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AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

WHAT'S NEW IN NATIVE TITLE

MARCH 2018

1. Case Summaries

Gordon on behalf of the Kariyarra Native Title Group v State of Western Australia [2018] FCA 430

29 March 2018, Separate Question – Claim Group Composition, Federal Court of Australia, Western Australia, North J

In this matter North J heard a separate question about the constitution of the native title holding group. There was dispute about the basis of the descent rule (whether it is cognatic or patrilineal) for Kariyarra membership and whether the language group to which an apical ancestor is reported as belonging to is determinative of rights to land. His Honour concluded that on the balance of probabilities each of the contested apical ancestors had rights and interests in land in the application area and their descendants inherit those rights by cognatic descent.

[1] In December 2016, the Court ordered that the following question be determined separately before each of the proceedings WAD 6169 of 1998 (the Kariyarra main application); WAD 232 of 2009 (the Kariyarra – Pipingarra application); and WAD 47 of 2014 (the Kariyarra – Abydos application) progressed: Who are the persons (if anyone) holding the communal rights comprising the native title claimed by the applicants in the Kariyarra Claim Area?

[7] The applicant in each application argued in favour of the formulation of the native title claim group as described in each application. That is, that the native title claim group comprises those Aboriginal persons who:

(a) are a descendant from one or more of the apical ancestors; and
(b) recognise themselves as having rights and interests in the Claim Area under Kariyarra traditional law and custom.

The State of Western Australia supported the applicants, save that it argued for an additional requirement for inclusion in the native title holding group, namely, recognition of a person as Kariyarra by the community.

[8] Six siblings from the Dann, Todd, and Lockyer families namely, Mary Attwood, George Dann, Robert Dann, Shirley Lockyer, Patricia Mason and Eugenia Smith, the Indigenous respondents, opposed the above formulation of the native title holding group. The Indigenous respondents were respondents in the Kariyarra – Pipingarra application. The Court rejected an application by the applicants in that application to remove them as respondents: *TR (Deceased) on behalf of the Kariyarra Pippingarra People v State of Western Australia* [2016] FCA 1158. The Indigenous respondents are descendants from Tommy Anderson. They disputed that the other apical ancestors, other than Maggie, were Kariyarra and entitled to rights to land. Although the Indigenous respondents were not respondents in the other two applications, the arguments and reasoning apply equally to all three applications.

[11] The applicants relied on the expert evidence of the anthropologist, Dr Kingsley Palmer. He wrote an initial report filed in December 2013 (the Palmer 2013 report), a further supplementary report filed in September 2015 relating to the Kariyarra – Abydos application area (the Palmer 2015 report), and a responding report dated April 2016 but filed in January 2017 (the Palmer 2017 report).

[12] The Indigenous respondents relied on the expert evidence of the anthropologist Dr Phillip Clarke. [13] On 22 and 23 May 2017, Dr Palmer and Dr Clarke participated in a conference of experts conducted by Registrar Herrmann in an attempt to narrow the issues in dispute between the parties. An agreed written record of the result of that conference was received in evidence. [15] The parties agreed that an expert report dated February 2012, written by the anthropologist Dr John Morton, form part of the evidence without Dr Morton being called to give oral evidence. The circumstances in which the report was commissioned are set out in a judgment of the Court: *Roberts v State of Western Australia* [2010] FCA 1483.

[19] The first matter his Honour addressed was whether the language group to which the apical ancestor is reported as belonging is determinative of rights to land. The experts agreed that it is not. [28] There was no dispute about this matter between the experts. The record of the conference of the experts stated that ‘identity group names were not at sovereignty, and are not today, determinative of rights to country. Rather, rights to country were and are gained by reference to a structured, principled system including descent.

Are rights to land acquired through patrilineal or cognatic descent?

[33] The applicants contended that rights to land were acquired by one generation from another by cognatic descent – through either the patriline or the matriline. [34] The Indigenous respondents contended that under traditional laws and customs of the Kariyarra people rights to land could only be acquired, subject to one exception, by descent down the patriline. The exception applied when the father was a non-Aboriginal man. In that event, a Kariyarra person acquired rights to land through their mother. But that matrilineal descent applied to that generation alone. Paragraphs [35] – [52] of the reasons for judgment recount the evidence given by both the applicants and the indigenous respondents

[79] Dr Clarke was instructed to report on the connection of the Indigenous respondents to Kariyarra country. He addressed that issue in five pages of his 2015 report. Most of the balance of the report of 54 pages was focused on the question of whether the applicants were entitled to rights in Kariyarra country. [82] Dr Clarke asserted that the basis for membership was determined by descent along the male line and also reported that in spite of the importance of deriving identity from the father's country, it was recognised that some secondary rights came through the mother.

[84] Dr Palmer responded to the Clarke 2015 report in the Palmer 2017 report. On the question of whether descent was patrilineal with limited exceptions or cognatic, Dr Palmer made three points:

1) 'According to the account provided to me, rights to country could be gained through either matri or patrifiliation.
2) [86] He recalled the reference in the Palmer 2013 report to the debate among anthropologists about the acquisition of rights to land which followed the work of Radcliffe-Brown and the more accepted view that patrilineal descent was not the only means of acquiring rights to land. Dr Palmer observed that Dr Clarke relied on Radcliffe-Brown's view without reference to or engagement with the different views expressed by later anthropologists involved in that debate.
3) [87] Dr Palmer raised questions about the exception rule propounded by Dr Clarke as follows: The 'exception rule' as defined by Dr Clarke is particularly significant for the descendants [sic] of Tommy Anderson. For this now extended family all present-day descendants [sic] trace ancestry to Tommy's daughter Mary Yinpung (aka Mary Todd). Thus if the rule of exclusive patrilineal descent were to be applied, none of the descendants [sic] of Tommy Anderson could be regarded as claimants.'

[115] The Morton report addressed the culture and rules of the Kariyarra people at sovereignty by reference to the early writers. Dr Morton gave particular attention to the work of Radcliffe-Brown 1913, but also discussed later ethnographic work of the Wilson (Wilson 1961), and of Palmer in the 1970s as well as the later interpretations by Peter Sutton. Of particular relevance to the present discussion, Dr Morton said:

35. Radcliffe-Brown's general model of Aboriginal rights and interests in land, initially worked out in relation to his Pilbara fieldwork, was subject to much criticism during the second half of the twentieth century. Anthropologists now generally maintain that:

a) his use of concepts, such as horde and clan, were confused and confusing;
b) he sometimes ignored, sidelined or dismissed counter-evidence;
c) he increasingly tended towards abstraction and oversimplification;
d) his original data were of relatively poor quality;
e) his generalisations were far from fully supported by better quality data from around Australia.

36. There is no doubt that Radcliffe-Brown accurately identified patrilineal descent as a key principle of Kariyarra group formation. However, his overwhelming concentration on the patrilineal clan as the land-holding unit and the estate as the unit of landed property would now be regarded as inadequate. Matters that Radcliffe-Brown treated as somewhat peripheral (like rights in mother's country) or seemingly irrelevant (such as conception site or 'birthplace', or being welcome in the country of a spouse) might now be explored as vital aspects of the larger system of landed rights and interests. [footnotes omitted].

[116] Dr Morton expressed the view at [48] that recruitment was by bilateral inheritance, that is to say, one could belong to the land owning group through either parent or both. North J stated at [117] that 'it is significant that these views were expressed following consultation by Dr Morton with the Indigenous respondents and their families.

[118] On this issue North J concluded that:

> The evidence of the Aboriginal witnesses is of first importance in determining the content of traditional laws and customs. The Aboriginal witnesses called by the applicants and the Indigenous respondents who gave evidence, when properly understood, was all to the same effect, namely, that rights to land are acquired through mother or father … Dr Clarke's interpretation of the evidence of Ms Irene Roberts and Ms E Williams to the opposite effect cannot be sustained. The interpretation raised in Clarke 2017 report in reply, for the first time four years after the evidence was given, indicates a propensity to advocate for the Indigenous respondents' case rather than an attempt to provide independent expert advice.

[120] North J considered that Dr Palmer's experience with the Kariyarra people and the Pilbara Aboriginal culture extended back to the 1970s and he spent much longer investigating the current issues than Dr Clarke. [119] North J held that the expert evidence of Dr Palmer and Dr Morton supports the evidence of the Aboriginal witnesses. North J found that their evidence should be preferred to the evidence of

Dr Clarke where there is a conflict concerning the descent rule for acquiring rights to land. [125] North J was satisfied on the balance of probabilities that under the traditional law of the Kariyarra people, rights to land were and are acquired on the basis of cognatic descent.

[21] North J considered the evidence in relation to each of the contested apical ancestors, namely, Dougal Robinson, Puyubungu, Yanki Williams, Topsy McKenna, Fanny, Nyitji, Pontroy, Wirtinpangu and Jinapi.

[22] His Honour concluded that, on the balance of probabilities, each of the contested apical ancestors had rights and interests in the land in the application area, and their descendants by cognatic descent inherit those rights and interests.

General observations about the approach to evidence

> [282] At sovereignty, the traditional laws and customs governing Kariyarra society were passed down orally from generation to generation. There are no contemporary written records from that era. As time went on, various observers, such as pastoralists, government officials and missionaries, made written accounts of where people lived, what they believed, and how they were connected to the land. Anthropologists took an interest in particular communities. But that historical and anthropological material, as has been observed earlier in these reasons for judgment, was of varying quality. Where people lived on or near boundaries of different groups, the identity and rights to land were sometimes confusing and ambiguous to the outsider. People who held multiple identities and rights across boundaries could be recorded as linked to one rather than another group. Then, whilst the tradition of handing down information from generation to generation continued, the communities were disrupted by the policies of the new settlers. Children were removed to missions and orphanages where policies prevented them acquiring cultural knowledge and language. In the result, their later accounts were fragmentary.
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> [283] Notwithstanding these challenges: family and cultural history was passed down from the elders to succeeding generations in a continuation of the traditions of the people. They learnt about the place of their family in the wider social order and learnt of the protocols that governed the way they lived and related to each other and to their country.
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> [284] In the present case, the evidence of all of the Aboriginal witnesses, both for the applicants and the Indigenous respondents, was fundamental to the understanding of the way rights to land were acquired. The evidence of the applicants' witnesses was largely unchallenged in cross-examination on those issues. It was inherently credible.

Should the indigenous respondents be found not to be part of the Kariyarra people?

[25] North J rejected the argument advanced by the applicants' that the Indigenous respondents should be found not to be part of the Kariyarra society because, by their conduct opposing these applications they have demonstrated that they do not adhere to the traditional laws and customs acknowledged by that society.

His Honour reflected that the basis of power to exclude the Indigenous respondents from the native title claim group depends on the laws and customs of the Kariyarra people, and whether those laws and customs allow for exclusion of those who challenge the constitution of the group.

No evidence was led on the issue and North J could not infer that the Kariyarra people have traditional laws and customs which excommunicate dissidents in such circumstances as the present. At [352]: 'The future relations between the Kariyarra people and the Indigenous respondents must be dealt with by the Kariyarra people in accordance with the rules applicable to the circumstances rather than by the Court in this proceeding.'

North J concluded at [355]:

> 'There is no further justification for the Indigenous respondents to remain respondents in the Kariyarra – Pipingarra application. Their interests are wholly protected as members of the native title claim group. An order will be made that they be removed as respondents from the Kariyarra – Pipingarra application. Further, in the Kariyarra – Pipingarra application there will be an order that the Indigenous respondents be removed as respondents, subject to any order for costs which might be made against them if any application of that nature is brought.'

[349] His Honour considered there was little between the positions of the parties on the issue of community recognition raised by the State. The applicants accepted in final submissions that an element of community recognition was necessary but suggested that it was encapsulated in their single recognition criterion. The formulation proffered by the State is supported by the evidence and is not in substance inconsistent with the position of the applicants or the Indigenous respondents. North J held that the State's formulation should be adopted in the answer to the separate question.

[357] The answer to the separate question provided by the Court follows the draft proposed by the applicants with the addition of the second criterion of recognition proposed by the State. In order to more accurately reflect these reasons for judgment, the answer proposed in [1(a)] of the applicants' draft adds the words 'by cognatic descent' after the word 'descendant'.

[358] As the applicants foreshadowed a potential application for costs, North J made orders that the costs of the proceeding be reserved and directed that the applicants and the State file a proposed determination within a timeframe to be discussed.

Eagles on behalf of the combined Thiin-Mah Warriyangka, Tharrkari and Jiwarli People v State of Western Australia **[2018] FCA 442**

29 March 2018, Application for Joinder, Federal Court of Australia, Western Australia, Barker J

In this case, the Court ordered that the application for joinder made by the Kulyamba Aboriginal Corporation RNTBC be dismissed. Kulyamba Aboriginal Corporation RNTBC applied to be joined as a respondent party to this proceeding. Kulyamba is the registered native title body corporate for the Thudgari People and the area as determined in *Thudgari People v State of Western Australia* [2009] FCA 1334. [3] The present claimant application (WAD 464 of 2016) over an adjacent but different area was lodged on 7 October 2016 and registered on 21 October 2016.

[4] Kulyamba asserted that the claim group description differed from the description of the native title holders in the Thudgari determination.

[6] Kulyamba sought to be joined as a respondent in order to be heard in relation to:

- The appropriate description of the persons who are determined to hold native title in the claim area
- The appointment of a prescribed body corporate
- The applicant opposed the joinder application.

Section 84 (5) of the *Native Title Act 1993* (Cth) (NTA) provides that the Court may at any time join any person as a party to the proceedings if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so. [17] Whilst Kulyamba did not assert a specific interest in the current claim area [19] it asserted an interest in the terms of a future determination of native title on the basis that it is the PBC managing native title under the Thudgari determination. The Court noted that Kulyamba did not seek a proprietary or other direct interest.

[21] Kulyamba sought to be heard on the terms of any future determination, particularly in relation to how the common law holders might be identified and who should be the PBC under a new determination. Barker J noted that on the face of it the claimants in this proceeding were the same as or similar to the group in whose favour the Thudgari determination was made. However, his Honour did not see how that factor resulted in any relevant interest for the purposes of their application for joinder.

[22] Barker J found that Kulyamba may have a general, specific or strategic interest in who will be appointed in due course as the PBC but in the current claim area it has

no statutory or legal powers or responsibilities in relation to the making of the determination. Barker J found that it would be for the determined common law holders to elect the PBC under s 56(2) NTA. [24] Barker J did not accept Kulyamba RNTBC's assertion that there would be an impact upon them in terms of governance.

[25] The applicant asserted that at this stage Kulyamba would not be the PBC. [26] The Court found that the potential conflict as to the responsibilities of Kulyamba as the PBC under the Thudgari claim and those of a future PBC upon the determination on this claim 'does not produce an outcome that Kulyamba thereby has an interest in relation to the current proceeding.' Barker J held that an existing PBC in relation to another native title determination cannot control the process of the nomination of the PBC in the current proceeding. [28] Barker J also found that to the extent that Kulyamba sees itself as a form of native title representative body under the NTA this was misconceived finding that it was the PBC for the Thudgari determination area and nothing more.

[29] The Court concluded that there was no relevant interest to support the joinder of Kulyamba Aboriginal Corporation RNTBC nor was there any basis to grant the application in the interests of justice and [31] the application for joinder was dismissed.

Agius v State of South Australia (No 6) [2018] FCA 358

21 March 2018, Consent Determination, Federal Court of Australia – South Australia, MortimerJ

In this matter, a consent determination of non-exclusive native title rights and interests was made in favour of the Kaurna Peoples, in an application area that covered approximately 7,000 square kilometres and stretched from south of Rapid Bay to approximately Redhill in the north. The eastern boundary of the claim area runs parallel with the crest of the Mt Lofty Ranges and extends north into the Barossa Valley. The western boundary has as its natural marker the coastline of the Gulf St Vincent in what is now known as the State of South Australia as set out in Schedule 3 of the written reasons for judgment. The determination area itself only covers approximately one half of the claim area. The main parties included the applicant, holders of commercial fishing licences, State of South Australia, the Commonwealth, Telstra, SA Power Networks, South Australian Native Title Services; holders of water licences within the claim area, Epic Energy, 27 local councils and other respondents.

[1] A trial in this proceeding had been set down to commence on 3 April 2018. The applicant and the State of South Australia reached an agreement on the terms of a draft consent determination that native title exists over a part of the area originally claimed by the applicant together with a determination that native title does not exist

over the balance of the area, save for parts in the north and south that were dismissed.

[3] The consent determination application was supported by joint submissions made on behalf of the applicant and the State of South Australia. There was some opposition to the proposed determination, and Mortimer J referred briefly to the course of the opposition in her Honour's written reasons for judgment. [4] Mortimer J was ultimately satisfied with the orders sought and in this matter made the orders as requested by consent as between the parties. [6] Pursuant to orders made on 7 March 2018, fourteen respondents sought and were granted leave to withdraw as a party to the proceeding. All remaining respondents indicated their consent to the orders agreed to between the applicant and the State.

[7] The original application was filed in October 2000. For a historical review of the proceedings to 2016 see Mortimer J's reasons for judgment in *Agius v State of South Australia (No 4)* [2017] FCA 361. As noted in those reasons, during the course of 16 years there were considerable periods of inactivity, and non-compliance with the Court's orders.

[19] The joint submissions also recognise that claim group members trace their society back through their parents, grandparents, and great-grandparents, particularly at Point Pearce (Yorke Peninsula), Poonindie (Eyre Peninsula) and Point McLeay (mouth of the River Murray). The Court accepts that the use of the name 'Kaurna' need not be proven to be one that can be traced back to sovereignty nor proven to have been used continually since that time. It is not at all uncommon in native title cases for group labels to change over time and to be a matter of controversy.

[19] It is not in dispute that at sovereignty, Aboriginal people lived in the claim area and, from the time of white settlement, became collectively called the 'Adelaide Tribe'. In the joint submissions, the applicant and the State accept the Kaurna People are the traditional descendants of the 'Adelaide Tribe'. The joint submissions recognise that the claim group's identification as 'Kaurna' is a more a recent phenomenon – specifically arising during the 1970s.

