandlewood, and, if it be the case, Bigambul: *Huang* 114 ACSR at 597-598 [56]-[60].

[46] The Court held that the applicants should be granted leave to bring the proceedings in Western Downs' name because each of the conditions in s 237(2) was met. Rares J deferred making orders until there was an opportunity to address what, if any, conditions should be imposed on the applicants in respect of how Western Downs was to prosecute the proceeding and to give the Attorney-General the opportunity to consider what, if any, steps she wishes to take in that regard. The matter was adjourned for case management to 30 October 2018.

Burragubba on behalf of the Wangan and Jagalingou Peoples v State of Queensland (No 2) **[2018] FCA 1031**

11 July 2018, Practice and Procedure, Federal Court of Australia, Court of Appeal – Queensland, Robertson J

In this matter the Court ordered that the interlocutory application be dismissed. [1] These reasons concerned an interlocutory application dated 8 June 2018 brought by the applicant, in the following terms:

1. That pursuant to rule 24.24, the Registrar is directed to produce documents falling within the description in the letter from Ms Andrea Olsen dated 23 May 2018 (the Applicant Letter) at the Brisbane Registry of the Court within 28 days of the date of this Order.
2. That the solicitor on the record for the Applicant may attend at the Brisbane Registry of the Court, on such dates and at such times as agreed with the Registry staff, to inspect and copy any or all of the documents produced pursuant to Order 1.
3. In the alternative to Orders 1 and 2, that, pursuant to rule 2.32(4), the Applicant be granted leave to inspect and copy documents falling within the description in the Applicant letter.
4. That, for the purposes of Orders 1 – 3, the entitlement to inspect and copy documents may be satisfied by the Registry delivering electronic copies of any or all of the relevant documents to the solicitor on the record for the Applicant.

The interlocutory application stated that it was not intended to serve any other party, but the Court notified the active respondents that the interlocutory application, the affidavit in support and the applicant's written submission were available on the Commonwealth Courts Portal for the parties to read.

[2] The letter dated 23 May 2018 was in the following terms:

Pursuant to r 24.24(1) of the Federal Court Rules 2004 (sic) (Cth), the applicant in the above proceedings seeks production of the following documents in the custody of the Court:

1. Any document entitled or styled as an “expert report” (or words to that effect) filed by any party in a proceeding listed in the Schedule;
2. Any affidavit annexing or exhibiting any document entitled or styled as an “expert report” (or words to that effect) filed by any party in a proceeding listed in the Schedule, including any annexures and exhibits attached to any such affidavit.

The applicant requests the proceeding be listed for a directions hearing, without notice to any other party, before a Judge of the Federal Court at Brisbane on 7 or 8 June 2018. The applicant further requests that, pursuant to r 24.24(2), you produce the aforementioned documents in Court at such hearing as listed.

Upon your production of the aforementioned documents, the applicant intends to seek directions from the Court for the applicant’s legal representatives to have permission to inspect and copy those documents.

[3] The schedule listed some 161 matters all of which are set out within this paragraph. [4] This was said to be a list of the current and historical native title determination applications and approved determinations of native title which Ms. Andrea Lynn Olsen, a solicitor employed by Queensland South Native Title Services Limited (QSNTS) and the solicitor on the Federal Court record for the present native title determination application (QUD 85 of 2004), compiled from the information provided to her by Mr. Jeff Harris, a cartographer, as explained in paragraph [6] of Ms Olsen’s affidavit affirmed 8 June 2018, set out at [7]. The active respondents to the present proceedings were notified of the interlocutory application but none chose to appear at the hearing of it.

The applicant’s submissions

[11] Reasoning by way of analogy to the hearing by the Court of an application for leave to issue a subpoena under r 24.01, upon production by the Registrar of any documents requested under r 24.24(1), the Court may make directions for access (by way of inspection or copying) without more, or the Court may conclude it should hear from any other person or party before granting such access, or the Court may grant access subject to any notice from any party objecting to such access following service by the requestor by a certain date. Those courses turn upon any particular directions to be made by the Court, however, and only upon the Court first hearing from the requestor on any question of what directions should be made.

