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WHAT'S NEW IN NATIVE TITLE

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1. Case Summaries

Gepp-Kennedy on behalf of the Dieri People v State of South Australia [2017] FCA 1156

28 September 2017, Consent Determination, Federal Court of Australia, South Australia, Charlesworth J

In this matter, Charlesworth J recognised, by way of consent, the non-exclusive native title rights and interests of the Dieri people to an area covering about 2115km^2 on the eastern shores of Lake Eyre in South Australia. The respondent parties included: the State of South Australia, BHP Billiton Olympic Dam Corporation Pty Ltd and the Australian Wildlife Conservancy. Other interests in the area include pastoral leases holders and those of the Crown and the public in relation to Kati Thanda - Lake Eyre National Park.

This is the third determination made in favour of the Dieri people. Its eastern boundary adjoins a large area already subject to a native title determination in favour of the Dieri people declared at Maree Station on 1 May 2012 *Lander v State of South Australia* [2012] FCA 427 (**Dieri No. 1**). In February 2014, a second native title determination was made in favour of the Dieri people in respect of an area adjoining the southern boundary of the *Dieri No. 1* determination area in *Lander v State of South Australia* [2014] FCA 125 (**Dieri No.2).** The land subject to the Dieri No.2

determination area includes part of Wilpoorinna Station in the west but stops at Yerila Creek in the east. The first of the Dieri claims was commenced more than 20 years ago.

Charlesworth J stated that:

> 'Although this is the third determination made in favour of the Dieri people, the boundaries between the land forming the subject of each determination area are immaterial as far as the traditional laws and customs of the Dieri people are concerned…Now viewed together, the three determination areas reflect the very large area of land with which the Dieri people have a connection in accordance with the traditional laws they acknowledge and the traditional customs they observe. For the purposes of the Act, the connection has persisted since the British Crown asserted sovereignty in 1788, although it does, of course, predate that year by a span of time as ancient as the Dieri people themselves.'(at [7]).

[7] – [9] Charlesworth J observed that pursuant to s 87 of the *Native Title Act 1993* (Cth) (NTA) the role of the Court is to give effect to the parties' agreement and 'avoids the necessity for the Court to determine the claim in a litigious contest'. Her Honour then outlined the authorities in relation to the requirements of s 87 of the NTA. Section 87 enables the Court to make a determination of native title with the consent of the parties without holding a hearing' (at [11]). 'The section contemplates that the Court may make a determination of native title in the absence of a comprehensive evidentiary case sufficient to establish all of the facts supporting the determination'. The focus of the section is upon the making of the agreement and especially upon the role of the State party in scrutinising the claim carefully (at [16].)

Charlesworth J further observed [at 19]: 'In satisfying itself that there is a credible basis for a native title determination, the State party is not required to conduct a comprehensive and inflexible inquiry in substitution for a trial. It may rely upon significantly less material that would be necessary to justify a judicial determination of the issues: *Lovett on behalf of the Gunditjara People v State of Victoria* [2007] FCA 474 at [38].'

[20] The detailed joint submissions of the State of South Australia and the Dieri People were based upon the State's policy document entitled Consent Determinations in South Australia: A Guide to Preparing Native Title Reports.

[26] The majority of the evidence relied upon by the Dieri people had already been supplied and favourably assessed by the State for the purposes of the consent determinations in **Dieri No. 1** and **Dieri No. 2** (at [35]). The evidence included two reports prepared in 2002 by expert anthropologists Drs Rod Lucas and Deane Fergie and by way of affidavits from members of the claim group (at [26]). In **Dieri No.1** and **Dieri No.2** the Court accepted that the Dieri people are an identified society united by traditional law and custom. The claimant group for the **Dieri No. 3** area is the

same as that for the earlier determinations and has already been recognised as a society that satisfies the requirements of s 223(1) of the NTA.

[29]-[30] Evidence provided to the State in respect of the present claim made reference to the 'Thirrari people', who were recorded in the proposed determination area in the early ethnography. The Dieri people claimed that the Thirrari (or Tirari) were the original inhabitants of the area but when they died out, the Dieri people assumed the rights and responsibilities of caring for Tirari country. The parties agreed that 'the people who identified as Dieri and those who once identified as Tirari shared common ancestry, language and laws and customs to such an extent that **the inference can readily be made that the Tirari were part of the Dieri society which acknowledges and observes a body of laws and customs which is substantially the same normative system as that which existed at sovereignty'** (at [30]-emphasis added in original).