[21] A determination was sought only in relation to non-exclusive native title rights and interests, and only in relation to a limited number of parcels of land, seventeen parcels to be precise. They are set out in Schedule 3 to the proposed determination.

[22] In relation to those seventeen parcels of land, the native title rights and interests recognised include the right to access and live on the land and waters, to take and use the resources of the land and waters including by fishing, hunting and gathering (excluding those resources referred to in item 1 of Schedule 4 of the orders), the right to conduct funerals and burials and the right to maintain and protect places of importance under traditional laws, customs and practices on the land and waters.

[23] The rights are expressed to be for personal, domestic and community use.

[25] A core component of the agreement reached was that part of the area claimed would be dismissed, and that there would be a determination that native title does not exist in any part of the claim area other than the seventeen parcels specified in Schedule 3 to the determination.

[26] The claim group held several information and authorisation meetings to consider whether a consent determination should be pursued and then ultimately, the terms of the consent determination. On 20 December 2017, a meeting of the applicant unanimously instructed its lawyer to continue negotiating a consent determination. At an authorisation meeting on 18 February 2018, the terms of the consent determination and an ILUA were presented and discussed. The meeting resolved, by majority, to settle and finalise the claim by consent and in the form of an ILUA, that Kaurna Yerta Aboriginal Corporation (KYAC) would act as the prescribed body corporate, and that the chair of KYAC was authorised to sign on behalf of the applicant for the purposes of performing any functions under the NTA and the ILUA.

[27] Three objections were raised to the matter being resolved by consent. The first was by a member of the applicant, Ms Georgina Williams. Ms Williams objected to the surrender of certain lands and about the compressed timeframe to achieve the consent determination. Mortimer J granted Ms Williams leave to appear at case management conferences so as to be heard on these issues. Mortimer J ordered that South Australian Native Title Services (SANTS) assist Ms Williams to access and understand the connection material that had been filed as part of the claim and that SANTS file an affidavit so that the court could be satisfied that the solicitor with carriage of the claim could depose to the steps taken to assist Ms Williams. [3] Mortimer J was ultimately satisfied that Ms Williams was provided with the opportunity to understand the nature of the evidence on connection and to appreciate the risks of contested proceedings or a trial as opposed to a consent determination leading to an ILUA. Mortimer J appreciated the great emotion and passion of Ms Williams but did not consider that her objection was sufficient to prevent the consent determination from proceeding.

[33] The Ramindjeri Heritage Association (RHA), a respondent party, also raised an objection to the matter being resolved by consent. The history of Mr Lance Walker, chair of RHA's involvement in the matter after being joined as party in 2001 is set out in paragraphs [33]- [45] of her Honour's reasons for judgment. Mr Walker passed away in 2015 and the written notice of objection to the consent determination in this proceeding was provided by Ms Greenshields and Ms Christine Walker on behalf of RHA on the basis that the country south of the Torrens River is Ramindjeri Country. [43] In the early evening of Sunday 18 March 2018, the Court was informed that the Ramindjeri (through the RHA) sought leave to withdraw as a party. Mortimer J was satisfied that the objection of the RHA (and the Ramindjeri people it represents) to the consent determination was also withdrawn.

[46] On 19 March 2018, Mr Michael Hunter Coughlan filed an interlocutory application seeking to be joined as a respondent to the proceeding. In his supporting

affidavit, Mr Coughlan states that he is a Peramangk person descended from an ancestor identified as ‘Buffalo’, and a woman known by her tribal group ‘Korolde’. Mr Coughlan claimed that the country of the Peramangk people overlaps with parts of the eastern portion of the Kaurna determination area, including around Mylor, where some of the seventeen parcels of land subject to a positive determination are located. Both the applicant and the State opposed the joinder application. If joined as a party, Mr Coughlan confirmed he would oppose the consent determination and take an active part in any trial that may subsequently occur. [52] Mortimer J dismissed Mr Coughlan’s application to be joined as a respondent to the proceeding for the reasons set out in paragraphs [53] and [54].

[76] Mortimer J considered that the State gave due recognition to the damaging effects of dispossession, removal and family disruption on how claim group members in the position of the Kaurna people can prove their claims. That approach is evident in paragraphs [47], [48] and [51] of the joint submissions:

> [76] ‘A consent determination can be made without the necessity of strict proof and direct evidence of each issue as long as inferences can plausibly be made. The parties submit that, in the circumstances of a consent determination, it is appropriate to focus on credible contemporary expressions of traditional laws and customs and pay less regard to any laws and customs that may have ceased. For the purposes of a consent determination, the State is prepared to infer that such contemporary expressions are sourced in the earlier laws and customs, on the basis that it is inherently unlikely that such contemporary expressions are recent inventions.
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> The State has borne in mind the fact that the original Aboriginal custodians of this particular land were affected in a unique way by the settlement of Adelaide and its surrounds as a capital city and that the Applicant represents a group that has held, and will continue to hold into the future, recognition by the State and by many in the community as representing those original inhabitants and the current traditional owners of the area.’
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> Given this background, the flexible approach encouraged by the NTA and the Court and the shared desire of the State and the Applicant to avoid what could have been an extremely divisive and damaging trial, the State is prepared to accept there being sufficient ongoing connection by traditional laws and customs of those identifying as Kaurna with the determination area. Specifically, the State is prepared to infer that the pre-sovereignty normative society has continued to exist throughout the period since sovereignty. While there has been inevitable adaptation and evolution of the laws and customs of that society, it should be inferred that the society today (as descendants of those placed in the area in the earliest records) acknowledges and observes a body of laws and customs which is substantially the same normative system as that which existed at sovereignty.

[79] A full tenure analysis was not conducted in this matter. The parties acknowledged that the intensive settlement of the Adelaide plains and its surrounds resulted in the early extinguishment of the vast majority of native title in the region. The cost of determining precisely each and every parcel over which native title has not been extinguished was estimated to be in excess of $3 million and to be a process which would take approximately 5 years to complete with the resources likely to be available to the State. As part of the State and the Applicant reaching agreement to settle the entire matter, intense and targeted work was performed to locate parcels within the determination area that are not subject to extinguishing acts which wholly extinguish native title rights and interests. For the purposes of the consent orders, final agreement has been reached by the parties as to the effect on native title of the various tenures granted and acts done in the determination area.

Negative determination: applicable principles and conclusion

[81] A negative determination can be made if the Court is satisfied that 'there is no native title that can be recognised and thus protected': see CG (Deceased) on behalf of the *Badimia People v State of Western Australia* [2016] FCAFC 67 (North, Mansfield, Reeves, Jagot and Mortimer JJ) at [66]. In *Badimia*, the Full Court emphasised the particular care needed before the making of a negative determination, especially in relation to the Court's satisfaction there are no other potential claimants for the recognition of native title over the claim area. However, there are examples of a negative determination being made (and upheld on appeal) where there were overlapping claims and none of the claimant groups established native title: see *Wyman on behalf of the Bidjara People v State of Queensland* [2015] FCAFC 108.

[82] In *Weribone on behalf of the Mandandanji People v State of Queensland* [2018] FCA 247, Rares J made a negative determination of native title under s 87 of the Act. There was no positive determination over any part of the claim area in that proceeding. That determination was made shortly before a trial of the claim was due to start, but in circumstances where the State and the applicant had both agreed to a negative determination.

[83] At [21], Rares J described some of the circumstances which led his Honour to be satisfied that such a determination was appropriate, including the applicant and the State having the benefit of advice from experienced senior counsel, solicitors and expert anthropologists, before taking the decision. His Honour also referred to the endorsement to that course given by the claim group as a whole. Finally, his Honour referred at [21] to the divergence in the expert evidence to be presented.

[84] Each of those features is present in the Kaurna people's proceeding. Mortimer J referred earlier to the significant hurdles to be faced by the Kaurna people if this claim were to be subjected to a full trial. In the face of a great deal of evidence having been gathered, the claim group as a whole decided, in February 2018, to endorse the proposed determination, in both its negative and positive parts. The

group also decided to accept an ILUA which has been proposed, and which forms a separate part of the agreement between the parties. Mortimer J noted that an ILUA is not a legal precondition to a determination under s 87 or s 87A, but nor are parties precluded from deciding, on a full, free and informed basis, to include one as part of their agreement.

[88] Mortimer J was satisfied that it is unlikely any other claim group exists which could make a case, in another proceeding, for a positive determination in respect of the limited portions in the claim area that have not been subject to acts extinguishing native title. Her Honour accepted that the Court can be satisfied there is no other group which may hold native title rights and interests in the area to be covered by the negative determination. Her Honour was also satisfied that a negative determination over those parts of the determination area except for the seventeen parcels identified in Schedule 3 of the determination, would provide certainty to all those with proprietary interests in the claim area, and will resolve the question of native title claims over the land encompassing the city of Adelaide on a final basis.

[89] Mortimer J was satisfied that it was appropriate to dismiss the remaining parts of the claim area rather than make a negative determination. In the south, there was some evidence to suggest the traditional country of another group or groups may have extended into the southern part of the Kaurna area as claimed. In the north, based on the evidence before the Court, the traditional country of other groups may also extend into areas in the north of the claim area, adjacent to the areas they already claim.

Although Mortimer J noted that it is not part of the Court's function under s 87 to assess and make findings about the matters set out in s 223 of the NTA, her Honour nevertheless considered that it is the determination and reasons for judgment, which will stand as the permanent record for the claim group of the judicial recognition of their native title rights. Since that was the case, her Honour made comments at [91]-[97] about the Kaurna people and their country, as revealed in the evidence before the Court.

Paragraph [18] of the proposed consent determination is to the effect that the native title is not to be held on trust. [99] The Court determined that the Kaurna Yerta Aboriginal Corporation ICN 4043 is to be the prescribed body corporate for the purpose of s 57 (2) NTA.

The determination represents the first positive determination of native title over any area within the area of an Australian capital city. [2] Whilst the Kaurna claim had a long and difficult history and Mortimer J stated that this was an occasion to focus on the positive outcomes of the parties. Mortimer J concluded by stating at [100] that 'The Kaurna people and the State are to be congratulated on reaching agreement in this claim. The other respondent parties have, appropriately, accepted the position taken by the State, and they are to be congratulated for that constructive approach and the Court made orders in the form sought by the parties.'

Attorney General v Helicopter-Tjungarrayi (Ngurra Kayanta & Ngurra Kayanta #2) [2018] FCAFC 35

16 March 2018, Appeal, Federal Court of Australia – Full Court, Western Australia, North, Jagot and Rangiah JJ

This matter before the full Federal Court of Australia Court of Appeal concerned appeals from: *Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia (No 2)* [2017] FCA 587[1] (*Ngurra Kyanta (No 2)*) and

Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia (No 3) [2017] FCA 938[2] (*Ngurra Kyanta (No 3)*).

The appeal principally concerned sections 47 B and s 47B(1)(b)(ii) of the *Native Title Act 1993* (Cth) (NTA) and whether petroleum exploration permits granted under State legislation are 'mining leases', so that s 47B does not apply to the land the subject of those permits. In this matter the Court ordered that the appeal in WAD 442 of 2017 brought by the Attorney-General of the Commonwealth be dismissed and that in WAD 444 of 2017 brought by the State be allowed and that attachment A to the orders of 15 August 2017 be amended as set out in attachment A to the reasons for judgment in this proceeding.

The State's appeal

[2] In *Ngurra Kyanta (No 2)* the State contended that two petroleum exploration permits, EP 451 and EP 477, granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) (the Petroleum Act), are 'leases' for the purposes of s 47B(1)(b)(i) of the NTA, so that s 47B does not apply to the land the subject of those permits.

[4] The primary judge held at [53] that he should apply the same reasoning as identified in *Narrier v State of Western Australia* [2016] FCA 1519, 'with the result that neither of the petroleum exploration permits in issue before me constitutes a "lease" for the purposes of s 47B(1)(b)(i)'. [5] Subsequently, the Full Court held that this aspect of the reasons in *Narrier* was wrong. In *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (Tjiwarl and Tjiwarl # 2)* [2018] FCAFC 8 (*Tjiwarl*) North, Dowsett and Jagot JJ held that certain exploration licences granted under the *Mining Act 1978* (WA) were leases as referred to in s 47B(1)(b)(i) of the NTA (at [46]-[81]).[3]

[6] As the notices of appeal and submissions of the parties in these appeals had been filed before the publication of the judgment in *Tjiwarl*, the parties were requested to provide further submissions dealing with the effect of the Full Court's judgment. The State, and the other appellant, the Commonwealth, contended that *Tjiwarl* decided all issues with the consequence that the appeals should be allowed and the primary judge's orders amended as they proposed. Other than in one

[1] See What's New in Native Title May 2017.
[2] See What's New in Native Title August 2017.
[3] See What's New in Native Title Jan-Feb 2018.

respect, the first respondent (the applicant claiming native title on behalf of the claim group), conceded that *Tjiwarl* was not distinguishable and accepted that the Court would be bound to follow it. Nevertheless, the first respondent otherwise submitted that *Tjiwarl* was wrong to the extent that it did not decide the issue which it wished to raise and, if it did decide that issue against the first respondent's contention, *Tjiwarl* was plainly wrong and should not be followed by this Court.

The issue in contention relates to s 245 NTA. The first respondent proposed that *Tjiwarl* did not decide whether s 245 NTA, in referring to a mining lease as a 'lease...that permits the lessee to use the land or waters covered by the lease solely or primarily for mining', means only an instrument which permits the holder to so use the land to the exclusion of, or so as to limit, other concurrent uses under some other right, title or interest. According to the first respondent, it is only such an instrument which, by reason if its terms and the operation of the legislation under which it is made, excludes other concurrent uses that is a 'mining lease' as defined by s 245 of the NTA. The petroleum exploration permits in this case, according to the first respondent, do not satisfy this requirement.

[7] The Full Court disagreed stating that: 'The first respondent's submissions do not accord with the subject of s 245 of the NTA, which is the definition of a particular kind of instrument, being a mining lease. The focus of the provision is the activities which the instrument permits the holder (the lessee, a term defined in s 243(2) of the NTA to include the holder of a mining lease) to carry out. The definition of "mining lease" has nothing to do with the capacity of persons other than the lessee to use the land for other purposes under other rights.'

Their Honours continued at [8] and [9]: 'As explained in *Tjiwarl* at [72]-[73], because "mine" is defined in s 253 of the NTA to include 'explore or prospect for things that may be mined' and s 242(2) provides that in the case "only of references to a mining lease, the expression lease also includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory", a permit authorising the exploration of land for things to mine is a mining lease. And, as noted, by s 243(2), a person who holds a mining licence, authorisation or permit is taken to be a "lessee".'

'For present purposes, what is important to understand is that s 245 is concerned with the permission which the instrument asserted to be a mining lease grants to the lessee. If that instrument grants permission to the lessee to use land "solely or primarily for mining", the instrument is a mining lease. This is so whether or not the instrument, by reason of its terms or the operation of the legislation under which it is granted, wholly or largely excludes any other use of the land … The NTA contains expansive definitions of "mine", "mining lease" and, for a "mining lease" of "lessee" which operate to ensure that any instrument which permits the holder of it solely or primarily to "mine" (in its expanded sense which includes explore or prospect) is a "mining lease" for the purposes of the NTA, whether or not such an instrument would be a mining lease for the purpose of the legislation under which the instrument was granted.'

The Full Court stated at [10]: 'The scheme of Div. 3 of Pt 15 of the NTA, which defines various kinds of leases, does not assist the first respondent. In particular, the fact that certain kinds of leases, in ss 247, 248 and 249A, are defined not only by the activities they permit but also what they say or the purpose for which they are granted, does not support the first respondent's construction of s 245. As the State submitted, the key to understanding the different definitions is that some leases are defined only by reference to what the instrument permits the lessee to do (including s 245) and others are defined by reference also to either the way in which the instrument describes itself or the purpose of the grant. And, as the State also submitted, it is apparent that where exclusive possession is a necessary element of the rights granted by the instrument, that is expressly identified as, for example, in ss 247A and 248A of the NTA.'

[11] 'In *Tjiwarl*, as noted, the instruments were exploration permits under Div. 2 of Pt IV of the *Mining Act*. Under the *Mining Act*, these instruments were not mining leases and did not carry the kind of rights under that Act which a mining lease carries. Nevertheless, as held in *Tjiwarl* at [65]-[81], those instruments were "mining leases" and thus "leases" under the NTA because they permitted the holder to use the land solely or primarily for the purpose of mining (under the expanded definition of "mine" in the NTA). We do not accept that *Tjiwarl* is wrong. To the contrary, we consider it correctly reflects the scheme of the NTA. We also do not consider that *Western Australia v Ward* [2002] HCA 28 suggests to the contrary. *Ward* concerned extinguishment. *Tjiwarl* and the State's appeal concern statutory definitions. Those definitions must be given effect according to their terms.'

The Full Court continued stating at [12]: 'The same reasoning must be applied to the petroleum exploration permits in the present case. In s 253 of the NTA, "mine" is also defined to include in sub-paragraph (b) of the definition, "extract petroleum or gas from land or from the bed or subsoil under waters". Thus, sub-paragraph (a) of the definition, which refers to "explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c))", means that a permit to explore for petroleum is a mining lease if that instrument permits the land to be used solely or primarily for exploring the land for petroleum. Subject to consideration of the effect of the conditions of the permits (on which the first respondent also relied to submit that there is no relevant permission), the petroleum exploration permits satisfy this requirement because, being grants under s 38(1) of the Petroleum Act, they permit the holder "subject to this Act and in accordance with the conditions to which the permit is subject, to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area".'