[12] Further, the applicant submitted, in the circumstances of the present case, the applicant was conscious of statements made by the Court affirming the need to observe the requirements of s 37M of the *Federal Court of Australia Act 1976* (Cth) in native title proceedings in particular: *Agius v South Australia (No 4)* [2017] FCA 361 at [84]-[85] per Mortimer J. Given the costs which might be unnecessarily borne by other parties should they be required to attend at the first mention of its application for directions under r24.24, the applicant sought the listing of the hearing without notice.

The applicant submitted:

> [14] that there was scant relevant case law by reference to which the criteria for the making of directions permitting a requesting party access to documents in the custody of the Court itself, as opposed to the custody of a different court, had been set down.
>
> [16] While it was not necessary for the applicant to demonstrate the relevance of the documents sought in the applicant's letter, there was concern about the level at which the description of "society" was pitched in this proceeding, and how that society might be constituted. The documents sought were expressly relevant to further consideration of the nature and extent of the relevant society in the context of the broader region.

The applicant further submitted at [17] that there was a strong likelihood that the expert reports filed in the proceedings listed in the schedule to the applicant's letter would be of "real utility" to those issues, and to the matters in issue in the applicant's case.

[18]The Court held that leave to inspect documents was not the language of the rule. The language of 'leave' was common in rules of court and r 24.24 appeared to be a deliberate departure from that language and had such a requirement been contemplated, such language could have been used. While an applicant for directions under r 24.24(2) might have a practical and persuasive onus to obtain a favourable exercise of the discretion to make directions in the terms sought, such an applicant need not surmount a hurdle of obtaining permission to inspect the documents.

[20] There was no requirement, the applicant submitted, to serve any other party to the present proceeding, or any party to any of the proceedings in which the document for which leave was sought was filed. [21] Having regard to the Olsen affidavit, the applicant submitted there were four categories into which the named proceedings might be allocated:

1. Proceedings determined by judgment following trial;
2. Proceedings determined by consent determination;
3. Proceedings currently pending before the Court;
4. Proceedings terminated prior to any determination by the Court.

[22] The applicant submitted that the power to permit inspection under r 2.32(4) was discretionary. [23] The Court observed that the open justice principle would provide sufficient reason where an affidavit had been 'used' or 'deployed' in open court, and that would usually have occurred where an affidavit was 'read', insofar as an announcement that an affidavit is 'read' was usually taken as deeming all the words in the affidavit to be treated as though they had been read aloud. [24] The applicant submitted that in circumstances where documents played no role in the conduct of

proceedings in open court, in contrast, there was generally no occasion to justify granting access to a non-party to any of that material.

Consideration

[32] The Court observed that the first matter to be noticed is the very large number of files listed in the Schedule to the 23 May 2018 letter, some 161 matters. [33] Next, Robertson J was not persuaded that the purpose of the request by the applicant was forensically related to an issue that has arisen in the present proceedings. Indeed it was not clear to his Honour how the applicant would be advantaged by having access to all the reports and affidavits in the Schedule that the applicant seeks. Robertson J further noted that the orders made on 17 May 2018, which he reproduced at [9], did not provide for the applicant to file a fresh expert report. Additionally, it was not clear that whatever it may be the applicant may seek to establish could not be established more efficiently and economically by other evidentiary means. [34] Thirdly his Honour found that it was not suggested that the non-government parties to the proceedings listed in the Schedule have been consulted. It is not known whether any of the material sought is or is claimed to be confidential.

Rule 24.24

[36] – [38] Robertson J found that it is clear that the Registrar is not required to produce the document to the party seeking production of the document in the custody of the Court. Second, the Court has discretion whether or not to allow access to the document to the party seeking production. It was the question of whether inspection should be allowed which was addressed in *Graham v Colonial Mutual Life Assurance Society Limited* [2013] FCA 1213 and *International Litigation Partners Pte Ltd v Commissioner of Taxation* [2014] FCA 671. Third, in his Honour's view it follows from the terms of r 1.34 that the Court may dispense with compliance with the rule and lift what would otherwise be the Registrar's obligation under r 24.24 to produce the document in Court or as the Court directs. If there be an analogy between r 24.24 and a subpoena, then r 1.34 would stand in the place of r 24.15 whereby the Court may set aside a subpoena in whole or in part. Rule 1.40 provides that the Court may exercise a power mentioned in these Rules on its own initiative.