Charlesworth J observed that: [32] 'The Court may act on the assurance of the parties that the material supports the inference expressed in the joint submissions and Her Honour concluded (at [38]) that the proposed orders fulfilled the requirements of s 225 of the Act.

[39] Together ss 55 and 56 of the Act require the Court, when making a native title determination (or as soon as practicable thereafter) to determine whether the native title is to be held on trust and if so by whom. Paragraph 13 of the proposed orders is to the effect that the native title recognised in the determination is not to be held in trust. Charlesworth J further ordered that: the Dieri Aboriginal Corporation RNTBC (ICN 3890) is to be the prescribed body corporate in respect of the determination and it has given its written consent to be the prescribed body corporate pursuant to the Act and the *Native Title Regulations (Prescribed bodies Corporate) Regulations 1999* (Cth).

Charles, on behalf of Mount Jowlaenga Polygon #2 v Sheffield Resources Limited **[2017] FCA 1126**

21 September 2017, Appeal of NNTT decision-where Tribunal determined s35 future act determination, Federal Court of Australia, Western Australia, Barker J

In this matter, Barker J heard an appeal in relation to the determination made by the National Native Title Tribunal (the Tribunal) in *Sheffield Resources Ltd and Another v Charles and Others on behalf of Mount Jowlaenga Polygon #2* [2017] NNTTA 25 that the lease application M 04/459 under the *Mining Act 1976* (WA) may be granted to Sheffield Resources Limited. The decision was made in respect of Sheffield's s 35 application.

Barker J ordered that: (1) the appeal be dismissed and (2) no orders were made as to costs.

[1] The 'appeal' concerned the good faith negotiations obligations found in section 31(1)(b) of the *Native Title Act 1993 (Cth)* (NTA). [2] The obligation to negotiate in

good faith arises in connection with a proposal for the doing of a 'future act', as defined in the NTA. Barker J set out the Preamble to the NTA that from its commencement has stated:

> [4] 'Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.
>
> It is particularly important to ensure that native title holders are able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be fully supplemented. In future acts that affect native title should only be able to be validly done, if typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of native title holders through a special right to negotiate. It is also important the broader Australasian community be provided with certainty that such acts may be validly done.
>
> A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.'

Background

[17] On 8 August 2014, Executive Director of the Department of Mines and Petroleum of the Government of Western Australia (The State **Government Party**) gave notice of the future act in accordance with s 29 of the NTA that a **lease application** M 04/459 under the *Mining Act 1978* (WA) may be granted to Sheffield Resources Limited (the **grantee party**). The grant of the lease would constitute a future act as defined by the NTA. [18] This notification triggered the good faith negotiations obligation created by s 31(1)(b).

Following the s 29 notification, the Mount Jowlaenga Polygon #2 claim group (**native title party)**, who claimed native title in the lease application area, appointed KRED Enterprises Pty Ltd as its lawyers to engage in negotiations with the grantee party for s 31 negotiation purposes.

[20] After six months, on 24 October 2016, when an agreement had not been reached, the grantee party applied to the Tribunal as the relevant arbitral body, pursuant to s 35 of the NTA, for a determination that the act, being the grant of the lease, might be carried out.

[21] Almost immediately after lodging the s 35 application, Sheffield sent letters putting their offer directly to three individuals who comprise the native title party (the registered native title claimant), stating that they had been attempting to negotiate with KRED but had been unable to 'reach a conclusion'.

[23] At material times prior to making the s 35 application, a negotiation protocol had been agreed between the parties, which specified that all negotiations would be between Sheffield Resources and KRED on behalf of the native title party, not individual members of the claim group. This was to ensure that the native title party was professionally represented in the commercial negotiations.

[25] In submissions to the Tribunal concerning whether the s 35 application should be determined, the native title party raised this conduct by the grantee party as proof that the negotiations conducted by the grantee party failed to meet the s 31 good faith negotiations requirement, and why the s 35 application should not be determined.

[26] The Tribunal Member found that the grantee party had conducted the relevant negotiations prior to the making of the s 35 application, in good faith. [27] The Tribunal further determined that the grantee party did not labour under any duty to negotiate in good faith (see paragraphs [179], [195-196] of the Tribunal's written reasons for the decision.

[31] Pursuant to section 169 of the NTA the native title party appealed the decision on a 'question of law'. Three grounds for appeal are set out in the notice to appeal.