The Court continued stating that: [13] 'Accordingly, and contrary to the first respondent's submissions, it does not matter that the land remains unallocated Crown land available for other uses. Nor does it matter that the permits, reflecting s 117 of the Petroleum Act, contain an endorsement that the activities of other land

users and occupiers are “not interfered with to a greater extent than is necessary for the reasonable exercise of the rights and performance of the duties of the holder”. The permits do not permit the lessee to use the land for any purpose other than exploring for petroleum and thus are instruments which permit the use of the land solely or primarily for mining. Nor can it be relevant that the permits cover a large area and, as the first respondent put it, contemplate relatively short term activities within the permit area at particular times. The permits permit the lessee to use the whole of the land only for mining, which is all that s 245 requires.’

The Full Court further emphasised at [14]: ‘The Full Court’s decision in *Banjima People v State of Western Australia* [2015] FCAFC 84 is not authority to the contrary. *Banjima*, to the extent relevant, concerned s 47B(1)(b)(ii) of the NTA and the reference in that provision to a permission or authority “under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose” (as does the Commonwealth’s appeal in this matter, discussed below). In *Banjima* it was not argued before the primary judge or in the appeal that the various instruments in issue were a lease within the meaning of s 47B(1)(b)(i) (see [87]-[118]).’

[15] ‘Insofar as the first respondent relied on the conditions imposed on the permits, it may be accepted that the permits must be construed as a whole and in the statutory context established by the Petroleum Act. Section 38(1) of that Act is noted above. Section 15(1) is also relevant, and is in these terms:

> Subject to this Act and to any condition referred to in section 91B(2), but notwithstanding the provisions of any other Act or law, the authority conferred by section 38, 43D, 48C or 62 upon a permittee, holder of a drilling reservation, lessee or licensee is, by virtue of this Act, exercisable on any land within the permit area, drilling reservation, lease area or licence area, as the case may be, whether Crown land or private land or partly Crown land and partly private.’

The Full Court distinguished Banjima for tor the following reasons:

> [21] The instruments in Banjima were granted in a different statutory context and on different terms, as is apparent from [83]-[86] of the Full Court’s reasons. In Banjima, ss 46 and 63 of the Mining Act provided that the licences were subject to a condition that the holder “will explore for minerals and will not use ground disturbing equipment when exploring for minerals on the land the subject of the exploration licence unless the holder has lodged in the prescribed manner a programme of work in respect of that use and the programme of work has been approved in writing by the Minister or a prescribed official”. Apart from the general reference to “will explore for minerals” (an obligation which the instruments disclosed could be fulfilled without entering upon let alone using the land), the instruments in *Banjima* did not require works to be carried out on the land and prohibited the use of all

ground disturbing equipment without approval. On this basis, and in the context of the question whether the instruments satisfied s 47B(1)(b)(ii) of the NTA (where the question is whether "...the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose") the Full Court in *Banjima* said at [108] that "on the evidence to which the court was taken, there was no relevant permission or authority in existence at any relevant time for one category of use potentially permitted or authorised by each licence". In the present case, where the permits require works to be carried out, albeit not before and in accordance with the Minister's approval in writing, and in the context of s 245 of the NTA (where the question is whether the instrument "permits the lessee to use the land or waters covered by the lease solely or primarily for mining"), the reasoning in *Banjima* is inapplicable.

[22] Other aspects of *Banjima* must not be overlooked. The Full Court did not have the exploration licences before it, as noted at [85]. The Full Court had to infer that no mechanical equipment had been approved for use on any part of the land (at [86]). The Full Court was dealing with an argument that the words "is to be used" in s 47B(1)(b)(ii) meant "is permitted or authorised to be used" (at [87]). It was doing so in the face of evidence that the exploration under the instruments could be undertaken by aerial survey rather than use of the land (at [109]). Most importantly of all, perhaps, is that [108] of the Full Court's reasons (relied upon by the first respondent and the primary judge) cannot be read in isolation.

The Full Court emphasised that: [23] 'As noted, s 245 is not concerned with the concept of land which "is to be used". It is concerned with permission to use land. The Commonwealth's submissions, albeit directed to its appeal about s 47B(1)(b)(ii), felicitously undermine the first respondent's argument.'

[25] The Court did not accept the first respondent's submission that the permits gave no permission to the lessee to use the land solely or primarily for mining but, rather, gave rise to "only potentially permitted uses".[26] The State's appeals were allowed and the primary judge's orders amended as necessary.

As the State did not seek an order for costs no order for costs was made.

The Commonwealth's appeal

[27] The Commonwealth's appeal, as in *Banjima*, concerns s 47B(1)(b)(ii) of the NTA: [28] 'It will be apparent from the discussion above that we disagree with the reasons of the primary judge at [92]-[95] in which his Honour concluded that conditions 1(1) and 1(2), as in *Banjima*, meant that it could not be said that any land "is to be used" under the permits. For the reasons given above, *Banjima* is distinguishable as on the facts of the present case, land is to be used under the permits because the permits require actual physical works to land to be carried out.'

[29] The remaining issues were what land is to be used and is any such use for a particular purpose? The first respondent otherwise submitted that the requirements of s 47B(1)(b)(ii) are not satisfied first because, as the primary judge appears to have accepted at [90]-[91], the permits do not require any actual physical works to land within the claim area and second because, as the primary judge also appears to have accepted at [98], exploration for petroleum is not a use for a "particular purpose" within the meaning of s 47B(1)(b)(ii) of the NTA. [30] The second issue, related to the concept of a use for a particular purpose.

The Full Court did not accept that the cases cited in [98] of the primary judge's reasons, *Banjima* at [111], *Banjima People v State of Western Australia (No 2)* [2015] FCAFC 171 at [25], [33] and [39], *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [187], or *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 at [160], support the conclusion that under the permits land is not to be used for a particular purpose.

[31] The present proceeding was deemed to be different. By s 38(1) of the Petroleum Act the permits authorise the holder to 'explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area'. The purpose of exploring for petroleum is a particular purpose, and is capable of involving the use of land. Provided the permits involve (as they do in this case) a requirement to use land for that purpose, we do not see how it can be said that the requirement of land which 'is to be used...for a particular purpose' remains unsatisfied.

At [32]: 'The first issue, relating to the concept of "the area" as it appears in s 47B(1)(b)(ii), involves more complex issues. As the Commonwealth submitted, while the word "area" in s 47B should be construed as having the same meaning wherever it is used, the land within such an "area" for the purposes of the provision is not necessarily the same. This is because "area" is described by reference to different criteria, including in s 47B(1)(a) by reference to the claimant application, in s 47B(1)(b)(i) in relation to the area not covered by a freehold estate or lease, in s 47B(1)(b)(ii) in relation to the area not covered by a relevant reservation (etc), in s 47B(1)(b)(iii) in relation to the area not subject to a resumption process, and in s 47B(1)(c) in relation to an area which was occupied by the claim group when the claim was made. Some of the complexities associated with the repeated use of the word "area" in s 47B were explored in Banjima at [93]-[99]. In particular, at [96] in Banjima, the Full Court explained why the "area" as it appears in ss 47B(1)(b) and (c) cannot mean the whole of the claim area as referred to in s 47B(1)(a).'

The Full Court emphasised that: [33] 'Nothing in *Banjima* or *Banjima (No 2)* supports the proposition that merely because the reservation (etc) extends beyond the claim area, s 47B(1)(b)(ii) is incapable of being satisfied. If [91] of the primary judge's reasons is to be understood as endorsing this proposition, then The Full Court disagreed with it. The focus of the section is whether any part of the claim area is

covered by a reservation (etc) under which that land is to be used for a public purpose or particular purpose. To answer that question, however, the relevant instrument must necessarily be considered in its entirety.'

The Full Court further explained that: [34] 'The difficulty is this: In some cases, the reservation (etc) may co-extend with the land in the area of a claim. In other cases, the reservation (etc) may extend beyond the area of the land in the claim. And in yet other cases, the reservation (etc) may cover only part of the area of the land in the claim and not cover any other land. Section 47B(1)(b) is a negative stipulation focusing on the land within the claim area which is not covered by or subject to any of the identified circumstances. Insofar as s 47B(1)(b)(ii) is concerned, the identified circumstance is that land in the claim area not be covered by a reservation (etc) of the requisite character. The character of a reservation (etc) which engages the negative stipulation is one under which the whole or any part of the land in the claim area is to be used for public purposes or for a particular purpose. The character of a reservation is not affected by the "whole or part" criteria. Those criteria make clear only that the negative stipulation is engaged if the relevant kind of reservation affects any part or the whole of the claim area. The reservation either does require that land is to be used for a particular purpose or it does not. Thus, it is not possible to posit that a reservation (etc), on the one hand, may require all of the land covered by the reservation to be used for a particular purpose and, on the other hand, not require the land within the claim area covered by the reservation to be used for a particular purpose. These propositions cannot co-exist.'

At [35]: 'The question then is ultimately one of characterisation of the reservation. [36] The Commonwealth contended that these facts mean that the whole of the land the subject of the permits is to be used for a particular purpose so that, necessarily, all parts of the land (including the claim area) are also to be used for that purpose. As The Full Court stated earlier: if the former proposition is correct, the latter necessarily follows. The Full Court accepted that the permits satisfy the requirement of permitting the lessee to use the land solely or primarily for mining and thus are mining leases engaging s 47B(1)(b)(i) but this did not mean that the Full Court necessarily accepted that the permits are to be characterised as instruments under which the whole of the land the subject of the permits is to be used for a particular purpose. Further, the fact that the Full Court accepted that land is to be used under the permits for a particular purpose also does not mean that it necessarily accepted the Commonwealth's proposition. Indeed, but for the way in which the arguments in the appeal were developed, The Full Court would not have dwelled on the concepts of "is to be used" or "particular purpose" separate from the claim area because the requirements of s 47B(1)(b)(ii) are best approached as a composite, the question being whether the reservation (etc) is one under which the whole or any part of the land in the claim area is to be used for a public purpose or a particular purpose. The focus of s 47B(1)(b)(ii) is whether any land in the claim area is to be used for a public purpose or a particular purpose or not.'

[37] The Full Court did not accept that the permits in the present case engaged s 47B(1)(b)(ii). This was not because the permits extended to land outside the claim area but rather because the full Court did not accept the Commonwealth's characterisation of the permits as instruments under which the whole of the land the subject of the permits is to be used for the particular purpose of exploring for petroleum. [38] The permits in the present case authorised the use of all of the land subject to the permits (including the claim area but excluding the blocks into which access is prohibited) for the particular purpose of exploring for petroleum.

[39] The Full Court noted finally that at [96]-[97] of his reasons the primary judge said his conclusions were supported by *Ward* at [217]-[242] so that land is used for a particular purpose if it is either required to be so used or other uses are excluded. The Full Court stated that: 'We agree with the Commonwealth that the discussion in *Ward* concerns a different context and that the operation of s 47B(1) of the NTA is to be determined on the ordinary meaning of the language used, construed in the context of the NTA as a whole and not otherwise.'

Justices North, Jagot and Rangiah ordered that the Commonwealth's appeal should be dismissed and that given that the first respondent did not seek any order for costs, no orders for costs were made.

Allen on behalf of the Nyamal People #1 v State of Western Australia **[2018] FCA 320**

13 March 2018, Application for Joinder, Federal Court of Australia – Western Australia, Barker J

[1] This matter dealt with applications of Ms Selina Ali to be joined as a respondent under s 84(5) of the *Native Title Act* 1993 (Cth) (NTA) in two claimant applications made by the Nyamal People, WAD6028/1998 (Nyamal #1) and WAD6003/2000 (Nyamal #10). Her joinder application in each case was opposed by the Nyamal applicant in each of those claimant applications. Barker J noted at the outset that the applications were made very late in the proceedings and the consent determination scheduled for 5 April 2018 would likely need to be vacated if Ms Ali were joined as a respondent.

Background

[7] Each of Ms Ali's joinder applications was filed on 7 February 2018, seeking orders that:

1) Pursuant to s 84(5) of the *Native Title Act 1993* (Cth) (NTA), that she be joined as a party to this proceeding; and
2) That pursuant to s 84D(1)(b) of the NTA, the members of the applicant produce evidence to the Court that they are authorised to implement the resolutions which

were purportedly passed at an authorisation meeting held in South Hedland on 6 and 7 December 2017.

[9] Ms Ali's joinder applications were filed five days after an application was filed in the Nyamal #1 on behalf of Mavis Westerman also seeking an order pursuant to s 84D (1) (b) of the NTA that members of the applicant produce evidence to the Court that they are authorised to implement resolutions purportedly passed at the authorisation meeting held in South Hedland on 6 and 7 December 2017.

[10] The Nyamal applicant, which was also legally represented in these proceedings, opposed the joinder applications but, by affidavits of Craig Marshall Jones, Darren Paul Hopkins and Mr Peter William Stokes filed on 21 February 2018, produced materials relating to the December, South Hedland meeting. [11] As a result of the filing of those materials the requests of Mavis Westerman and Ms Ali for the production of such relevant materials were obviated.

[12] The allegations relating to the December 2017 meeting included that the notice for the authorisation meeting was defective and the conduct of the meeting was unsatisfactory. [13] The Nyamal applicant was seeking to obtain claim group approval or verification of the terms of the proposed consent determination scheduled for consideration on 5 April 2018. Consequently there was some interest in the meeting, particularly in the question of who comprised the members of the claim group. [17] Following the production by the Nyamal applicant of the required materials, the only application pressed by the interlocutory applicants was Ms Ali's application for joinder in the two Nyamal claimant applications. [20] The Court added that Ms Ali did not make any submissions in relation to the adequacy of the meeting notice or the number of votes cast for or against resolutions at the meeting.

[21] Applications for joinder are governed by section 84(5) as it stood prior to the 2007 amendment to the NTA that introduced the requirement for the Court also to take into the account the interests of justice. Under the provision as applicable, the Court might at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interest may be affected by a determination in the proceedings.

[33] It was submitted that consistent with authority, it is not for the Court on the joinder applications to decide whether Ms Ali's allegations are finally made out but rather that they are properly arguable. It was not for the Court to determine whether her allegations [concerning eligibility of membership of the native title claim group] are correct and that all Ms Ali needed to show was a *prima facie* case that she has an interest that could be affected by a determination in the proceedings.

[40] The Nyamal applicant submitted that the interests of justice do not support the joinder of Ms Ali, especially at this late stage of the proceedings. The Nyamal applicant generally submitted that the late joinder of Ms Ali is likely only to be destructive of the orderly conduct at the proceedings and for that reason should not be allowed.

Barker J held that: [70] ‘Taking all of the above factors into account, I consider there is sufficient evidence to show that Ms Ali has an arguable interest in the proceedings that may be affected by a determination in favour of the applicants in the two claimant proceedings, especially by the proposed consent determination. Further, I consider that in all of the circumstances surrounding the challenge to the proper notification and conduct of the December 2017 meeting, I should exercise discretion in her favour.’

> [70] I should add here that the fact that Ms Ali has not and I do not think proposes to file a claimant application of her own is not an impediment to joining her as a respondent at this point. Only where it is plain that a person asserting native title interests who wishes to be joined as a party intends to maintain a claim for another group different from the existing native title applicant, does that become a question.

[75] His Honour appreciated that to facilitate this joinder at this late stage of these two claimant applications may well cause delay and extra expense to parties. Nonetheless, his Honour considered the joinder was necessary in order to do justice in this case. [76] Barker J ordered that Selina Ali be joined as a respondent to the proceeding.

Forrest on behalf of the Ngurrara People v State of Western Australia **[2018] FCA 289**

12 March 2018, Consent Determination, Federal Court of Australia – Western Australia, Bromberg J

In this matter, Bromberg J made a consent determination in favour of the Ngurrara people in relation to an area of approximately 22,064 square kilometres in two parts, the larger part being south of Fitzroy Crossing in the Kimberley region of Western Australia, and the smaller part being further to the west. It was proposed the whole claim area would be determined together, however because of a series of events in early 2018, the claim was split into two parts (Part A and Part B), only Part A of which was the subject of the orders made in this proceeding.

The respondent parties were the State of Western Australia, Shire of Halls Creek, Kevin Stephen Brockhurst, Jubilee Downs Pastoral Company Pty Ltd, Gogo Station Pty Ltd, Klopper Holdings Pty Ltd, Shiyng Yougawalla No 2 Pty Ltd and Telstra Corporation Limited (Telstra). Aside from the State, Halls Creek Shire and Telstra, the respondent parties hold pastoral interests. The Commonwealth of Australia intervened in the application on 6 October 2016 because of an issue as between the Commonwealth and the State regarding the application of ss 47A and 47B of the NTA and whether there is an entitlement to compensation from the Commonwealth arising under s 53 of the NTA. Despite the issue being raised the Commonwealth did not oppose the consent determination.

[2] This was the fifth consent determination over the country of the Ngurrara people. The first consent determination was made in 2002 in the Percival Lakes region which recognised the traditional rights and interests of Ngurrara people in co-existence with Martu people: *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208. Three subsequent consent determinations recognising the exclusive possession native title rights and interests of the Ngurrara people were made in 2007 and 2012 over an area in excess of 77,000 square kilometres in the central region of traditional Ngurrara country: *Kogolo v State of Western Australia* [2007] FCA 1703; *May v State of Western Australia* [2012] FCA 1333; *Kogolo v State of Western Australia (No 3)* [2012] FCA 1332.

[3] This claim was filed on 1 February 2012 and amended once in September 2014. The area claimed is part of a larger area of Ngurrara country and includes in the south east and far western portions of the claim, unallocated Crown land (identified as UCL 2), part of which was the subject of the determination made in 2007.

[8] The Court was largely reliant on the parties' agreement as there was no evidentiary material before the Court on the substantive matters raised in s 223 of the NTA. Joint submissions provided extracts from the affidavit material filed and the expert reports of anthropologist Dr Daniel Vachon.

[24] The Court was entitled to rely on the processes established by a State (or Territory) for the assessment of claims to native title and, without abdicating its task of determining that the matters set out in s 225 are present in a particular application, is entitled to proceed on the basis the State (or Territory) has made a reasonable and rational assessment of the material to which it has access in deciding to enter into a s 87 agreement: see, in relation to a similar point with respect to s 223 of the Act, *King on behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group v State of South Australia* [2011] FCA 1387 at [21] (Keane CJ).