[44] Robertson J found for the reasons provided at paragraphs [32]-[34] above, the Registrar should be excused from producing the documents in Court or at all. If the documents were to be produced, his Honour would refuse leave to the applicant to inspect those documents.

Rule 2.32

[45] Rule 2.32(1) applies to a party in the proceeding. The present applicant is not a party to any of the proceedings listed in the Schedule. Neither are the present non-government respondents. However, a person who is not a party may inspect documents of the kind specified in r 2.32(2). It was accepted by counsel for the applicant that none of the documents sought, that is, any 'expert report' filed by any

party in a proceeding listed in the Schedule, or any affidavit annexing or exhibiting any 'expert report' filed by any party in a proceeding listed in the Schedule, falls within r 2.32(2). This leaves to be considered r 2.32(4), which confers discretion on the Court to grant leave to a non-party to inspect a document that that person is not otherwise entitled to inspect.

[46] In *Oldham v Capgemini Australia Pty Ltd* [2015] FCA 1149, Mortimer J rejected an application for non-party access to inspect the complaint made by Ms Oldham, the applicant in the proceedings in the Federal Court, to the Australian Human Rights Commission. A copy of Ms Oldham's complaint was lodged with the originating application in the proceeding in accordance with the requirements of r 34.163 of the Federal Court Rules. Her Honour said, at [24] that a member of the public is entitled to see those documents which will enable the person to understand what a proceeding in this Court is about and how the parties' respective cases are framed. Her Honour substantively elaborates at [26]-[27]. Her Honour also took into account, at [39] the reason access was sought, saying that, in a given case, a person's reasons for requesting access to a document may provide a powerful discretionary consideration.

[51] Robertson J accepted that a party engaged in litigation has a legitimate interest in inspecting documents which contain information relevant to the issues in the litigation which that party is involved: however in this respect he repeated what he said at [33] above.

[52] The issue in the present case came down to a balance between giving unlimited scope to the principle of 'open justice' to which r 2.32 is referable, on the one hand, and to limited resources on the other hand, including the factors in the overarching purpose stated in s 37M of the Federal Court of Australia Act 1976 (Cth).

[53] Robertson J found that scope of the request would, on its face, impose very substantial burdens on the Court and on the parties to the litigation listed in the Schedule. [54] Further, his Honour found that the request was disproportionate to its asserted purpose. [56] For these reasons His Honour refused leave to the applicant to inspect the documents listed in the Schedule and [58] dismissed the interlocutory application. Given the nature of the application and the non-participation in this application of the other parties to the present proceedings, His Honour made no order as to costs.

Pappin on behalf of the Muthi Muthi People v Attorney General of New South Wales (No 3) [2018] FCA 1036

10 July 2018, Practice and Procedure, Federal Court of Australia– New South Wales, Griffiths J

In this matter the Court ordered that the amended claimant application in NSD 1248 of 2014 be dismissed pursuant to s 190F(6) of the *Native Title Act 1993* (Cth).

[1] The issue before the Court was whether the Court should of its own motion exercise its discretion to dismiss an application for a determination of native title pursuant to s 190F(6) of the *Native Title Act 1993* (Cth) (NTA). [2] Section 190F(6) of the NTA confers a power on the Court to dismiss an application for a determination of native title (the application in issue), on the application of a party or on its own motion, where:

1. the Court is satisfied that the application in issue has not been amended since it was considered and not accepted for registration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
2. in the opinion of the Court, there is no other reason why the application in issue should not be dismissed.

[3] Section 190F(5) provides the conditions precedent to the operation of s 190F(6).