Grounds of appeal

1. **First ground for appeal** [32] The native title party's first ground of appeal is to the effect that the Tribunal erred at law in not finding the grantee party continued to labour under a good faith negotiation obligation at all material times, including following the making of the s 35 application when it approached the individuals comprising the native title party to the doing of the act? The native title party says that the Tribunal should have found that the conduct was not in good faith and so the s 35 application should not have been determined'.

[38] Mount Jowlaenga (the **native title party)** contended that the Tribunal erred when it found that if the grantee party chose to negotiate after the s 35 application had been made, it was not bound by the obligation of good faith. It referred to the Preamble and the objects of the NTA in s 3 (a) and (b) that the right to negotiate is a primary element of the protection of native title and that the requirement of good faith is not conditioned by the interplay between negotiations and the s 35 arbitral system. The native title party noted the beneficial nature of the obligation to negotiate in good faith and its recognition as a main object of the NTA.

[41] The native title party also acknowledged that s 36(2) places an evidentiary burden on the party alleging a lack of good faith in the negotiations. The native title party submits [54] that the Tribunal erred when it found that if the grantee party chose to negotiate after the s 35 application had been made it was not bound by the obligation of good faith.

[70] The essence of the submissions made by the Government Party and the Grantee Party is that s 35 (3) merely empowers parties to continue negotiations after

the making of a s 35 application if they wish, in circumstances where in its absence, there may be some doubt as to the effect that an agreement reached after the making of a s 35 application might have. [71] The grantee party submitted that s 31(1)(b) contains two elements-the first being a process that the parties must negotiate in good faith with the view to reaching an outcome and the second is an outcome-an agreement that the future act may or may not be done with or without conditions. [74] The grantee party submitted that s 35 does not refer to the first element being the process of negotiation in good faith if negotiations continue after the s 35 application has been made.

Barker J:

> [80] 'The proposition that, following the making of a s 35 application, the Government party or a grantee party may, in a sense, actively seek to negotiate otherwise than in good faith would, one would think, be an anathema given the text of the Preamble and the general objects of the NTA set out above, not to mention s 31 (1) (b) itself. Every indication in the NTA points towards a "good faith" being a constant requirement in all dealings under the NTA.'

[81] However His Honour then states 'that broad reflection cannot of itself dictate the manner in which s 35(3) of the NTA should be construed…if any government or grantee party continues negotiations with a native title party with a view to obtaining an agreement following the making of a s 35 application, and behaved badly, as it were, and demonstrated bad faith in doing so, it may be that conduct may well be relied on to inform a decision by an arbitral body, for the purposes of s 36(2), that the earlier negotiations had in fact been conducted otherwise than in good faith.'

Barker J further observed: [82] A good corporate citizen standing in the native title community more generally, would be greatly tarnished, if they were so to behave and would affect any future negotiations that they may wish to conduct with a relevant native title party, and indeed the preparedness of any Government party to do the proposed future act or to do a similar future act in the future.

[83] Barker J agreed with the submissions of the Government party and the grantee party as to their construction of s35 (3). Principally section 36(2) appears to be drafted on the basis that the arbitral body will be considering whether the negotiations that preceded the making of the s 35 application met the requirements as set out in s 31 (1) (b).

[84] It was submitted that there is nothing in s 31(1)(b) or the NTA generally which says or implies that the outcome can only arise from the s 31(1)(b) process, that is, good faith negotiations under that provision. In this regard, the grantee party relied on what Carr J said in *Walley v Western Australia* [1996] FCA 490 at [375].

[86] Section 35(3) empowers the negotiation parties to continue to negotiate with a view to reaching an agreement and if the parties proceed to negotiate one would expect them to do so in good faith but 'strictly speaking there is no obligation on them

to do so'. They will however be required to have negotiated in good faith up until the point of making the s 35 application. If they move quickly from pre s 35 application negotiations to a s 35 application and then begin behaving badly then the arbitral body may well entertain real doubts that they never engaged in good faith negotiations.

[88] Barker J ruled that s 35(3), in authorising negotiation parties to continue to negotiate with a view to obtaining an agreement of the kind mentioned in s 31(1)(b), does not carry with it the express obligation, or the implied obligation, to negotiate in good faith' and for this reason ground 1 of the appeal fails.