Bromberg J stated at [34]: 'As the fifth determination for the Ngurrara people, these orders will go some way towards completing, or joining, or perhaps re-joining the country of Ngurrara people. When Part B of this claim is determined, the reunification will be more complete.'

[49] Mr Peter Murray's evidence was:

> That country has been our Ngurrara, our home and country since the time of the Dreaming. I know that from the stories my old people who were told by their old people. As a young person I walked all across our Ngurrara country with the old people. They showed me special places. They showed and told me things like where the *jilas* (water places) are right through that country. Places like Parkal Springs, Jindngu Springs, Balguna and Muningambin. There are many other places. I now look after these places and visit them often. Through the Ranger work I do it makes it easier for me to take the younger boys out and teach them about these places.

> As a *Ngurrara* Ranger I make sure that these places are not destroyed by the invasion of feral plants and animals. This helps keep these places strong, helps keep the stories strong, and this keeps our culture strong. I have a responsibility both as a *Ngurrara* Ranger and a traditional owner to protect and care for these places that are special to us. That is why our old people tell us about these places, the paintings, the songs and the stories. They tell us so we know what to protect and how to protect it.

[51] The joint submissions also paid tribute to the creation and continued celebration of the 'Ngurrara Canvas'. This artwork was painted in 1997 and was intended to be a documentary record of the right of *Ngurrara* people to speak for their country, as then encompassed by the first Ngurrara native title applications that resulted in the making of the 2007 Ngurrara Determination.

His Honour observed at [56]-[57]:

> It is clear that Ngurrara people are present on their country in the claim area, on a day to day basis, for a range of reasons. They gather food from it, they work to protect it, and they teach younger generations within the claim group about their country. They perform ceremony, and keep up their obligations to country, as their ancestors have done since time immemorial. The importance of claim group members being able to maintain their connection to country, and to discharge their obligations to country in both traditional and non-traditional ways, through initiatives such as ranger programs, cannot be overstated.

[60] At the time of the making of the Court's orders and the determination of native title, a prescribed body corporate had been nominated. However amendments to the rules of that corporation to permit it to be the prescribed body corporate for the Yi-Martuwarra Ngurrara (Part A) determination area had not yet been made. Accordingly, the Court did not make a determination in accordance with ss 55, 56 and 57 of NTA. Rather, as the orders disclose, the Yi-Martuwarra Ngurrara (Part A) determination will take effect immediately upon the making of a determination under s 56(1) or s 57(2) of the NTA.

Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia **[2018] FCA 275**

8 March 2018, Form of Consent Determination, Federal Court of Australia – Western Australia, North J

In this matter, North J ordered the parties to file a draft determination in accordance with the reasons for judgment. The judgement addressed the outstanding issues between the parties to the native title application brought on behalf of the Bindunbur and Jabirr Jabirr peoples: the land holding area issue, the public access and enjoyment issue and the negative determination issue. The judgement also

addressed three drafting issues relating to captured water, the relationship clause and the description of non-exclusive native title rights and interests. Finally the reasons for judgment determine a drafting issue on the description of the right to access resources and to protect places and things.

The main contest on these issues was between the Bindunbur applicants and the State. The Jabirr Jabirr applicants generally adopted the arguments put by the Bindunbur applicants, and the Commonwealth adopted the arguments put by the State.

Land Holding areas

The parties were unable to reach agreement on the boundary designations defined by reference to language identity. In broad terms, the State sought to delineate the land holding areas within the external perimeter of the area of the main claim by reference to language groups using generally straight or defined boundary lines. The reason given for that clear definition was so that /those needing to seek authority to do things on the land in the future will know whom they must contact in order to seek permission.

The Bindunbur applicants contended that the evidence did not support such delineation. Often boundaries were indefinite and, in some instances, there was country which was shared between members of different language groups. The Bindunbur applicants proposed that the areas of the land holding groups be described by reference to particular sites identified in the evidence as the sites of the group. Further, where country limits were less defined or merged, the Bindunbur applicants proposed that the area be described in the determination as being 'generally' in a particular location.

There was controversy among some members of the Bindunbur native title holding group over which language group holds rights in some particular areas. That controversy was evidenced by a copy of a letter dated 12 February 2018 sent by Mr Bruno Dann to the KLC contesting the characterisation of Winawal as shared country.

In the course of argument, a map prepared by the KLC for internal purposes came to light. It represented boundary areas in a feathered colouring reminiscent of fairy floss. That visual representation, together with a verbal description reflecting the visual representation, seems suitable to accommodate the positions of the parties as near as possible. The parties were directed by the Court to confer to create a map and words in accordance with the fairy floss concept.

Public access and enjoyment

The public access and enjoyment issue was dealt with in [633] to [645] of the reasons. The State proposed that the interest of the public to access and enjoy is to be recognised in the Bindunbur application areas as an 'other interest'. The Bindunbur applicants accepted that the public has a right to access and enjoy the

areas designated in the State draft for the purpose of exercising the common law public right to fish and to navigate. They proposed an alternative draft limited to access and enjoyment for the purpose of the exercise of those rights.

[19] The Bindunbur applicants contended that the public was able to access and enjoy the contested areas only because there was no proscription preventing such access or enjoyment. But they contended that the ability of the public to access and enjoy those coastal areas by reason of the absence of any proscription does not fall within the definition of an 'other interest'. That result, so it was argued, can be seen by reference to the consequence of an interest being recorded as an 'other interest'. The operation of the relationship clause would mean that the ability of the public to access and enjoy the coastal areas would prevail over native title rights and interests. The Bindunbur applicants argued that such an outcome was not likely to have been intended by the legislation.

North J did not accept the argument of the Bindunbur applicants stating at [20]: 'Section 253 of the *Native Title Act 1993* (Cth) (NTA) defines interest to include a privilege in connection with land or waters. The ability of the public to access and enjoy coastal areas because access is not proscribed falls within the definition of an interest because it is a privilege in relation to land and waters.' The description proposed by the State was accepted by his Honour.

The ability of the public to access and enjoy coastal areas in the Jabirr Jabirr application area requires a different description because the areas in question relate to unallocated Crown land or parts of unallocated Crown land rather than reserve areas as in the case of the Bindunbur application area. Nonetheless, the issues otherwise raised by the Jabirr Jabirr applicants in respect of their application area are the same as those raised by the Bindunbur applicants. North J found at [24] that the State's draft should also be adopted in respect of the Jabirr Jabirr application.

Negative determination issue

North J held at [34] that the argument of the State should be accepted and the determination specify that there are no native title rights and interests in the agreed areas where they have been extinguished.

Captured Water

The State sought the inclusion in the determination of a statement that there are no native title rights and interests in relation to water lawfully captured by the holders of other interests. The reason advanced by the State was that, unlike flowing water, captured water is property and capable of being owned. The act of capturing water does not permit of recognition of a right or interest in the native title holders to access, use or take that lawfully captured water. The Bindunbur and Jabirr Jabirr applicants opposed the inclusion of the subparagraph because the capturing of water is the way in which a right is exercised, not the right itself (*Akiba v The Commonwealth* [2013] HCA 33), and hence cannot constitute the relevant necessary inconsistency.

The Bindunbur and Jabirr Jabirr applicants stated that the determination should include a statement that 'the water and the activity of lawfully capturing it falls to be dealt with by reference to the relationship between the native title rights and the rights under the 'other interest' under which the water is captured. There is no extinguishment of the native title right involved in the exercise of the other interest to capture water. Either the right under which the water is lawfully captured itself extinguishes (or partially extinguishes) the native title or it doesn't.'

North J accepted the Bindunbur and Jabirr Jabirr applicants' argument and held that the determination should not contain the statement proposed by the State.

The relationship clause

The State and the Bindunbur and Jabirr Jabirr applicants proposed clauses that set out the relationship between the defined native title rights and interests and the recognised other interests in accordance with s 225(d) NTA. On this issue North J held at [44]: 'The Bindunbur and Jabirr Jabirr applicants' proposed clause should be adopted as both formulations accurately reflected the legal position.'

Non-exclusive rights and interests

[45] The State proposed that [8] of the determination include a statement that the native title rights and interests referred to in paragraphs 6(b) and 7 do not confer:

a) possession, occupation, use and enjoyment of those parts of the Determination Area on the Native Title Holders to the exclusion of all others, nor
b) a right to control the access of others to the land or waters of those parts of the Determination Area.

The Bindunbur and Jabirr Jabirr applicants argued that (b) is unnecessary and redundant. The State contended that (b) was plain and understandable, attributes which are important where the rights recognised are rights *in rem* granted in perpetuity. North J held at [47] that 'Whilst (b) does not add to the substance of (a) it does serve a purpose. It is explanatory of the practical effect of the limitations expressed in (a). Subparagraph (b) proposed by the State should be included in the determination.'

The right to access and use resources

[49] The Bindunbur and Jabirr Jabirr applicants sought the inclusion of a clause defining the non-exclusive native title right 'to access and take for any purpose the resources in [specified areas].' The State proposed a form of the clause which would delete the words 'for any purpose' and add the word 'natural' before the word 'resources'. The debate centred on the evidence concerning the traditional laws and customs concerning the prohibition on the waste of resources.

[52] The State argued that the evidence demonstrated that resources could not be used for the purpose of waste. The Bindunbur and Jabirr Jabirr applicants' formulation would permit such a use because it allows for the use of resources for all purposes including for the purpose of wasting them. The expression 'for any

purpose' is so wide that it allows for a right which exceeds the right found in the traditional laws and customs. Traditional laws and customs do not permit resources to be used for the purpose of wasting them. [53] The Bindunbur and Jabirr Jabirr applicants contended that the prohibition on waste under traditional laws and customs was a restriction on the manner of the exercise of the right to use resources. It was not a qualification on the right itself. The evidence, so it was argued, was that the right to access resources was untrammelled.

North J considered at [54] that 'The formulation proposed by the Bindunbur and Jabirr Jabirr applicants has been used in a number of recent determinations, namely, *Akiba v Queensland* [2010] FCA 643*, Pilki v Western Australia (No 2)* [2014] FCA 1293*,Birriliburu v State of Western Australia* [2016] FCA 671, *Rrumburriya Borroloola Claim Group v Northern Territory (No 2)* [2016] FCA 776*.* There is value in adopting a consistent approach to the drafting of the terms of determinations where the evidence justifies the formulation proposed.'

[55] 'Further, the articulation of the right must be read with the provision in the determination that the native title rights and interests must be exercised in accordance with traditional laws and customs. That provision would limit the exercise of the right by prohibiting waste whilst at the same time allowing the terms proposed by the Bindunbur and Jabirr Jabirr applicants to reflect the untrammelled right to access the resources.'

North J held that: [56] 'In the present case the evidence supports the draft proposed by the Bindunbur and Jabirr Jabirr applicants and that formulation should be adopted.'[57] Further, the State has not made out grounds for limiting the resources concerned to natural resources.

The right to protect places, areas and things of traditional significance

[58] The Bindunbur and Jabirr Jabirr applicants sought to express non-exclusive native title rights and interests 'to protect places, areas and things of traditional significance'. The State sought to replace 'areas and things' with 'sites'. [60] The State argued that using the word 'sites' was clearer than the reference to areas. The State further contended that it is unclear whether there is a distinction between places and areas. It further argued that the reference to things should be deleted because the word 'things' is unclear and may refer to something more than a right or interest in relation to land or waters contrary to s 223(1) of the NTA.

[61] The Bindunbur and Jabirr Jabirr applicants contended that the things referred to are things of traditional significance in the determination area where non-exclusive native title exists. In other words, the word must be read in the context of the clause as a whole. It is unlikely that protecting such things would not be a right in relation to land. The Bindunbur and Jabirr Jabirr applicants contended that the reference to sites has an ambiguity which the reference to areas does not have. Further, there is no reason why place and area should not be used together even if they have some overlapping meaning.

[62] In the *Birriliburu*, *Borroloola*, and *Wiluna* determinations, the right to protect was expressed to apply to places and areas. In the in the *Yilka* and *Narrier* determinations the right to protect was expressed to apply to places alone.

North J considered at [63] that 'There is a useful distinction between places and areas used in the context of a native title determination. A place suggests something more confined than an area. A site suggests perhaps a yet more confined area. In the end, whilst there is little to argue about, the preferable wording is places and areas as proposed by the Bindunbur and Jabirr Jabirr applicants. Sites have not been used in the recent determinations referred to above, and is probably somewhat too confining to reflect the nature of the likely locations intended to be included.'

[64] 'Things of traditional significance is a formulation that was recently used in the *Borroloola* determination. In the *Yilka* determination the reference was to objects of significance. The argument of the Bindunbur and Jabirr Jabirr applicants that the reference to things read in context properly signifies the necessary relationship with land should be accepted.'

North J found at [65] that the clause reflecting the right to protect proposed by the Bindunbur and Jabirr Jabirr applicants should be adopted.

Weribone on behalf of the Mandandanji People v State of Queensland **[2018] FCA 275**

7 March 2018, Consent Negative Determination, Federal Court of Australia – Queensland, Rares J

In this matter, Rares J made a negative determination of native title in accordance with an agreement between the applicant, the State and the other respondents, pursuant to s 87(1) of the *Native Title Act 1993* (Cth) (NTA). The application brought on behalf of the Mandandanji people commenced in 2008. The respondents are the State of Queensland, Balonne Shire Council, Maranoa Regional Council, Western Downs Regional Council, several energy supply and mining companies, and pastoralists.

[5] Rares J relied on *CG v Western Australia* [2016] FCAFC 67 [65]-[66], where North, Mansfield, Jagot and Mortimer JJ (with whom Reeves J agreed at 487 [85]) held that the Court had power under the Act to make a negative determination of native title in appropriate circumstances if, and after careful consideration, it is satisfied on the balance of probabilities that no native title rights or interests exist in relation to the particular area.

Background

[6] 'This is the fourth proceeding in which persons who identify themselves as Mandandanji have sought a determination of native title in respect of some or all of the claim area. The first was filed in September 1997 and was subsequently

withdrawn, and the second, filed in October 1997 ultimately, was dismissed. The third filed in June 2001 was also dismissed. Each of those three claims covered almost all of the claim area in this proceeding. Jesse Land, one of the solicitors acting for the applicant, affirmed in his affidavit of 21 February 2018 that he had not been able to locate any application for the first of those 1997 claims. He said that the second of the 1997 claims identified the apical ancestors of the claim group as being Nellie Edwards, William Combarngo, Weribone Jack and Mary Jaylor. It is not clear whether Mary Jaylor was also known as Mary Weribone or was a different person. The only two apical ancestors for the third (2001) claim, were Weribone Jack (Snr) and William Combarngo.

[7] There were also other claims by the Bidjara, Western Wakka Wakka and Barunggam peoples made in 1997, 1999 and 1999 that overlapped relatively small parts of the claim area in the west and the east. The Bidjara people's claim was withdrawn in 1997. The Western Wakka Wakka people's claim was struck out in 2007, while the Barunggam people's claim was dismissed on 5 August 2008. There have also been nine claims in respect of areas that surround the claim area, some of which have resulted in determinations of native title.'

[8] Rares J made case management orders on 18 December 2015 and 27 June 2016, to prepare the proceeding for a contested final hearing to commence in Roma in June 2017. The parties, particularly the applicant and the State, prepared detailed evidence for that hearing. This evidence included:

- statements of evidence by 18 lay witnesses;
- expert anthropological reports filed by each of the applicant (Dr John Morton) and the State (Dr Sandra Pannell) that led to them making a joint report dated 9 November 2016;
- detailed tenure research by the State; and
- an agreed statement of facts dated 5 April 2017 filed pursuant to s 87(8).

[9] The joint report disclosed that the experts disagreed about whether the apical ancestors and other claim group descriptors on which the applicant relied established that the claim group was descended from the persons who held native title rights and interests in relation to the land and waters in the claimed area, and whether the claim group acknowledged and observed the traditional laws and customs of those earlier inhabitants. [10] The agreed statement of facts identified that native title had been extinguished in all but about 5% or 6% of the claim area, or 485 of 9,350 parcels located wholly or partially within it. Those 485 parcels had a total land area of about 115,000 hectares.

[11] In her affidavit affirmed on 24 May 2017 the applicant's solicitor, Wati Qalotaki said that she received advice from senior counsel for the applicant on 3 May 2017. He had been briefed to review and provide advice upon the totality of the evidence that the applicant had filed, including Dr Morton's reports. [12] In May 2017, Ms Qalotaki provided advice to members of the applicant about the evidence and

options for disposition of the proceeding. The applicant instructed her at that meeting that the applicant did not wish to proceed to the contested final hearing and sought, instead, the present outcome. [13] In May 2017, the native title claim group met with Ms Qalotaki at the Explorers Inn at Roma. The meeting confirmed that the applicant should not proceed with its application and, instead, should seek the present consent determination that native title does not exist over the claim area. Ms Qalotaki explained that the applicant had instructed her to proceed on this course both before and after the claim group meeting.

[15] Peter Hutchison is the acting director, claim resolution of Aboriginal and Torres Strait Islander Land Services in the Department of Natural Resources, Mines and Energy, the lead agency of the State that deals with native title matters. Mr Hutchison said that the State received a letter dated 11 May 2017 from Ms Qalotaki. That revealed that the applicant's senior counsel had advised that, taking account of the whole of the evidence, including that recently obtained, the claim had only limited prospects of success and, when considered with the very limited portions of the claim area where native title could possibly be recognised, those prospects were insufficient to justify proceeding to what would doubtless be a lengthy and expensive contested hearing. [16] Following the State's receipt of this letter and the 20 May 2017 meeting of the claim group, Mr Hutchison said that the State agreed to vacating the orders for the trial and to negotiate towards an agreement pursuant to s 87 NTA under which the parties would seek a negative determination.

Is the proposed determination appropriate?