[4] Other relevant provisions of the NTA are summarised in *Pappin on behalf of the Muthi Muthi People v Attorney-General of New South Wales* [2017] FCA 76 (Pappin No 1) at [7]-[14] (for further background to the matter, see *Pappin on behalf of the Muthi Muthi People v Attorney-General of New South Wales* [2017] FCA 817 (Pappin No 2)).

[5] Where the Registrar has not accepted a claim for registration and has given the applicant a notice under s 190D(1), the applicant has a right to apply to the National Native Title Tribunal (NNTT) to reconsider the claim (see s 190E). As long as the NNTT is not reconsidering a claim under s 190E, the applicant may also apply under s 190F to the Court for a review of the Registrar's decision not to accept the claim. As emerged, Griffiths J found that the applicant in the current proceeding sought neither a reconsideration of the Registrar's second decision, nor a review of that decision by the Court.

[6] The Court was satisfied that the application should be dismissed pursuant to s 190F(6) of the NTA for the reasons provided in paragraphs [30] – [39].

Griffiths J stated that: [38] The applicant failed to provide any evidence that a further amendment would be made to the application for native title which would lead to a different outcome on a reconsideration by the Registrar. In the absence of any evidence or material to the contrary, I find it unlikely that the deficiencies in the claimant application as identified by the delegate will be remedied.

[39] In His Honour's view, there was no other reason within the meaning of s 190F(6)(b) why the application should not be dismissed.

[40] Finally, the Court did not accept the applicant's submission that NTSCORP was a vexatious litigant and was improperly joined as a respondent. On 4 December 2015, NTSCORP lodged an application to be joined as a party in the substantive proceeding (NSD 1248 of 2014), which was opposed by the applicant. The Court made separate orders on 16 March 2016 that NTSCORP be joined as a respondent

in both the substantive proceeding and in the related review proceeding (NSD 1603 of 2015). To date the applicant had not sought leave to appeal those interlocutory orders. Those interlocutory orders still stood. There was no material before the Court to support the applicant's serious allegations that NTSCORP has acted improperly or vexatiously.

His Honour further observed that: 'The applicant's attack on NTSCORP appears to be based on the mere fact of NTSCORP's opposition to the applicant's case. As these reasons demonstrate, that opposition was soundly based and responsibly advanced by NTSCORP. Although NTSCORP was three days late in filing its outline of written submissions in respect of the current application, Mr Pappin did not suggest that the applicant was prejudiced by this short delay. It appears that Mr Pappin had at least 11 days to consider NTSCORP's written submissions before he filed the applicant's outline of written submissions.'

[41] For these reasons, the amended claimant application was dismissed pursuant to s 190F(6) of the NTA. There was no order made as to costs.

2. Legislation

There were no current Bills before the Federal, State or Territory parliaments, or relevant previous Bills that received Royal Assent or were passed or presented during the period 1- 31 July 2018 that impact on native title law.

3. Native Title Determinations

In July 2018, the NNTT website listed 1 native title determination.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC/ PBC
Yaburara & Mardudhunera People	Holborow on behalf of the Yaburara & Mardudhunera People v Western Australia	27/07/2018	WA	Native title exists in parts of the determination area	Consent	Claimant	Wirrawandi Aboriginal Corporation

4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate

The Native Title Research Unit within AIATSIS maintains details about RNTBCs and PBCs in each state/territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information. The statistics for RNTBCs as of 31 July 2018 can be found in the table below.

Information on RNTBCs and PBCs including training and support, news and events, research and publications and external links can be found at www.nativetitle.org.au. For a detailed summary of individual RNTBCs and PBCs see the PBC Profiles.

Additional information about RNTBCs and PBCs can be accessed through hyperlinks to corporation information on the Office of the Registrar of Indigenous Corporations (ORIC) website; case law on the Austlii website; and native title determination information on the NNTT and ATNS websites.

State/Territory	RNTBCs	No. of successful (& conditional) claimant determinations for which RNTBC to be advised
Australian Capital Territory	0	0
New South Wales	7	4
Northern Territory	30	1
Queensland	84	0
South Australia	17	1
Tasmania	0	0
Victoria	4	0
Western Australia	47	11
NATIONAL TOTAL	**189**	**17**

Note some RNTBCs relate to more than one native title determination and some determinations result in more than one RNTBC. Where a RNTBC operates for more than one determination it is only counted once, as it is one organisation.