Once an application has been made, the Tribunal must make a determination under s 38 that the act must not be done, or may be done, or may be done subject to conditions. Barker J held that it is then, by virtue of s 36(2), that the question of the earlier good faith negotiations arises. If there have not been good faith negotiations, then by that subsection the Tribunal must not make a determination on the application. Where the Tribunal finds that the s 31(1)(b) obligation has not been satisfied, and so the s 35 application cannot be determined, s 36(2) notes that a further s 35 application can be made. His Honour considered this to presuppose that fresh negotiations are conducted for at least six months, in good faith.

His Honour considered that s 36(2) was drafted on the basis that the Tribunal will consider whether the negotiations that preceded the making of the s 35 application met the good faith requirements set out in s 31(1)(b), and that the provision is not framed with continuing negotiations in mind, reinforced by the past tense used in the section. The grantee party says that s 36(2), in providing that the Tribunal must not make a determination if the grantee party or Government party did not negotiate in good faith, refers to the process element and requires the Tribunal to satisfy itself that the relevant party did negotiate in good faith prior to the making of the s35 application.

2. **Second ground for appeal**. [33] The second ground of appeal put by the native title party is that the post s35 application conduct by the grantee party in approaching individual members of the native title party could have evidentiary value in assessing whether the pre-s35 application conduct disclosed a failure to negotiate in good faith. Did the Tribunal err by failing to assess the significance of the post s35 application conduct?

[91] The native title party submitted that the Tribunal failed to act upon the conduct by the grantee party and it post s 35 application and the direct contact that it made to members of the native title claim group (as set out at [101]). Only the grantee party made submissions with respect to ground 2 of the appeal [97]. The grantee party submitted that the contact demonstrated nothing about the grantee party's conduct prior to the making of the section 35 application [102].

At paragraph [179] of its decision, the Tribunal referred to the *Pilbara Stone Pty Ltd/Angelina Cox and Ors on behalf of Puutu Kunti Kurrama & Pinikura 2/Western Australia* [2012] NNTA 114 and *South Blackwater Coal Ltd Queensland/Cliff Kina and others on behalf of the Kangulu People (Qc98/25) and Lindsay Kemp and*

Others on behalf of the Ghungalu People (Qc 99/16) [2001] NNTTA 23 (27 March 2001) . In these decisions, it was held that negotiation conduct after a s 35 application may be relevant to whether a party has negotiated in good faith before the application was made. The Tribunal stated that it would take the same approach as Deputy President Sumner and Member Shurven in those decisions. Mount Jowlaenga submitted that the Tribunal failed to act upon its statement in [179], that it was bound to take into account the post s 35 application conduct and failed to do so.

[129] By reference to *South Blackwater Coal Ltd Queensland/Cliff Kina and others on behalf of the Kangulu People (Qc98/25) and Lindsay Kemp and Others on behalf of the Ghungalu People (Qc 99/16) [2001] NNTTA 23 (27 March 2001)* the Tribunal found that it would not make an adverse finding with respect of the grantee party on that ground.

[133] Barker J concludes that the Tribunal *did* take into account the direct contact made by the grantee party to the native title party following the s 35 application however it did not find that there was any good faith lacking in the negotiations conducted by the grantee party in the pre-application conduct. It follows that there was no error of law and that the second ground for appeal fails [140].

3. **Third ground for appeal** [34] The native title party's third ground of appeal raises the question whether the Tribunal was obliged as a matter of law to take into account the grantee party's persistent conduct at the time when the s 35 application was before the Tribunal, in continuing to directly contact or seek to directly contact members of the native title party, as a relevant consideration when seeking to determine whether the grantee party's conduct satisfied its obligation to act in good faith. It is said that the Tribunal erred in law when it failed to consider any of the direct approaches by the grantee party to members of the native title party in respect of the negotiations that had occurred, and when notified to the Tribunal by the native title party during the s 35 application proceeding, despite having expressly indicated that the Tribunal would s consider the matter. Did the Tribunal err by failing to consider the incident of 7 March 2017?

[141] The native title party contended that post s 35 application conduct is relevant to the determination of the question of good faith, a question that can be agitated at any time prior to a determination under s 36A or s 38 of the NTA. The third ground of appeal related specifically to a further incident of post-application conduct, which occurred on 7 March 2017, at a time when the Tribunal had reserved its decision on the good faith issue. The grantee party sent an email to the legal representatives of the native title party attaching a letter of which the grantee party said 'we are forwarding to the Mt Jowlaenga Named Applicants today to provide them with an update regarding native title matters at Thunderbird'.