[17] Experienced senior and junior counsel for each of the applicant and the State made detailed written submissions in support of the proposed consent negative determination. Rares J considered those submissions and was satisfied that they addressed a proper basis on which the Court may act under s 87 NTA.

Rares J stated at [18]: 'The State has a particularly significant role to play in proceedings under ss 87 and 87A because of its position as an institution of government that has responsibility for protecting the public interest: *Munn (for and on behalf of the Gunggari People) v Queensland* (2001) 115 FCR 109 at 115 [28]-[30] per Emmett J. The discretion created by s 87(2) to make an order in, or consistent with, the terms of that agreed by the parties, must be exercised judicially, on the basis that it must appear to the Court that it is appropriate to do so, as s 87(1A) provides.'

[20] A relevant consideration in assessing the appropriateness of making a consent determination under s 87 is the overarching purpose of the civil practice and procedure provisions as provided in ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth). Relevantly, s 37N(1) imposes a duty on the parties to conduct the proceeding, including negotiations for settlement, such as the present, that has culminated in an agreement under s 87 of the Act, in a way that is consistent with that overarching purpose: *Oil Basins Ltd v Watson* [2014] FCAFC

154 at [145] per Siopis, McKerracher and Barker JJ. I am satisfied that the parties have acted in accordance with s 37N in arriving at the s 87 agreement.

Consideration

His Honour found at [21]: 'The applicant and the State have given substantive consideration, with the benefit of advice from experienced senior counsel, solicitors and expert anthropologists, before taking the decision to seek the negative determination sought. That was done very soon before the trial was to commence and it was a decision that both the applicant and the native title claim group endorsed with the benefit of the advice of the applicants' senior counsel and Ms Qalotaki. Thus, in May 2017, when the applicant and the claim group decided not to pursue a contested determination of native title they did so in the knowledge that, first, only a small portion of the claim area, consisting of disparate parcels, could be found to be land and waters in relation to which native title rights and interests could still exist, and, secondly, there was a significant difference in the experts' evidence as to whether the applicant could prove that the claim group had any native title rights or interests at all.'

[22] Rares J observed that the agreement for a negative determination was appropriate. His Honour had regard to the matters set out above and in particular to the significant differences between the expert anthropologists, the relatively small portions of scattered land and waters (albeit, in total over 115,000 hectares) in respect of which native title could be found to exist, the complexity, personal stress on many lay witnesses, the expense of a contested trial and the opinions of the applicant's senior counsel as to the applicant's prospects of success on the available evidence. His Honour also had regard to the fact that the State has agreed to the making of the negative determination.

His Honour made the following observations at [23]:

Both the applicant's and the State's written submissions noted, the parties' s 87 agreement is not underpinned by, or associated with, an indigenous land use agreement in favour of the claim group. Had there been such an outcome, it may have provided the claim group with a potential benefit, apart from the finality it will obtain by the resolution of this proceeding. However desirable the provision of such an indigenous land use agreement may seem in theory, the end result of the negotiations between the parties, who have had competent legal and other expert advice, is the s 87 agreement as it is. The Court was satisfied having regard to the substantive disparity of the experts' views in the joint report, that there was nothing in the circumstances to suggest that it was necessary for there to be an indigenous land use agreement to underpin the parties' agreement or that the terms of the s 87 agreement are other than an appropriate resolution.

His Honour further observed at [24]:

> There can be little doubt that the claim group will regard the negative determination as, to say the least, a real disappointment. One of the

> consequences of the interactions between Australia's indigenous peoples and the early European settlers, together with their governments (Colonial, Federal and State), was the significant interruption of both the indigenous people's presence on their traditional land and waters and their relationships within their original social structures. As each of those separations lengthened, the capacity of some indigenous societies to acknowledge, retain and observe their traditional laws and customs was sometimes weakened and, on occasion (as appears to have happened here), disrupted to the point where it has disappeared.

[26] The Court was satisfied that it was unlikely that any other claim group exists that could make a case for a positive determination in respect of the limited portions in the claim area that have not experienced acts of extinguishment of native title. Accordingly the Court was satisfied that there is no approved determination of native title or other extant application for such a determination in relation to all or any part of the claim area.

His Honour concluded at [27]: 'The negative determination that the parties have agreed is appropriate. That is because it will provide substantial certainty as to the land title status to all persons, including the State, with legal or equitable interests in the land and waters in the claim area. That certainty, as is the case in respect of all consent and final determinations of native title is, of course, subject to the possibility of a future application for a variation or revocation of that determination made under s 13(1)(b), if events subsequently occur that cause the determination no longer to be correct or the interests of justice require its variation or revocation (s 13(5)).'

Rares J concluded at [28] by stating that 'There is a real public benefit in finality of litigation and in the Court giving the public and the parties' certainty in respect of rights to, and interests in, real property.'

Starkey on behalf of the Kokatha People v State of South Australia **[2018] FCAFC 36**

16 March 2018, Appeal, Federal Court of Australia – Full Court, South Australia, Reeves, Jagot and White JJ

In this judgment Reeves and White JJ dismissed all three appeals with respect to the area known as Lake Torrens (SAD249/2016, SAD250/2016 and SAD251/2016). Jagot J allowed all three appeals.

Reeves J

[1] Lake Torrens is the second largest salt lake in Australia. It is situated in the mid-north of South Australia. As the primary judge, Mansfield J recorded in the introductory section to his reasons for judgment (*Lake Torrens Overlap Proceedings (No 3)* [2016] FCA 899) (the Reasons), the surface of the Lake is 'unsuited to long-

term occupation, save for Andamooka Island', an island 'which protrudes into the western side of the lake [and is] accessible by a causeway from the west' (at [2] and [3]).

[2] Lake Torrens is the central object of the three appeals filed by each of the Kokatha People, the Adnyamathanha People and the Barngarla People. Before the primary judge, each of the three appellants made a competing and entirely overlapping native title claim to the land and waters comprising Lake Torrens. At the time of the trial, each of the claimant groups had already achieved a consent determination of native title in its favour under s 87(1) of the *Native Title Act 1993* (Cth) (NTA) over a separate area of the shores and surrounding land of Lake Torrens.
To the west and contiguous with the western shore of Lake Torrens, the claim area abuts the area recognised as the native title lands of the Kokatha Uwankara People: *Starkey v State of South Australia* [2014] FCA 924 (*Kokatha Part A*). To the east and contiguous with the eastern shore of Lake Torrens, the claim area abuts the area recognised as the native title lands of the Adnyamathanha People: *Adnyamathanha No 1 Native Title Claim Group v South Australia (No 2)* [2009] FCA 359 (*Adnyamathanha No 1*). Separating the *Kokatha Part A* determination area from the *Adnyamathanha No 1* determination area at the northern tip of Lake Torrens is a narrow strip of land (approximately 200 m wide at the shoreline) determined to be the southern part of the native title lands of the Arabana people: *Dodd v State of South Australia* [2012] FCA 519. Separating the *Kokatha Part A* determination area from the *Adnyamathanha No 1* determination area at the south-eastern part of Lake Torrens is approximately 6 km of shoreline which forms the northern part of lands determined to be the native title lands of the Barngarla People: *Croft v State of South Australia* [2015] FCA 9 (*Barngarla*)*; Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia (No 2)* [2016] FCA 724 (*Barngarla No 2*).

The decision at first instance

[4] All three appellants failed in their claims before the primary judge. With respect to the Kokatha appellants, Mansfield J found that it was because their claimed rights and interests were contemporary in origin, rather than traditional, and they did not therefore meet the requirements of s 223(1) (b) of the NTA (at [4]). [5] With respect to the Adnyamathanha appellants (also referred to in the Reasons as the Kuyani People), his Honour concluded that they had not established a continual substantially uninterrupted connection with the claim area under whatever traditional laws and customs they held with respect to that area at sovereignty.(at [772].) [6] Finally, for similar reasons as for the Adnyamathanha appellants, but with greater concerns about the credibility of their evidence, his Honour was not satisfied with the claims of the Barngarla appellants.

[7] The primary judge remarked on the 'counter-intuitive' nature of these conclusions in the immediately succeeding paragraph of his Reasons. There, his Honour

contrasted the anthropological opinion about the likelihood that Lake Torrens 'would have been subject to traditional rights and interests by an Aboriginal society, or societies, at sovereignty and that it is likely that members of country groups closest to Lake Torrens would likely have had stronger rights and interests in the nearby portions of the Lake, its islands and springs, than others' (at [207]) with the 'contemporary significant and credible spiritual connection' (at [774]) each of the appellants presently had to parts of Lake Torrens. Nonetheless, he concluded each had failed to meet the requirements of s 223(1) of the NTA.

The review role of the Full Court

[8] In their separate notices of appeal, the Kokatha appellants and the Adnyamathanha appellants raised eight grounds of appeal and the notice is set out at paragraphs [8] and [9] respectively of the judgment. The Barngarla appellants raised seven grounds of appeal and their notice of appeal is set out at [10].

Reeves J set out the Court's review role in the appeals. The appellants had contended that the principles established by the majority in *Warren v Coombes* (1979) 142 CLR 531 at 551–553 applied. Specifically, they contended that the Court 'is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge' (at [11]).

[13] The State was the main respondent in each of these appeals. It pointed to the three existing consent determinations of native title described above and agreed that this Court was in as good a position as the primary judge to draw inferences from those determinations. Nonetheless, with respect to most of the Kokatha appellants' grounds of appeal (1, 2, 2A, 3, 4(a), 5 and 6) and some of the grounds of appeal of the Adnyamathanha appellants (1 and 4) and the Barngarla appellants (1, 5, 6 and 7), the State contended that the challenges concerned sought to overturn the facts as found by the primary judge, or to contest his Honour's unwillingness to make positive findings of fact. It followed that, to succeed in those challenges, the appellant concerned would need to show that the findings in question were of the kind described in *Fox v Percy [2003] HCA 22* at [28]–[29] and *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22 (*Robinson Helicopter*) at [43].

[14] Furthermore, the State took particular issue with the Kokatha appellants on the question of the primary judge's advantage. It contended that, in hearing these three native title claims, the primary judge had a unique advantage over the appeal Court, as explained most recently by the five member Full Court in *Banjima People v Western Australia* [2015] FCAFC 84 (*Banjima*) at [57]–[77].

[15] Reeves J found that the State accurately described the review role of the Court in the particular circumstances that gave rise to these three appeals. [16] His Honour also noted that these appeals proceeded by way of rehearing (s 27 of the *Federal Court of Australia Act 1976* (Cth) and *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17 at [75], [128]). [17] Ordinarily, in an appeal by

way of rehearing, the Court's power to interfere with the decision at first instance is exercisable only if it is satisfied that there is error apparent on the part of the primary judge (see *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47 at [14]). Nonetheless, in an appeal by way of rehearing, this Court is obliged to:

- conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons' and 'to determine whether the judge has erred in fact or law' (*Fox v Percy* at [25] and *Robinson Helicopter* at [43] respectively)';
- 'give the judgment which in its opinion ought to have been given in the first instance' or, to '… make its own findings of fact and to formulate its own reasoning based on those findings' (*Fox v Percy* at [23] and *Robinson Helicopter* at [43] respectively);
- draw its own inferences 'from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge' (*Fox v Percy* at [25] citing *Warren v Coombes* at 551).

[18] Those principles are qualified when the error in contention concerns the primary judge's findings of fact. The Full Court should not interfere with findings of that kind 'unless they are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or they are 'glaringly improbable' or 'contrary to compelling inferences'.

[19] His Honour noted that the reliance on the trial record places some 'natural limitations' on the Court sitting as an appellate court. They included: 'the disadvantage that the appellate court has when compared with the [primary] judge in respect of the evaluation of witnesses' credibility and the fact that 'the appellate court does not typically get taken to, or read, all of the evidence taken at the trial'. [20] It follows that, where an appellate court is called on to consider an error concerning findings of fact, it has to 'resolve the dichotomy' between its obligations to conduct a 'real review' as mentioned above and the need for it to respect the advantages held by the primary judge. Reeves J also noted the 'significant advantage' of the trial judge in having heard substantial evidence on country, including the secret aspects taken during closed sessions at trial [28].

Reeves J summarised the applicable principles at [31]: 'where the alleged error relates to the primary judge's factual findings, it requires the appellant concerned to establish that the findings in question are "wrong by incontrovertible facts or uncontested testimony" or are wrong because they are "glaringly improbable" or are contrary to "compelling inferences". Furthermore, where the alleged error involves inferences which the appellant claims were wrongly **not** drawn, as is the case with all of these appeals, it requires this Court to ensure that, before it draws that inference, it is truly based upon undisputed facts and/or facts that are positively established in the Reasons and it requires this Court to be satisfied that inference is compelling such that the primary judge was wrong not to draw it.' [emphasis in original]

Kokotha's grounds for appeal

[62] The primary judge concluded at [713] of the Reasons that 'it is not possible, on the evidence, to be satisfied that the Kokatha People had extended their country under their traditional laws and customs into the area east of that western boundary of that determination at the time of sovereignty'. [73] Reeves J agreed, concluding that 'the deficiency in the Kokatha appellants' case on connection was that their lay evidence did not "take Kokatha occupation or connection to [Lake Torrens] anywhere near sovereignty."'

Ground 1 – not drawing an inference

[75] The first ground of appeal asserted both that the primary judge erred because he came to the conclusion that the Kokatha appellants did not possess native title rights and interests in any part of the claim area and because he did not come to the conclusion that they did possess such rights and interests in that area. The particulars rely upon approximately 40 paragraphs of the Reasons predominantly selected from the sections where his Honour reviewed the evidence of the Kokatha appellants' lay witnesses.

[81] Reeves J found that the appellants failed on both criteria for two reasons:

> First, on the need for a proper factual foundation, they cannot point to a sufficient body of "positive proved facts" from which an inference can be drawn that they hold native title rights and interests over Lake Torrens. Secondly, in the circumstances of these three competing claims, with each claimant advancing a similar conflicting inference of approximately equal probability, no inference can be drawn in favour of any one of them.

[85] Further, his Honour considered 'nothing has been advanced by the Kokatha appellants to show why his Honour was wrong in any of this reasoning. That is, no attempt has been made to show that, notwithstanding this reasoning, the inference they sought to have drawn was so well supported by positive proved facts, and so compelling as to its probabilities that his Honour should have drawn it'.

Grounds 2 and 3 – the very significant objects

[89] The Kokatha appellants' ground of appeal 2 concerns 'the very significant objects' shown to the primary judge during the restricted men's evidence session on Andamooka Island. They claim that his Honour erred in finding that none of those objects was 'specific to either the Lake generally or to Andamooka Island'. [92] Reeves J observed that 'while it is difficult to determine what his Honour meant by the words "specific to either the Lake generally or to Andamooka Island", given all the unambiguous statements I have referred to above and having regard to the advantage he possessed, I am not willing to conclude the former statement is reflective of appealable error on the part of the primary judge.'

Grounds 2A and 3 – the Kokatha Tjukurpa and Crombie Ridge

[93] This ground concerned the '*Angarta*, *Urumbulla* and *Wanampi* (sic – *Wanambi*) stories' with respect to which the primary judge is alleged to have erred at [609] of the Reasons. According to the Kokatha appellants, the primary judge stated in that paragraph that the stories in question 'were mentioned only in passing by Michael Starkey and there was no evidence given describing how those stories related to the claim area.' [114] Reeves J did not consider these grounds to have any merit.

Ground 4 – the 1980s ethnographic surveys

[115] In this ground of appeal, the Kokatha appellants disputed the primary judge's conclusions at [341] and [724] about the absence of any support for their claim with respect to the claim area in the ethnographic surveys 'until the relatively recent past.'

[152] Reeves J did not consider that his Honour's treatment of the 1980s reports by Vachon, Hagen, Fitzpatrick and Gara, or the contents of those reports as particularised by the Kokatha appellants, provided any support for any of the errors raised under this ground of appeal. His Honour was not willing to infer that the primary judge had not considered the Fitzpatrick and Gara 1984 report at [276]–[345] of the Reasons. Even if Mansfield J had not done so, Reeves J did not consider that it would have made any difference to the outcome to the Kokatha appellants' claim such that it constitutes an appealable error.

The Kokatha appellant also contended that the primary judge erred by failing to consider whether there may have been cultural reasons why particular information about Kokatha interests in Lake Torrens did not emerge from some of the ethnographic surveys carried out in the 1980s. Reeves J found that the primary judge had acknowledged the potential impact of secrecy at [355], and agreed with his Honour that 'if secrecy and danger explain why there is a dearth of mention of such records in the 1980s, that does not provide the Kokatha appellants with the positive evidence they need to establish the necessary connection to the Lake Torrens claim area' (at [156]).

Ground 5 of appeal –Drs Vachon and Hagen and the Kokotha stories relating to Lake Torrens

[159] The appellant alleged that the statements made by the primary judge in [719] of the Reasons regarding the absence of Kokatha or Western Desert stories relating to Lake Torrens itself are contrary to the evidence of Drs Vachon and Hagen. Having regard to the observations his Honour made about how the Court should approach the primary judge's advantage in these appeals, Reeves J was not willing to conclude that the contents of that paragraph demonstrate an appealable error.

Ground 6 – Dr Gara and the Kokotha's sites on Andamooka Island

[160] Ground of appeal 6 alleges error in [325] of the Reasons where the primary judge stated that 'if there were significant sites on or immediately adjacent to Lake Torrens, there is no reason why they would not have been identified.' [163] Reeves J

considered this ground unmeritorious for the same reasons as provided above with respect to particular (b) in ground of appeal 4 (see at [155]–[157]).

Ground 7 – a catchall ground

[164] Reeves J found that this this ground of appeal is a catchall ground which does not require separate consideration. It falls with all of the other unmeritorious grounds above.

[167] Reeves J found that for the reasons set out above, none of the Kokatha appellants' grounds of appeal had any merit and their notice of appeal must therefore be dismissed.