Source: http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx and Registered Determinations of Native Title and RNTBCs as at 31 July 2018.

5. Indigenous Land Use Agreements

In July 2018, 13 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
31/07/2018	Kandiwal ILUA	W12018/008	Body Corporate	WA	Co-management, Access
26/07/2018	Gumbaynngirr (Boney) Settlement	NI2018/004	Area Agreement	QLD	Extinguishment/ Settlement
26/07/2018	Gumbaynngirr (Wenonah Head) Settlement	NI2018/005	Area Agreement	NSW	Tenure Resolution/ Settlement
25/07/2018	Ugar Health Care ILUA	QI2018/010	Body Corporate	QLD	Community, Infrastructure
25/07/2018	Poruma Health Care ILUA	Q12018/012	Body Corporate	QLD	Community, Infrastructure

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
25/07/2018	Badu Island Land Holding Act	Q12018/013	Body Corporate	QLD	Government Community Living infrastructure
13/07/2018	Barkandji Appin Station ILUA	NI2018/002	Area Agreement	NSW	Native Title Settlement
13/07/2018	Barkandji Weinteriga and Yobel Station ILUA	NI2018/003	Area Agreement	NSW	Native Title Settlement
12/07/2018	Masig (Yorke Island) Social Housing ILUA	QI2018/007	Area Agreement	QLD	Government Community Living infrastructure
12/07/2018	Western Bundjalung Settlement ILUA	NI2018/001	Area Agreement	NSW	Government Consultation/ Tenure resolution
03/07/2018	Northern Gas Pipeline Burramurra ILUA	DI2018/002	Area Agreement	NT	Pipeline development gas
03/07/2018	Northern Gas Pipeline Dalmore Downs ILUA	DI2018/003	Area Agreement	NT	Pipeline development gas
03/07/2018	Northern Gas Pipeline Dalmore Downs South ILUA	DI2018/004	Area Agreement	NT	Pipeline development gas

For more information about ILUAs, see the NNTT website and the ATNS Database.