Adnyamathanha's grounds for appeal

[168] The Adnyamathanha appellants alleged that the primary judge made the following errors:

- various errors with respect to connection – grounds 1, 2.1 to 2.3 and 3 to 4;
- misuses of the prior consent determinations – grounds 5 and 6;
- errors on particular evidentiary matters – ground 7;
- the failure to make a ruling under s 86 – ground 2.4; and
- the rejection of the shared claim with the Barngarla appellants – ground 8.

[171] Except to the extent that the effect of the three consent determinations are considered under grounds of appeal 5 and 6 above, his Honour found it unnecessary to consider the s 86 issue as a separate issue in the appeals. [173] The shared claim issue raised by ground of appeal 8 relied upon the Adnyamathanha appellants and/or the Barngarla appellants succeeding in their appeals and, because of Reeves J's conclusion that all of these appeals must fail, it was unnecessary to consider that issue.

Accordingly, in considering the grounds raised by the Adnyamathanha appellants' notice of appeal, Reeves J dealt with the three alleged core errors set out in their notice of appeal and then turned to consider the various evidentiary-related errors that are mentioned in the notice. In the latter, Reeves J also included the other evidentiary-related errors mentioned in the Adnyamathanha appellants' submissions, but not specifically covered by their grounds of appeal.

Error (a): no requirement for occupation or physical connection

[184] In this first core error, the Adnyamathanha appellants alleged that the primary judge focused on the 'occupation or use of Lake Torrens', in the sense of physical presence on, or use, and thereby applied the wrong test for connection under s 223(1) of the NTA. In support of this contention, they provided a list of approximately 20 usages in the Reasons of the expression 'occupation', some of which they conceded were not reflective of error. However, they claimed that when the whole of the usage of that expression is considered, the identified error emerges from the Reasons. [185] Reeves J did not accept this contention. In his Honour's view, it was abundantly clear from the Reasons that Mansfield J was well aware that occupation

or use for the purposes of s 223(1) of the NTA did not involve western legal concepts of the physical presence, or the use or possession of land, but rather occupation, use, or possession according to the traditional laws and customs of the Aboriginal or Torres Strait Islander Peoples concerned.

Error (b): misuse of the consent determinations

[188] In this second core error, the Adnyamathanha appellants claimed that Mansfield J had misused 'inferences arising from the prior consent determinations as a "filter" or "yardstick" against which to assess, weigh and reject evidence'.

[190] In their submissions, the Adnyamathanha appellants submitted that the three consent determinations described at [4] and [8]–[10] of the Reasons were conclusive as to which groups now hold certain native title rights and interests in the determined areas, but they are not conclusive as to why those groups hold those rights and interests. Nonetheless, they sought to emphasise that they did not seek any findings at the trial 'which were necessarily inconsistent with' those three determinations.

Further, they submitted that a judgment *in rem* 'is only a basis for drawing inferences, or finding further facts, which flow from the determination itself (rather than facts or findings assumed to underpin the determination)'. Noting that the primary judge had ruled at [54], [57], [171], [364], [479] and [743] that no weight would be given to any lay or expert evidence that was inconsistent with those three determinations, they contended that Mansfield J had erred in making and applying those rulings. In particular, they contended that the primary judge was 'wrong to rule (at [192]) that it was "a determined fact" that the Kokatha People *occupied* the area immediately west of the claim area at Sovereignty'.

They also contended that the primary judge was wrong at [194] and [203]–[340] 'to prefer his own analysis of the ethno-historic record … to the opinions of Mr Ellis, Prof Sutton and Dr Fergie et al'. They further contended that the primary judge was wrong at [205], [235], [250], [274] and [315] to 'filter' those materials by reference to the prior determinations and to 'disregard or de-weight' those parts of them that did not support *Kokatha Part A*.

Finally, with respect to the *Kokatha Part A* determination, they expressly acknowledged that an inference necessarily arose that 'at some point prior to that determination, [they] ceased to hold [native title rights and interests] in any part of the Kokatha determination area'. They added 'one may infer this occurred in 2014'.

[191] The Barngarla appellants made submissions to similar effect. They contended that the Mansfield J had erred in failing to attempt to reconcile the three consent determinations, including the *Kokatha Part A* determination, with the evidence before him, particularly the expert and historical evidence.

[201] Reeves J found that the Adnyamathanha appellants were wrong in their contention that the three consent determinations and, in particular, the *Kokatha Part A* determination, were not conclusive as to why the Kokatha People hold the native

title rights and interests they do in the *Kokatha Part A* determination area. [202] Reeves J found that this conclusion had adverse consequences for two other contentions the Adnyamathanha appellants made in these appeals. First, as his Honour explained when setting out the principles concerning the connection inquiry above in order to obtain the *Kokatha Part A* determination, the Kokatha People also had to establish that the acknowledgement and observance of their traditional laws and customs which gave rise to their rights and interests in that determination area had continued, substantially uninterrupted, and their connection with that area under those laws and customs had been substantially maintained, since sovereignty. This continuity of observance and connection was therefore fundamental to their rights and interests in that area.

Accordingly, Reeves J considered that it follows that the *Kokatha Part A* determination also determined as a fundamental matter, once and for all, that the Kokatha People's native title rights and interests in that area held that intrinsic continuity element: 'That is to say, those rights and interests did not come into existence as a consequence of, and from, the *Kokatha Part A* determination. Rather, that determination recognised as a fundamental matter that those rights and interests had existed continually in that form at all times in the past to at least sovereignty.'

Reeves J found that the Adnyamathanha appellants were wrong in their contention that the *Kokatha Part A* determination was only conclusive as to the native title rights and interests that the Kokatha People now hold in that area, or at least they have held since it was made in 2014. [203] Secondly, Reeves J's analysis explains why the Adnyamathanha appellants were also wrong in their contention that the native title rights and interests they purportedly held in the *Kokatha Part A* determination area inferentially ceased in 2014 at about the time the *Kokatha Part A* determination was made.

[204] Reeves J did not consider that the primary judge committed any error in any of the rulings concerning the effect of the consent determinations and, in particular, with respect to the *Kokatha Part A* determination. Reeves J found that Mansfield J was correct in ruling that those determinations determined that the three peoples concerned held (and hold) the traditional rights and interests described in them with respect to the area to which they related at sovereignty and at all times since then. [205] 'It was a matter for his Honour to decide how he proceeded to conduct that review. Choosing to do his own analysis of the evidence was a course that was properly open to him and it certainly does not demonstrate error.'

[209] Reeves J found no validity in any of the Adnyamathanha appellants' complaints about his Mansfield J's review of the Historical and Early Ethnographic Evidence with his Honour adding that he did not consider that Mansfield J engaged in any 'filtering' of that evidence in any way indicative of error on his part. [211] Reeves J did not consider that any of these statements are inconsistent with Mansfield J's rulings or that they demonstrated any error on his part.

[214] Reeves J did not consider that the contents of [315] are indicative of any error on Mansfield J's part adding that 'the observation at [331] regarding the map in the *Encyclopaedia of Aboriginal Australia* edited by Horton in 1994 is in the same category. It accurately applies the rulings and is otherwise adverse to the Kokatha appellants' claims.'

[216] Reeves J found that the rulings made by Mansfield J made in his review of all this evidence had to be considered in the light of the Adnyamathanha appellants' and Barngarla appellants' positions before Mansfield J at trial, namely that the Kokatha appellants did not have traditional rights and interests to the land immediately to the west of Lake Torrens. On that assumption, Reeves J considered that all of these comments are entirely consistent with his Honour's rulings. 'Even if this assumption were not adopted and these comments are considered in light of the Adnyamathanha appellants' position in these appeals, that they held traditional rights and interests in the land immediately to the west of Lake Torrens prior to 2014, such that those traditional rights and interests should be taken into account in determining their claim to Lake Torrens, for the reasons I have expressed above I do not consider that contention is valid or correct' (at [216]). On either approach, Reeves J did not therefore consider that the comments Mansfield J made in this paragraph evidence any error.

Reeves J found at [219] that:

> His Honour's comments in the paragraphs above were consistent with the fundamental premise of the *Kokatha Part A* determination which Mansfield J identified when making his rulings. The position may have been different if the effect of this evidence was not to mount a direct challenge to the *Kokatha Part A* determination. The difference may be subtle, but his Honour was in the best, perhaps the only, position to assess the effect of this evidence and whether the Adnyamathanha appellants and the Barngarla appellants were attempting to use it for a proper, or an improper, purpose.

Reeves J did not consider that Mansfield J as the primary judge erred in applying his rulings in any of these paragraphs.

[227] Reeves J considered that the appeal Court should defer to the considerable advantage the primary judge possessed and accept that Mansfield J properly used it. Reeves J therefore rejected the Adnyamathanha appellants' contention that the contents of this paragraph show that his Honour erred by misapplying his rulings.

[228] The other concerns the Adnyamathanha appellants had about Mansfield J's review of the lay evidence related to four paragraphs in the evidence of some of the Barngarla appellants' lay witnesses. For the reasons Reeves J expressed above his Honour did not consider the appeal Court was in a position to gainsay the considerable advantage that the primary judge had in making that assessment. Reeves J therefore did not consider the contents of any of those paragraphs show that his Honour erred by misapplying his rulings.

[231] Finally, for the reasons Reeves J explained above, his Honour considered that all of the references to the *Kokatha Part A* determination (and all three consent determinations in the case of [763]) in [742]–[744], [758] and [762]–[763] accurately described the effect of a consent determination and/or the *Kokatha Part A* determination in particular. [232] His Honour found that accordingly, none of the paragraphs in the final Consideration section of the Reasons about which the Adnyamathanha appellants complained shows any error by his Honour misapplying his rulings, or in misusing the effect of the *Kokatha Part A* determination or the three consent determinations generally.

[233] For these reasons, Reeves J did not consider there was any merit in the Adnyamathanha appellants' second core error.

Error (c): failing to draw an inference

[235] Reeves J earlier dealt with this issue in considering the similar ground of appeal raised by the Kokatha appellants with respect to these paragraphs of the Reasons above. For the reasons there expressed, Reeves J did not consider that Mansfield J erred in refusing to draw an inference in favour of the Adnyamathanha appellants, or indeed any of the other appellants. Reeves J found that Mansfield J's conclusions on that issue were entirely consistent with the established principles his Honour there outlined.

For those reasons, Reeves J rejected the Adnyamathanha appellants' third core error as unmeritorious.

Other errors

[238] Reeves J did not consider any of the Adnyamathanha appellants' challenges to the factual findings in the Reasons had any merit. His Honour held that this aspect of their appeal, didn't demonstrate any other error on the part of the primary judge.

[239] For the reasons set out above, Reeves J held that none of the Adnyamathanha appellants' grounds of appeal, or core errors, had any merit and their notice of appeal must therefore be dismissed

The Barngarla Appellant's appeal

[251] His Honour found that from the summary of the dispositive reasoning in the final Consideration section of the Reasons, it could be seen that the Barngarla appellants failed on the evidence to establish a factual foundation for their claim. That was so because, as Mansfield J found, their claim was bereft of credible supporting evidence. He variously described their evidence as 'impoverished', 'not persuasive', 'inconsistent', 'speculative" and 'somewhat indecisive' (see [759] and [763]). While Mansfield J found the witnesses who gave this evidence were truthful, that does not detract from the findings he made about its credibility. Reeves J stated at [251] that 'It is trite to observe that even truthful witnesses can give evidence that is unreliable or lacking in credibility.'

Barngarla appellants' grounds of appeal

[254] His Honour dealt with grounds 2 and 3 of the Barngarla appeal relating to the misuse of the consent determinations when dealing with the similar issue raised by the Adnyamathanha appellants. Reeves J disposed of the inference issue raised by ground of appeal 2(b) when considering the similar issue raised by the Kokatha appellants above.

His Honour stated at [252] that:

> Putting aside the two matters which I have dealt with separately below, as to the balance of their grounds of appeal, in essence they are confined to challenging findings his Honour made which were, in my view, to a substantial degree based upon the credibility of their witnesses. In this respect, it is important to record that the decision in *Warren v Coombes*, upon which the Barngarla appellants placed reliance, does not stand for the proposition that this Court can simply ignore those credibility findings and set about drawing inferences from facts which they carefully selected from the Reasons.

[254] In the final Consideration section of the Reasons where his Honour explained why he rejected the Barngarla appellants' claims, Reeves J found that Mansfield J had in his view, more than adequately explained why he came to that conclusion.

[256] For those reasons, Reeves J did not consider any of the Barngarla appellants' grounds of appeal has any merit. On that basis Reeves J found that the appeal must therefore be dismissed.

Conclusions and orders on all three appeals

[257] For these reasons, Reeves J considered that each of the appeals failed and were therefore dismissed.

White J

His Honour [401] agreed with the reasons and orders proposed by Reeves J with respect to each appeal.

At [402]: 'In order to succeed on the appeal, the appellants had to demonstrate error by the primary judge. It was not sufficient for them to show that other inferences or conclusions may have been open on the evidence if the inferences drawn, or conclusions reached, by the primary judge were reasonably open. The task of this Court was to conduct a real review of the trial and of the primary judge's findings with a view to determining whether error was established: *Fox v Percy* [2003] HCA 22 at [25]. In doing so, this Court had to recognise the advantages of the primary Judge, arising, amongst other things, from his Honour having seen and heard the evidence given. Even when the judge's findings were credibility based, this Court could intervene if those findings were inconsistent with "incontrovertible" evidence, "glaringly improbable" or "contrary to compelling inferences" (*Fox v Percy* at [28][29]).'

[403] White J reviewed all of the evidence, particularly the evidence to which the parties referred the Court, with those principles in mind. On that basis White J concluded by stating that: 'for the reasons given by Reeves J, I consider that none of the appellants has demonstrated error of the kind warranting (or permitting) appellate intervention.'

Jagot J (dissenting)

[261] Jagot J found that the appeals should be allowed and the matters remitted to a single judge.

Circumstances confronting the primary judge

[267] At [98] the primary judge said this:

> The necessary connection must be shown in relation to Lake Torrens, or parts of it, notwithstanding its harsh physical features. And, moreover, it will not readily be inferred on any of these three Applications from the existence of adjoining native title rights at sovereignty that such connection, and therefore such rights, extended naturally into Lake Torrens because that inference (without more) would apply equally to the Kokatha People from the west and to the Adnyamathanha (or Kuyani) People from the east, although perhaps not so strongly to the Barngarla People from the south, except to a limited extent into the southern part of Lake Torrens.

Jagot J found that [268] [w]hile this was subject to challenge by the appellants, [98] represented nothing more than a formal statement of logic which is beyond dispute. Her Honour found that the point being made was that, at least as between the Kokatha and Adnyamathanha Peoples, no inference could be drawn from their native title rights and interests in relation to the land adjoining the western and eastern boundaries respectively of Lake Torrens, as each such inference would be defeated by the other: 'This is necessarily correct given that both had native title rights and interests up to the boundary of the lake, those native title rights and interests related to the whole of the land on each side of the lake, and both claimed native title rights and interests over the whole of the lake exclusive of any other claimant. Given this, the primary judge's observation in [98] involves a logical necessity beyond reproach. It also said nothing about what inferences should otherwise be drawn on all of the evidence.'

Adnyamathanha and Barngarla Peoples' appeals

[270] The Adnyamathanha and Barngarla Peoples contended that the primary judge misused the native title determinations in favour of those groups and the Kokatha people and, in so doing, disregarded or wrongly discounted the weight given to many aspects of their evidence. The State of South Australia and the Kokatha People denied this contention.

Jagot J observed at [279] that the native title determinations of each group determined as a juridical fact a past (from sovereignty) to present (to the date of the

determination) state of affairs. [280] ‘It may also be accepted that each determination recognises that no Aboriginal peoples other than the Kokatha, Adnyamathanha and Barngarla peoples possessed rights and interests under their traditional laws and customs by which those people had a connection to any of the determination areas. In this respect, however, the determinations determine as a juridical fact only a present and future (on and from the date of determination) state of affairs. They say nothing about the possibility, as a matter of historical fact, of rights and interests of any other Aboriginal people under traditional laws and customs by which those people had a connection to any of the determination areas before the date on which each determination was made.

At [281]: ‘It is this possibility, of the Adnyamathanha People and the Barngarla People having had rights and interests under their traditional laws and customs by which those people had a connection to the Kokatha determination area before the Kokatha determination was made, which the Adnyamathanha and the Barngarla Peoples said the primary judge wrongly discounted by reason of the Kokatha determination.’

[282] Her Honour found that consistent with these propositions, ‘it was fundamental to the cases of the Adnyamathanha and the Barngarla Peoples that their evidence of rights and interests under their traditional laws and customs by which they had a connection to the Kokatha determination area before the Kokatha determination was made had to be weighed along with all other evidence to determine their claims to native title to Lake Torrens. It could not be disregarded or devalued because of the Kokatha determination. On their cases, if the Adnyamathanha and the Barngarla Peoples could establish, as a matter of historical fact, the existence of their traditional laws and customs under which they had rights and interests in relation to the Kokatha determination area before the Kokatha determination was made this would support their current claim to native title in relation to Lake Torrens because they would have proved connection under traditional laws and customs to both the east and the west of Lake Torrens, it being common ground between the anthropologists that Lake Torrens itself must have been the subject of traditional rights (even if such rights were shared between Aboriginal peoples).’

At [287] According to the Adnyamathanha and the Barngarla Peoples, Mansfield J proceeded on the incorrect basis that the Kokatha determination meant that he was bound to accept that from sovereignty to the date of determination no Aboriginal people other than the Kokatha People possessed rights and interests under traditional laws acknowledged, and the traditional customs observed, by Aboriginal peoples which, by those laws and customs, have a connection with the determination area. According to the Adnyamathanha and the Barngarla Peoples, whether they had proved such a connection or not was required to be assessed in the usual course having regard to the whole of the evidence. If, by that process, it was found that the Adnyamathanha and the Barngarla Peoples did have a connection under their traditional laws and customs to the Kokatha determination

area from sovereignty until some time before the Kokatha determination was made, then that fact would itself be relevant to the assessment of their claim to the immediate adjoining land, Lake Torrens, particularly when weighed along with their own determinations in relation to the land immediately to the east and south of Lake Torrens. This opportunity, however, was said to be denied to them by a process of reasoning which miscarried.

Jagot observed that:

> [288] The question in the present case is, what is it that a determination determines? … Section 223 supports the contention of the Adnyamathanha and the Barngarla Peoples about the effect of a determination under s 225. … The Kokatha determination itself also necessarily established that as at and from the date of determination no Aboriginal people other than the Kokatha People could claim any native title in the Kokatha determination area (subject only to the capacity for an application to be made to revoke or vary an approved determination of native title as provided for in s 13(5) which, under s 61(1) may be made by a limited class of persons, not including a native title claim group). The Kokatha determination did not establish, however, that the Adnyamathanha and the Barngarla Peoples did not have rights and interests under their traditional laws and customs by which they had a connection with the Kokatha determination area pre-sovereignty or at any time thereafter until the date of the determination itself.

[299] The Adnyamathanha and Barngarla Peoples also argued that the primary judge had confused (at [189] and [190]) the concepts of native title rights and interests (which may not involve the occupation of land in the Western sense of that term) and occupation. Her Honour did not agree, stating that the primary judge refers in [189] only to the premise of the Kokatha not being 'in' the land to the west of Lake Torrens as being inconsistent with the Kokatha determination. Jagot J considered the primary judge to be dealing with the concept of mere physical 'presence' and not occupation.

[301] Jagot J found that it was not necessary to decide the appeals of the Adnyamathanha and the Barngarla Peoples on the basis of what was said by the primary judge at [189] and [190], but her Honour accepted that it is possible these parts of the primary judge's reasons went too far. Jagot J concluded that Mansfield J must be understood as having decided that no weight could be given to Professor Sutton's opinions as recorded at [178] because they were inconsistent with the Kokatha determination:

> The main thing which Professor Sutton said which was inconsistent with the Kokatha determination is that the area of the Kokatha determination to the immediate west of Lake Torrens still remains Kuyani and Barngarla country. By reason of the Kokatha determination, at least insofar as native title rights and interest are concerned, that land is Kokatha country. By 'Kokatha country'

> all that is meant is that, as the determination recognised, the Kokatha People had maintained a pre-sovereignty connection under their traditional laws and customs with that land from which they derived rights and interests in relation to that land. This did not mean, however, that the land was not also Adnyamathanha and Barngarla country at sovereignty or that the land did not continue to be Adnyamathanha and Barngarla country until some time before the Kokatha determination. Nor did the Kokatha determination make the pastoral history of the area or the work history of Kokatha People irrelevant or inappropriate to be given weight, to the extent that history could inform the existence or otherwise of a pre-sovereignty connection to Lake Torrens which had continued. The Kokatha determination did not mean that such evidence from Professor Sutton should or could be disregarded or discounted.

[304] It was alleged that the confusion regarding occupation was also evident in the primary judge's reference to the Kokatha having 'occupied' the Kokatha determination area. Jagot J found that: 'This reference is in error but, standing alone, it cannot be characterised as material. The primary judge knew that he was dealing with native title rights and interests, not occupation.' [308] Her Honour found this to be of importance because it indicates that if Mansfield J did make an error when dealing with the ethnographic material the error may be material because he placed significant weight on his interpretation of the material. Her Honour did not consider that Mansfield J was bound to adopt the anthropologists' interpretation of the ethnographic material (which was suggested by the Adnyamathanha and the Barngarla Peoples) in preference to his own interpretation, but in applying his own interpretation he was bound to give effect to the determinations only to the extent required by s 223 of the NTA.

[323] Her Honour considered the primary judge's interpretation of the ethnographic evidence involved potential ambiguity. Her Honour found that:

> The potential ambiguity is that, as noted, the ethnographic record before the 20th century consistently shows the Adnyamathanha and the Barngarla Peoples surrounding Lake Torrens. Accordingly, the statement in [272] that the "the ethnographic observations to that time [the 1930s] do not record any instance or observations indicating in any persuasive way who those traditional owners might have been" is wrong if it means that the observations did not involve the Adnyamathanha and the Barngarla Peoples surrounding Lake Torrens. If, however, the statement means that the observations showed the Adnyamathanha and the Barngarla Peoples surrounding Lake Torrens but are not persuasive because, given the Kokatha determination, the Kokatha People must also have had a presence in the same area, then the statement is not wrong.

At [333] her Honour stated that Mansfield J was in error if his Honour chose not to consider or refuse to give weight to evidence of the pattern of Aboriginal presence and language to the immediate west of Lake Torrens 'because it supported or

tended to support the connection of the Adnyamathanha and the Barngarla Peoples under their traditional laws and customs to that land from sovereignty until some time before the Kokatha determination merely because of the Kokatha determination. It effectively doomed the claims of the Adnyamathanha and the Barngarla Peoples in relation to Lake Torrens to fail'.

Jagot J considered that if a proper understanding of the evidence meant that:

a) the pattern of Aboriginal presence and language indicates a pre-sovereignty connection of the Adnyamathanha and the Barngarla Peoples to all of the land surrounding Lake Torrens;
b) the Kokatha determination recognises the Kokatha connection to the land to the west of Lake Torrens;
c) the Kokatha determination establishes that any connection of the Adnyamathanha and the Barngarla Peoples to the land to the west of Lake Torrens did not exist as at and from the date of the determination;
d) the Adnyamathanha and the Barngarla determinations recognise the Adnyamathanha and the Barngarla connection to the east and south of Lake Torrens and establish that any connection of other Aboriginal Peoples (including the Kokatha) to that land did not exist as at and from the determinations;
e) the anthropologists agreed, as they did, that it was very unlikely that there were not pre-sovereignty rights and interests under traditional laws and customs in relation to Lake Torrens and that proximity of presence to the lake was likely to be related to the existence and the strength of those rights and interests (see [207], [272] and [386]),

'then it is possible that the claims of the Adnyamathanha and the Barngarla Peoples to Lake Torrens might have been inferred to be stronger than those of the Kokatha, at least if there was no evidence of pre-sovereignty Kokatha presence to the east of Lake Torrens in the determination areas of the Adnyamathanha and the Barngarla Peoples. By giving the Kokatha determination the effect of excluding from consideration the evidence of the presence of the Adnyamathanha and the Barngarla Peoples and of their language to the west of Lake Torrens from sovereignty or from settlement, the main planks of the claims of the Adnyamathanha and the Barngarla Peoples to Lake Torrens were removed' (at [333]).

Jagot J observed that:

> [334] The effect of the primary judge excluding evidence from consideration on the inferences he drew is also exposed in [365] where his Honour inferred that the absence of the Kokatha language to the west of Lake Torrens, given the Kokatha determination, was more likely to be a result of the confidentiality of word use in Western Desert society than to advance the cases of the Adnyamathanha and the Barngarla Peoples. Given that the Kokatha determination did not mean that the Adnyamathanha and the Barngarla Peoples did not have rights and interests in the land to the west of Lake

> Torrens from before sovereignty until the date of the Kokatha determination, the evidence of Barngarla language use in that area and lack of evidence of Kokatha language was capable of advancing the cases of at least the Barngarla People and, possibly, the Adnyamathanha People as another group of the Lakes society.

[336] Her Honour found that: 'the same error is apparent in the way in which the primary judge dealt with the evidence of Michael McKenzie, an initiated Adnyamathanha man, who gave evidence of mura (stories) he had learned about what he considered to be Adnyamathanha country which included Lake Torrens (at [478]). [337] The evidence was devalued by the primary judge on the basis of an erroneous approach to the effect of the Kokatha determination.'

[346] Further, 'by reason of the Kokatha determination, which was made in 2014, the primary judge gave no weight to the evidence of Adnyamathanha people of their relationship to and use of land to the west of Lake Torrens up to the 1970s. This approach involves error for the reasons already given, but also discloses why the response of the State and the Kokatha People cannot be accepted. The response was that any error the primary judge made about the effect of the Kokatha determination was immaterial because the Adnyamathanha and Barngarla Peoples' claims failed by reason of lack of continuity up to the present day. If, as is the case, the evidence of the use of and relationship to the land to the west of Lake Torrens by any people other than the Kokatha People from sovereignty was wrongly disregarded or discounted because of the Kokatha determination, then it necessarily follows that the conclusions of lack of continuous connection with Lake Torrens must have been infected by that error.'

[349] Her Honour found that the Kokatha determination said nothing about the rights and interests of the Adnyamathanha and Barngarla Peoples under their traditional laws and customs in relation to the land to the west of Lake Torrens from sovereignty to immediately before the making of the determination. As such, it cannot have been relevant to the state of affairs for 60 years from sovereignty. Jagot J held at [350]:

> In [763] and also [764] the primary judge repeated that, in respect of the claim of the Barngarla People, he has "not placed any weight on material to the extent that the anthropological evidence is inconsistent with the *Kokatha Part A* and *Adnyamathanha No 1* determinations". Given those earlier parts of the reasons for judgment, in which it is apparent that the primary judge took an over-expansive view of the effect of the determinations and thus the scope of any inconsistency between the evidence and the determinations, this discloses that the error had a material effect on the conclusions his Honour reached about the Barngarla People's claim.

[351] Jagot J found that at various places in [728] to [773] the primary judge also recorded his conclusions that the claims of the Adnyamathanha and Barngarla Peoples failed because they had not proved the continuity of their connection to

Lake Torrens under their traditional laws and customs. Her Honour observed that this must have been affected by the primary judge's view that the Kokatha determination meant that evidence of the Adnyamathanha and Barngarla Peoples' connection to the land to the west of Lake Torrens under their traditional laws and customs had to be disregarded or discounted.

Her Honour found that there were other difficulties with the approach of Mansfield J to this issue: 'Of themselves, the second, third and fourth of these matters, as discussed below, might not justify appellate intervention but, taken with the effect on the process of reasoning that the primary judge's views about the effect of the determinations must have had, they provide a further foundation for the conclusion I have reached that these appeals must be allowed' (at [351])

[363] Despite the appeals having raised other issues, Her Honour considered that only one other contention by the Adnyamathanha and Barngarla Peoples should be assessed – the contention that the primary judge erred in refusing to countenance a determination that both the Adnyamathanha and Barngarla Peoples had native title rights and interests in Lake Torrens. In Jagot J's view, Mansfield J was in error in refusing to countenance this possibility on the basis that it was precluded by the NTA: 'Undoubtedly, the possibility gave rise to case management considerations given the positions of the Kokatha People and the State, but the primary judge rejected the possibility on the basis that it was not open to consider it because of the NTA' (at [364]).

[368] The primary judge did not consider that this further alternative was open because no such claim by any such claim group had been made under s 61 of the NTA and thus none of the procedural requirements in the NTA for claimant applications had been satisfied in respect of such a claim (see the reasons at [105] to [127]). Jagot J considered that this was in error because the claims made by the Adnyamathanha and Barngarla Peoples did not exclude the possibility that another Aboriginal people might have native title rights and interests in relation to the claim area.

At [369]: 'Accordingly, it is not the case that to support a conclusion of a part of Lake Torrens being subject to shared rights and interests of the Adnyamathanha and Barngarla Peoples there had to be a new native title claim group constituted and applicant authorised to make a new native title claimant application. The claim groups would remain the Adnyamathanha and Barngarla Peoples. Their claims would remain the claims as authorised. It is merely that the determination made under s 225, if the evidence supported it having regard to s 223, would be a determination that native title exists in relation to the relevant part of Lake Torrens and that the persons, or each group of persons, holding the common or group rights comprising the native title are the Adnyamathanha People as identified in the Adnyamathanha claim and the Barngarla People as identified in the Barngarla claim. As the submissions for the Adnyamathanha People put it, the NTA does not require a single application by a conjoined claim group for a determination to be made under

s 225 of the NTA that more than one claimant group holds native title rights and interests in the relation to the same area. “Native title” is not necessarily unitary. It is “the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters” (s 223). Nothing in the NTA suggests that only one group of Aboriginal people may hold such rights and interests in one area. To use a Western concept, a determination of native title under s 225 may be a determination of native titles held by more than one group of Aboriginal people.’

[370] Her Honour disagreed with Mansfield J and did not consider that *Banjima People v State of Western Australia* [2015] FCAFC 84 proposes that there may be only one native title group which holds the native title rights and interests over a particular section of country. Her Honour found at [370] that:

> ‘To the contrary, the reasoning in *Banjima*, including at [54], recognised that there may well be more than one Aboriginal group that has native title rights and interests in relation to an area of land. In *Banjima*, the issue was whether those rights were exclusive of any other non-Aboriginal rights and interests. In circumstances where the rights and interests of other Aboriginal people in relation to the area (if they existed) were no longer asserted, it was held that there was no error in concluding that the rights and interests of the Banjima People were exclusive.’

At [354]-[355]: ‘The basis upon which the primary judge considered that there was an evidentiary gap for the 60 years from sovereignty to settlement is unclear. But the relevant point is that there was no such evidentiary gap. … Given this, the conclusion that the claims of the Adnyamathanha and Barngarla Peoples should fail because there was an evidentiary gap between sovereignty and settlement involves error in the sense described in *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22; (2016) 331 ALR 550 at [43] (references omitted) that the conclusion was “wrong by ‘incontrovertible facts or uncontested testimony’, or …‘glaringly improbable’ or ‘contrary to compelling inferences’”.

[360] Her Honour disagreed with the submissions for the State, stating that these matters cannot be explained by the primary judge having been confined by the fact that much of the evidence was subject to a gender restriction and confidential. ‘That does not explain why the primary judge considered that only two stories of the many on which the Adnyamathanha People relied concerned Lake Torrens when all of the stories related to the Lake.’ [362] Jagot J found that with respect to paragraph [772] of Mansfield J’s reasons for judgment that His Honour was side-tracked by a concern that he was being required to ‘prioritise one set of spiritual beliefs over the other’, which Jagot J concludes cannot be the case having regard to the criteria for native title established by s 223 of the NTA.

Her Honour observed that: [371] ‘There may well have been other reasons which would have made it inappropriate for such a determination in favour of the

Adnyamathanha and Barngarla Peoples to be made, including fairness to the Kokatha People and the State or inadequate evidence, but the NTA itself did not prevent the making of such a determination by reason of the nature of the claims made, their authorisation, or otherwise. The determination was a matter for the Court. In a case involving competing claims dealt with under s 67 of the NTA, nothing but the evidence and the dictates of fairness in the particular case prevents the making of a determination in which the competing claimants simultaneously succeed and fail (that is, succeed because they are found to have native title in relation to an area but fail because another Aboriginal group is also found to have native title in relation to the same area or part thereof). In such an event, it is the terms of the determination under s 225 which must identify the persons holding the rights comprising the native title(s) and the nature and extent of the native title rights and interests in relation to the determination area. The potential for inconsistency is to be resolved through the determination. As such, it is not necessary to consider s 84D of the NTA because there was no defect in the authorisation of the claims.'

[372] Jagot J concluded that the appeals of the Adnyamathanha and Barngarla Peoples must be allowed: 'In accordance with the agreement of the parties given the grounds on which the Adnyamathanha and Barngarla Peoples have succeeded, the appropriate order is that these matters be remitted to a single judge (the primary judge having retired) for rehearing on the papers together with any further evidence that judge may allow.'

Kokotha People's appeal

[373] As the Kokatha People's appeal did not involve any suggestion that the primary judge misused the native title determinations her Honour determined that the Kokatha appeal had to be dealt with separately.

[374] Her Honour dismissed one ground of the Kokatha appeal immediately being the contention that the primary judge, despite having heard evidence on a place called Crombie Ridge on Andamooka Island which was significant to all of the claims, mistakenly thought that the Kokatha witnesses placed Crombie Ridge outside of and to the west of the claim area. This was said to result from various paragraphs in the reasons for judgment which, on first reading and with no context, are ambiguous.

[379] Her Honour considered that other alleged errors by Mansfield J reveal that the worst that might be said is that the primary judge's reasons have been expressed in a potentially ambiguous manner or the primary judge has reached a conclusion about certain evidence contrary to that for which the Kokatha People contend, but which cannot be said to be other than reasonably open given that the primary judge had the benefit of seeing and hearing the evidence be given.

[380] Nonetheless Jagot J was satisfied that the appeal of the Kokatha People must also be allowed:

> As with the claims of the Adnyamathanha and Barngarla Peoples, it is apparent that some of these contentions by the Kokatha People are accurate, the State's answer being effectively that any such error or misunderstanding was immaterial. While this may be true in relation to some matters if considered in isolation, the overall number of such matters and the importance of some of them to the claims which the primary judge dismissed make me more inclined to characterise these matters as material than might otherwise have been the case.

Jagot J accepted at [385] that the primary judge overlooked the Fitzpatrick and Gara 1984 report. Her Honour concluded that if his Honour considered the 1984 report he could not have reached the conclusion he did in [325]. [394] 'In assessing the importance of the erroneous conclusions of the primary judge about the oral evidence, regard must also be had to the fact that at [405] he rejected a challenge to the credibility of the main Kokatha witnesses, the Starkey brothers, finding that there was no reason to doubt their honesty. The primary judge was undoubtedly right at [406] when he observed that there are a "range of reasons why evidence honestly given, and forcefully given, may not ultimately be found to prove all the critical fact or facts to which the evidence was directed". However, this does not authorise an appellate court to disregard conclusions as to a lack of evidence of critical matters which are demonstrably wrong.'

[399] Her Honour did not consider it necessary to address the Kokatha People's contention that Mansfield J ought to have considered making a determination in their favour at least in respect of Andamooka Island. Her Honour found that partial success is a possibility inherent in any native tile claimant application, however Mansfield J was not bound to advert to that possibility unless it was expressly sought by the Kokatha People.

In conclusion Jagot J allowed all three appeals and made orders for remittal.

2. Legislation

There were no relevant 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 March 2018.