6. Future Acts Determinations

In July 2018, 8 Future Acts Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
31/07/2018	Raymond William Ashwin (dec) and others on behalf of Wutha and POZ Minerals Ltd and Western Australia	WO2014/0813	WA	Objection - expedited procedure applies	This was a decision about whether the expedited procedure applies to the proposed grant of exploration licence E20/908 to POZ Minerals Ltd. The licence covers an area of 51.69 square kilometres and is located approximately 22 kilometres south east of Cue. The Wutha and the Yugunga-Nya native title claimants lodged an objection. Yugunga-Nya subsequently withdrew its objection after reaching an agreement. Member Shurven was not satisfied by the evidence filed by the Wutha native title claimants that the grant of the licence would cause major disturbance to the land or water/or disrupt community activities and determined that the act is an act that attracts the expedited procedure.
30/07/2018	Wanjina-Wunggurr Native Title Aboriginal Corporation RNTBC and Macallum Group Limited and Western Australia	WF2018/0003	WA	Future act may be done	Member McNamara: this determination that the State of Western Australia may grant exploration licence E04/2438 to Macallum Group Limited was made in the absence of an agreement of the kind mentioned in s 31(1)(b) of the *Native Title Act 1993* (Cth) (NTA). Had there been an agreement of that kind, the Tribunal would be barred from making a determination by s 37(a) NTA. The licence is 120.969 square kilometres in size and is located in the Shire of Derby-West Kimberley. The licence is located wholly within the native title determination area of the Wanjina-Wunggurr Wilinggin Native Title Determination. In joint submissions each party agreed to, and supported, a determination under s 38 of the Act that E04/2438 may be granted to the grantee party without conditions. The Tribunal determined therefore that the act may be done.
17/07/2018	Raymond William Ashwin (dec) and others on behalf of Wutha and Piper Preston Ltd and Western Australia	WO2017/0223 WO2017/0225 WO2017,0227 WO2017/0228 WO2017/0458	WA	Objection - expedited procedure applies	This was a decision about whether the expedited procedure applied to the grants of exploration licences E57/1062, E57/1063, E57/1064, E57/1065 and E30/495 to Piper Preston Pty Ltd. The determination of the Tribunal was that the acts, namely the grant of exploration licences E57/1062, E57/1063, E57/1064, E57/1065 and E30/495 to Piper Preston Pty Ltd, are acts attracting the expedited procedure.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
16/07/2018	Raymond William Ashwin (dec) and others on behalf of Wutha and Alverna Resources Pty Ltd and Western Australia	WO2017/0872	WA	Objection - dismissed	On 29 November 2017, the State Government of Western Australia gave notice under s 29 of the *Native Title Act 199*3 (Cth) of its intention to grant prospecting licence P36/1864 to Alverna Resources Pty Ltd. The area of the proposed licence wholly overlapped the Wutha claim group's native title claim (WC1999/010). On 21 December 2017, the Wutha claim group lodged an objection with the National Native Title Tribunal against the application of the expedited procedure to the grant of the licence. After no response was received from the native title party to the State's response to dismiss the objection Member Shurven dismissed the objection application.
13/07/2018	Gooniyandi Aboriginal Corporation and Inventum Resources Pty Ltd and Western Australia	WO2017/0691	WA	Objection- expedited procedure does not apply	This was a decision under s 32 of the *Native Title Act 1993* (Cth) about whether the expedited procedure applies to the State of Western Australia's proposed grant of exploration licence E80/5073 to Inventum Resources Pty Ltd (Inventum). Member Shurven considered it difficult to accept that the Gooniyandi People's social and community activities (camping, fishing, hunting, intergenerational learning) could co-exist with exploration activities in the licence without substantial disturbance, and found that the act is not one attracting the expedited procedure.
11/07/2018	Kevin Allen & others on behalf Of Njamal and Wodgina Lithium Pty Ltd and Western Australia	WO2016/0813 WO2016/0814	WA	Objection - dismissed	On 27 July 2016, the State Government of Western Australia gave notice under s 29 of the *Native Title Act 1993* (Cth) of its intention to grant exploration licences E45/4762 and E45/4763 to Wodgina Lithium Pty Ltd (formerly A.C.N. 611 488 932 Pty Ltd, and referred to in this decision as Wodgina). The area of the proposed licences was wholly overlapped by the Njamal claim group's native title claim (WC1999/008). Member Shurven dismissed the objections to the expedited procedure for non-compliance by the Njamal claim group to meet directions for the filing of evidence.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
06/07/2018	Yinhawangka Gobawarrah Registered Native Title Claimants and Empire Resources Limited and Western Australia	WO2018/0078 WO2018/0079 WO2018/0080 WO2018/0081 WO2018/0082 WO2018/0083 WO2018/0084 WO2018/0085 WO2018/0086 WO2018/0087 WO2018/0088 WO2018/0089	WA	Objection - dismissed	On 13 December 2017, the State Government of Western Australia gave notice under s 29 of the *Native Title Act 1993* (Cth) of its intention to grant prospecting licences P08/699, P08/700, P08/701, P08/702, P08/703, P08/704, P08/707, P08/708, P08/709, P08/710, P08/711 and P08/712 to Philip Richard Jamieson. The area of the proposed licences was overlapped by the Yinhawangka Gobawarrah native title claim. On 12 February 2018, the Yinhawangka Gobawarrah claim group lodged objections with the National Native Title Tribunal against the application of the expedited procedure to the grant of each of these licences. The objection applications against prospecting licences P08/699, P08/700, P08/701, P08/702, P08/703, P08/704, P08/707, P08/708, P08/709, P08/710, P08/711 and P08/712 were dismissed by Member Shurven.
06/07/2018	Raymond William Ashwin (dec) and others on behalf of Wutha and Empire Resources Ltd and Western Australia	WO2017/0019	WA	Future act may be done	This was a determination under s 38 of the *Native Title Act 1993* (Cth) that the act may be done. The act was the State of Western Australia's grant of mining lease M57/636 to Empire Resources Limited. Member McNamara made the determination because there was no s 31(1)(b) agreement by the native title party to the doing of the act. Had there been such an agreement, the Tribunal would be barred from making a determination (s 37(a)). Member McNamara determined that the act, being the grant of mining lease M57/636 to Empire Resources Limited, may be done.

7. Publications

University of Pennsylvania Press

Dynamics of Difference in Australia

Francesca Merlan is a Professor of Anthropology at the Australian National University in Canberra. In *Dynamics of Difference in Australia*, Merlan examines relations between Indigenous and non-Indigenous people from the events of early exploration and colonial endeavours to the present day. For more information, visit the publisher's website.

Oceania

Caring for country: history and alchemy in the making and management of Indigenous Australian Land

This paper by Noah Pleshet traces the history of 'caring for country' tropes in writing about indigenous Australian land and land management. While 'caring for country' initially referred to dynamic land use and ownership practices, it progressively became a less historical, more primordial, conception of Indigenous land ownership, use, and management. In reviewing constructions of 'land' in scholarly literatures and policy debates, Pleshet seeks to explain how they interact with local indigenous practices and idioms. Drawing on examples from the cultural and linguistic fields of Aṉangu, speakers of Pitjantjatjara and Yankunytjatjara, Pleshet examines a variety of concurrent uses of 'country', 'caring', or 'nurturance' and 'caring for country'. To view the article, visit the Wiley website.

Australian Institute of Health and Welfare

Aboriginal and Torres Strait Islander Stolen Generations and descendants numbers, demographic characteristics and selected outcomes

The Human Rights and Equal Opportunity Commission's Bringing them home (BTH) report (HREOC 1997) documented stories of individuals and families affected by the systematic policy of Australian governments to remove Aboriginal and Torres Strait Islander children from their families. The report also described the extent of harm created for, and the burden suffered by, both those individuals who were removed, and their families and descendants.

To coincide with the 20th anniversary of the BTH report, the Healing Foundation commissioned a study to review the principles and recommendations of the BTH report and to examine progress made on those recommendations in the contemporary policy landscape. This report, Bringing them home 20 years on: an action plan for healing (The Healing Foundation 2017), outlined actions to meet the continuing and emerging needs and rights of the Stolen Generations—noting the paucity of evidence on their current needs.

The Australian Government then funded the Healing Foundation to undertake a demographic analysis and needs assessment that aimed to identify the size,

characteristics and needs of the Stolen Generations, using both quantitative and qualitative data sources (as part of a broader Action Plan for Healing project). The Australian Institute of Health and Welfare (AIHW) prepared this quantitative analysis for the Healing Foundation as part of the Action Plan for Healing project. The report is available on the AIHW website.

8. Training and Professional Development Opportunities

AIATSIS

Australian Aboriginal Studies

Australian Aboriginal Studies (AAS) is inviting papers for coming issues. AAS is a quality multidisciplinary journal that exemplifies the vision where the world's Indigenous knowledge and cultures are recognised, respected and valued. Send your manuscript to the Editor by emailing aasjournal@aiatsis.gov.au.

For more information, visit the journal page of the AIATSIS website.

9. Events

The Healing Foundation

Healing our Spirit Worldwide, the Eight Gathering

The Healing Foundation will co-host an international Indigenous gathering in Sydney to address the following topics: Healing & Health; Land and Language; Learning, Education and Employment; Lore, Law and Justice and Our Future.

Date: 26-29 November 2018

Location: International Convention Centre, Sydney

For more information please visit the HOSW website by clicking here.

The Native Title Research Unit produces monthly publications to keep you informed on the latest developments in native title throughout Australia. You can subscribe to NTRU publications online, follow @AIATSIS on Twitter or 'Like' AIATSIS on Facebook.

The Native Title Research Unit produces monthly publications to keep you informed on the latest developments in native title throughout Australia. You can subscribe to NTRU publications online, follow @AIATSIS on Twitter or 'Like' AIATSIS on Facebook.