3. Native Title Determinations

In March 2018, the NNTT website listed 3 native title determinations.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC/ PBC
Kaurna Peoples Native Title Claim	Agius v South Australia (No 6)	21/03/2018	SA	Native title exists in parts of the determination area	Consent	Claimant	N/A
Mandandanji People	Weribone on behalf of the Mandandanji People v State of Queensland	12/03/2018	Qld	Native title does not exist	Consent	Claimant	N/A
Yi Martuwarra Ngurrara Part A	Forrest on behalf of the Ngurrara People v Western Australia	7/03/2018	WA	Native title exists in parts of the determination area	Consent	Claimant	N/A

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 23 April 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 beta.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	6	0
Northern Territory	26	2
Queensland	82	0
South Australia	16	0

State/Territory	RNTBCs	No. of successful (& conditional) claimant determinations for which RNTBC to be advised
Tasmania	0	0
Victoria	4	0
Western Australia	45	2
NATIONAL TOTAL	**179**	**4**

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 23 April 2018

5. Indigenous Land Use Agreements

In March 2018, 5 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
8/3/2018	FMG – Kariyarra Land Access ILUA	WI2016/013	Area	WA	Access, Medium Mining
7/3/2018	Wuthathi Land Transfer ILUA	QI2016/061	Area	QLD	Government, Tenure resolution
2/3/2018	Northern Gas Pipeline Phillip Creek ILUA	DI2017/004	Area	NT	Pipeline, development, gas
2/3/2018	Northern Gas Pipeline CLC Tennant ILUA	DI2017/005	Area	NT	Pipeline, development, gas
2/3/2018	Northern Gas pipeline CLC Tennant ILUA	DI2017/004	Area	NT	Pipeline, development, gas

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

6. Future Act Determinations

In March 2018, 14 Future Act Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
29/03/2018	Boonthamurra Native Title Aboriginal Corporation RNTBC and Garry Verdon Higgins and Queensland	QF2017/0008	Qld	Future Act – May be done subject to conditions	In July 2015, the State of Queensland gave notice under s 29 of the *Native Title Act 1993* (Cth) (NTA) of its intention to grant a renewal of mining claim MC60274 (the tenement) to Garry Verdon Higgins. The tenement sits entirely within the area of the Boonthamurra People's determination of native title (QCD2015/008). In December 2017, the State lodged a future act determination application in relation to the tenement. The Boonthamurra RNTBC did not challenge the power of the Tribunal to determine this matter due to any lack of good faith in negotiations with the State or Mr Higgins. Having considered the evidence, the Tribunal concluded that the future act may be done subject to the conditions outlined in Appendix 2 of the decision.
29/03/2018	Boonthamurra Native Title Aboriginal Corporation RNTBC and Alexandrea M Kranz and Queensland	QF2017/0014	QLD	Future Act – May be done subject to conditions	In March 2016, the State of Queensland gave notice under s 29 of the NTA of its intention to grant mining claim MC300069 (the tenement) to Alexandrea M Kranz. In December 2017, the State lodged a future act determination application in relation to the tenement. The Boonthamurra RNTBC did not challenge the power of the Tribunal to determine this matter due to any lack of good faith in negotiations with the State or Ms Kranz. Having considered the evidence and information the determination of Member Shurven was that the act, namely the grant of mining claim MC300069 to Alexandrea M Kranz, may be done subject to the conditions outlined in Appendix 2 of the decision.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
29/03/2018	Boonthamurra Native Title Aboriginal Corporation RNTBC and Gregory John Blair and Queensland	QF2017/0015	QLD	Future Act – May be done subject to conditions	In March 2016, the State of Queensland gave notice under s 29 NTA of its intention to grant mining claim MC300070 to Gregory John Blair. The tenement is 0.0966 square kilometres in size and sits entirely within the area of the Boonthamurra People's determination of native title (QCD2015/008). In December 2017, the State lodged a future act determination application in relation to the tenement. The Boonthamurra RNTBC did not challenge the power of the Tribunal to determine this matter due to any lack of good faith in negotiations with the State or Mr Blair. Having considered the evidence and information Member Shurven concluded that the future act may be done subject to the conditions outlined in Appendix 2 of the decision.
29/03/2018	Kevin Allen & Ors on behalf of Njamal and Muccan Minerals Pty Ltd and Western Australia	WF2017/0006 WF2017/0007 WF2017/0008	WA	Future Act – May be done subject to conditions	The determination of the Tribunal was that the acts, namely the grant of claims MC60308 and MC60309 to James Arthur Livingston, may be done subject to the conditions outlined in Appendix 2 of this decision. Muccan sought a determination that proposed mining leases may be granted. Njamal are a negotiation party in this matter because their registered native title claim overlapped the proposed leases four months after the notification day; and their native title claim is still registered (see ss 29(2)(b)(i), 30(2) and 30A of the NTA). Njamal opposed the grant of the proposed leases, contending that Muccan did not negotiate in good faith as required by s 31(1)(b). For the reasons set out President Webb was not satisfied that Muccan did not negotiate in good faith determined that the act may be done subject to conditions.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
29/03/2018	Boonthamurra Native Title Aboriginal Corporation RNTBC and James Arthur Livingstone and Queensland	QF2017/0016 QF2017/0017	Qld	Future Act – May be done subject to conditions	In March 2016, the State of Queensland gave notice under s 29 NTA of its intention to grant mining leases to James Arthur Livingston. Both tenements sit entirely within the area of the Boonthamurra People's determination of native title (QCD2015/008). In December 2017, the State lodged a future act determination application in relation to the tenements. The Boonthamurra RNTBC did not challenge the power of the Tribunal to determine this matter due to any lack of good faith in negotiations with the State or Mr Livingston. Member Shurven's determination was that the acts, namely the grant of claims MC60308 and MC60309 to James Arthur Livingston, may be done subject to the conditions outlined in Appendix 2 of the decision.
29/03/2018	Boonthamurra Native Title Aboriginal Corporation RNTBC and Robert John White and Queensland	QF2017/0018	Qld	Future Act – May be done subject to conditions	In November 2016, the State of Queensland gave notice under s 29 NTA of its intention to grant a mining lease to Robert John White. The tenement is 0.1383 square kilometres in size and sits entirely within the area of the Boonthamurra People's determination of native title (QCD2015/008). The Boonthamurra RNTBC did not challenge the power of the Tribunal to determine this matter due to any lack of good faith in negotiations with the State or Mr White. The determination of the Tribunal was that the act, namely the grant of mining claim MC300131 to Robert John White, may be done subject to the conditions outlined in Appendix 2 of the decision

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
26/03/2018	William Webb and Ors on behalf of South West Boojarah #2 and Hesketh Quarry's Pty Ltd Western Australia	WF2017/0022	WA	Future Act – May be done	The Tribunal determined that the State of Western Australia may grant mining lease M70/1350 to Hesketh Quarry's Pty Ltd. The lease is 33.69 hectares in size and is located wholly within the native title claim of South West Boojarah #2 (WC2006/004). Despite being informed that the native title party consents to a determination that the act may be done, Member McNamara could not overlook the Act's requirement that he assess the evidence provided by parties in terms of the criteria in s 39 (see *Western Australia v Thomas* [1996] NNTTA 30 at 165–166). The Tribunal found no evidence to suggest that the South West Boojarah group oppose the grant of the lease or that the act would cause detriment to South West Boojarah #2's native title rights or interests. In weighing up the public interest, he accepted that there is likely to be economic and social benefit to the public in the grant of the lease.
22/03/2018	Raymond William Ashwin & Ors on behalf of Wutha and Diversified Asset Holdings Pty Ltd and Western Australia	WO2017/0298	WA	Objection – Dismissed	In May 2017, the State of Western Australia gave notice under s 29 NTA of its intention to grant exploration licence E51/1810 to Diversified Asset Holdings Pty Ltd. Approximately 5.52 per cent of the proposed licence area is overlapped by the Wutha claim group's native title claim (WC1999/010). By including an expedited procedure statement in the public advertisement of the licence, the State asserted that the grant can be made without requiring Diversified Asset Holdings or the State to negotiate with the Wutha claim group. In May 2017, the Wutha claim group lodged an objection with the Tribunal against the application of the expedited procedure to the grant of the licence. Member Shurven dismissed the objection application according to s 148(b) NTA due to a failure by the native title party to comply with directions for the filing of evidence.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
21/03/2018	Raymond William Ashwin & Ors on behalf of Wutha and Coal First Pty Ltd and State of Western Australia	WO2017/0281	WA	Objection – Dismissed	In March 2017, the State of Western Australia gave notice under s 29 NTA of its intention to grant exploration licence E53/1927 to Coal First Pty Ltd, without requiring Coal First or the State to negotiate with the Wutha native title claim group. The area of the proposed licence is wholly overlapped by the Wutha claim group's native title claim (WC1999/010). In April 2017, the Wutha claim group lodged an objection with the Tribunal against the application of the expedited procedure to the grant of the licence. Member Shurven dismissed the objection application against exploration licence E53/1927 in accordance with s 148(b) NTA due to the native title party's failure to comply with directions for the filing of evidence.
20/03/2018	Tjiwarl Aboriginal Corporation RNTBC and Coventry Enterprises Pty Ltd Western Australia	WO2017/0532	WA	Objection – Expedited Procedure Applies	This was a decision about whether or not the expedited procedure applies to the proposed grant of exploration licence E36/856 to Coventry Enterprises Pty Ltd. The licence is approximately 6.06 square kilometres in size and is overlapped entirely by the Tjiwarl native title determinations. Tjiwarl exercised their right to lodge an objection against the State's assertion that the expedited procedure applies, and argued the expedited procedure should not apply as interference or disturbance with one or more of the criteria in s 237 NTA is likely. Member Shurven did not consider there to be any evidence in support of a conclusion that the grant of the licence is likely to involve, or create rights whose exercise is likely to involve, major disturbance to land or waters. Member Shurven determined that the grant of E36/856 to Coventry Enterprises is an act that attracts the expedited procedure.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
14/03/2018	Wanjina-Wunggurr (Native Title) Aboriginal Corporation on behalf of Dambimangari and Strategic Metals Pty Ltd and Western Australia	WO2017/0325	WA	Objection – Dismissed	In January 2017, the State Government of Western Australia gave notice under s 29 NTA of its intention to grant exploration licence E04/2325 to Strategic Metals Pty Ltd. In May 2017, the Wanjina-Wunggurr (Native Title) Aboriginal Corporation (WWAC) lodged an objection application on behalf of Dambimangari (WCD2011/002) against the assertion the expedited procedure applied to the grant of the licence. On the basis that this objection had been filed in duplication with another objection application, the State and WWAC's representative, Kimberley Land Council, agreed the matter could be dismissed pursuant to s 148(a) NTA. The WWAC's procedural rights to object about the application of the expedited procedure to the grant of the licence were preserved under WO2017/0373. The objection application against exploration licence E04/2325 was dismissed.
14/03/2018	Raymond William Ashwin & Ors on behalf of Wutha and Duketon Consolidated Pty Ltd and Western Australia	WO2017/0226	WA	Objection dismissed	In April 2017, the State of Western Australia gave notice under s 29 NTA of its intention to grant exploration licence E58/510 to Duketon Consolidated Pty Ltd. The area of the proposed licence overlaps the Wutha claim group's native title claim (WC1999/010) by 0.03 per cent. By including an expedited procedure statement in the public advertisement of the licence, the State asserted that the grant could be made without requiring Duketon Consolidated or the State to negotiate with the Wutha claim group. In April 2017, the Wutha claim group lodged an objection with the NNTT against the application of the expedited procedure to the grant of the licence. The native title party did not comply with Member Shurven's direction for the filing of evidence within the timeframe stipulated and on that basis the objection against exploration licence E58/510 was dismissed, in accordance with s 148(b) NTA.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
2/03/2018	Michael Ross and Ors on behalf of Cape York United Number 1 Claim and Gamboola resources Pty Ltd and Queensland	QO2016/0042	Qld	Objection – Expedited procedure does not apply	In this matter Member McNamara determined the proposed grant of exploration permit EPM 26190 by the State of Queensland to Gamboola Resources Pty Ltd is not an act attracting the expedited procedure. This matter was one of the first two expedited procedure objection applications in Queensland that have resulted in a determination that the procedure does not apply since the introduction of the State's Native Title Protection Conditions (NTPCs) (see also *Michael Ross & Others on behalf of the Cape York United Number 1 Claim v Lithium Australia NL and Another* [2018] NNTTA 10). In June 2016, the State gave notice of its intention to grant the permit, and included a statement that it considered the grant to be an act attracting the expedited procedure. The area of the permit falls within the boundaries of the Cape York United Number 1 native title claim. Member McNamara found the evidence established it was likely the proposed grant would interfere with sites of particular significance to the native title party per s 237(b), despite the application of the State's regulatory regime and Gamboola's stated intentions. It also found the grant was likely to result in major disturbance to the land and waters concerned per s 237(c).

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
02/03/2018	Michael Ross and Ors on behalf of Cape York United Number 1 Claim and Lithium Australia NL and Queensland	QO2016/0047 QO2016/0048 QO2016/0049	Qld	Objection – Expedited Procedure Applies AND Objection – Expedited Procedure Does Not Apply	This matter concerned the proposed grant of exploration permits EPM 26253, EPM 26254 and EPM 26257 by the State of Queensland to Lithium Australia NL. Member McNamara determined that the grant of EPM 26253 is an act attracting the expedited procedure, but the grants of EPM 26254 and EPM 26257 are not. This matter is one of the first two expedited procedure objection applications in Queensland that have resulted in a determination that the expedited procedure does not apply since the introduction of the State's Native Title Protection Conditions ('NTPCs') (see also *Michael Ross & Others on behalf of the Cape York United Number 1 Claim v Gamboola Resources Pty Ltd and Another* [2018] NNTTA 11). In June 2016, the State gave notice of its intention to grant the permits, as acts attracting the expedited procedure. The area of the permit falls within the boundaries of the Cape York United Number 1 native title claim. Lithium proposed to allow an Indigenous Ranger to accompany field staff when on site; avoid sites of significance. The Tribunal found the evidence in this matter established it was likely the proposed grants of EPM 26254 and EPM 26257 would interfere with the social and community activities of the native title party. The Tribunal also found the native title party's activities were not conducted over the area of EPM 26253 with such an intensity that the grant of that permit would likely result in interference.

7. Publications

ANU Press

Australian Native Title Anthropology: Strategic practice, the law and the state

This book by Kingsley Palmer is about the practical aspects of anthropology that are relevant to the exercise of the discipline within the native title context. The engagement of anthropology with legal process, determined by federal legislation, raises significant practical as well as ethical issues that are explored in this book. It will be of interest to all involved in the native title process, including anthropologists and other researchers, lawyers and judges, as well as those who manage the claim process. It will also be relevant to all who seek to explore the role of anthropology in relation to Indigenous rights, legislation and the state.

To download or purchase in hard copy, visit the ANU website.

Northern Land Council

The February 2018 issue of Land Rights News is available for download via the NLC's website.

Kimberley Land Council

The April 2018 Kimberley Land Council Newsletter is available for download via the KLC's 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.

ORIC

ORIC provides a range of training for Aboriginal and Torres Strait Islander corporations about the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (CATSI Act), the corporation's rule book and other aspects of good corporate governance.

For further information on training courses, visit the ORIC website.

9. Events

AIATSIS

National Native Title Conference 2018

In 2018 the National Native Title Conference will be convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the Kimberley Land Council (KLC), hosted by the Yawuru people on their traditional lands in Broome, Western Australia. The conference, 'Many Laws, One Land: Legal and Political Co-existence' acknowledges that at any one place in Australia, different systems of law exist. The theme marks 25 years since the passing of the *Native Title Act 1993* and represents the confluence of these laws as they relate to title of land and waters.

Date: 5–7 June 2018

Location: Cable Beach Resort, Broome WA

Registrations have closed. For more information visit the AIATSIS website.

Arts Libraries Society of Australia and New Zealand

Biennial Conference 2018

The 2018 Art Libraries Society of Australia and New Zealand (ARLIS/ANZ) conference will be held at the National Portrait Gallery (day one) and the National Gallery of Australia (day two). The theme is 'Expanding our Reach: Art, Research and Access, delving into the expanded uses and users of Art Library collections'. The society invites abstracts from art librarians, archivists, artists, scholars, authors, curators, critics, educators, students and other visual arts professionals.

Date: 4-5 October 2018

Location: Canberra, ACT

For more information visit the website.

Australian Archaeological Association

2018 Conference

The Australian Archaeological Association (AAA) Annual Conference is a major event for archaeologists, members and non-members, to get together, present papers and posters or just find out about the latest archaeological discoveries. AAA has about 1000 members and the Annual Conference typically attracts about 400 to 500 delegates from Australia and overseas. It encourages a broad-cross section of the archaeological community to attend and reduce travelling costs for participants. The AAA 2018 conference is being jointly run by the New Zealand Archaeological Association (NZAA).

Date: 28 November – 1 December 2018

Location: Auckland, New Zealand

The call for papers closes on 20 July. Further information is available on the AAA website.

Relationships Australia

The reflective practitioner: considering the role of the mediator (seminar)

Relationships Australia's national team is delighted to announce a free community event that may of interest to Aboriginal and Torres Strait Islander peoples, dispute resolution practitioners, mediators, lawyers, community leaders, restorative practitioners and others. National Native Title Tribunal Member, Helen Shurven will outline some of her experience in mediating native title disputes, including differences between two party and multi-party matters, as well as considering telephone mediation and special considerations that can be taken into account when mediation is not in a face to face context.

Member Shurven will touch on some skills based information, including the process of co-mediation, as well as tips and traps for mediators and party advisors. Member Shurven will reflect on mediated outcomes and contrast the process of agreement-making through mediation with her experience in making arbitral decisions that are final and binding on all parties.

Date: 9.30 to 12:00, 5 June 2018

Location: Burringiri Aboriginal and Torres Strait Islander Cultural Centre, 245 Lady Denman Drive, ACT

The seminar will count as 2.5 hours of Continuing Professional Development for mediators. Places are limited. To register, visit the event page.

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.