KRED wrote to the Tribunal on 8 March 2017 regarding this conduct and were advised on 9 March 2017 that although the Tribunal had reserved its decision, Member McNamara had agreed to consider the information 'in the context of overall

behaviour in determining the question of good faith.' The native title party contended that the Tribunal failed to consider the conduct.

[143] Barker J notes that The Tribunal did not make a factual finding about the 7 March 2017 letter in accordance with section 162 of the NTA, 'nor was it obliged to do so, that is the Tribunal evidently did not consider it was relevant to the issue of whether the grantee party negotiated in good faith before making the s 35 application. That is a conclusion of law and not a matter which engages section 162.'

[145] Barker J does not consider ground 3 to be made out for the same reasons that ground 2 failed. His Honour considered that the Tribunal should be taken to have considered that the 7 March 2017 letter was not significant to the question whether the pre-s 35 application negotiations were conducted otherwise than in good faith and so did not specifically refer to it.

[146] Barker J ordered that the appeal be dismissed.

Agius v State of South Australia (Ngarrindjeri Native Title Claim Parts A and B) [2017] FCA 1162

20 September 2017, Application for joinder, Federal Court of Australia, South Australia, White J

In this matter White J ordered that: (1) the interlocutory application, filed by Mr Birtwistle-Smith seeking to be joined as a respondent to the Ngarrindjeri Native Title Claim be dismissed and (2) that the matter be adjourned for the purposes of a Case Management Conference on 20 October 2017 and otherwise for a Consent Determination on 14 December 2017. Mr Birtwistle-Smith's application for joinder was made pursuant to s 84(5) of the *Native Title Act 1993* (Cth) (NTA). The State and the Ngarrindjeri native title claimants opposed the application.

Ex Tempore reasons for judgment

White J: [2] - [3] The Ngarrindjeri claim was filed on 23 June 1998, and covers a large area of land between Murray Bridge in the east and Cape Jervis in the west and extending south along the Coorong to a point just north of Kingston, and then extending northeast to meet the Dukes Highway and then following the alignment of that highway back to Murray Bridge. Mr Birtwistle-Smith is a member of the First Nations of the South East claim, which was filed on 7 July 2017. Part of that claim area overlaps the southern part of the area claimed by the Ngarrindjeri Native Title Claim group.

[4] – [5] Section 84(5) of the NTA empowers the Court at any time to join a 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 that it is in the interests of justice to do so. [5] An application for joinder must show that (a) the person has an interest (b) the interest may be affected by a determination in the proceedings and (c) in the

exercise of its discretion (in the interests of justice); the Court should join the person as a party.

The Ngarrindjeri Native Title Claim

White J: [9] In late 2014, the Ngarrindjeri claim was listed as a priority claim in the applications for determination of native title in South Australia. At a case management hearing on 1 September 2016, the Court raised concerns about the lack of progress towards the resolution of the matter. Since that time the Parties made considerable progress in the early part of 2017 and on 10 July 2017 at a case management conference the Court was advised that the parties may be available for a consent determination directly.

[11] A significant event for the Ngarrindjeri Native Title Claim occurred on 7 July 2017 when Mr Birtwistle-Smith and 11 others filed an application for a determination of native title described in the application as the First Nations of the South East. Part of the area claimed by the First Nations People in that application for a determination of native title overlaps in the southern part of the claim area claimed by the Ngarrindjeri Native Title Claim Group.

[12] On 27 July 2017, on the application of the Ngarrindjeri Native Title Claim Group, the Court made orders separating the Ngarrindjeri People's application into two parts, being Ngarrindjeri Part A and Ngarrindjeri Part B. Ngarrindjeri Part A comprises a part of the Ngarrindjeri claim not overlapped by the application of the First nation's application filed on 7 July 2017. Ngarrindjeri Part B comprises the balance of the area which is in effect the overlap area. The Court referred the overlapping claims for mediation to take place in early 2018. On 27 July 2017 the parties in Ngarrindjeri Part A advised the Court that they were in the final stages of agreeing the matter for the consent determination and on that basis the Court listed 14 December 2017 as the time contemplated for the consent determination.

[14] On 4 August 2017 a further application for a determination of native title was filed by the First Nations of the South East. The area of that application does not overlap with the Ngarrindjeri native title claims.

Application for joinder

[16] Mr Birtwistle-Smith filed his interlocutory application on 31 August 2017. The application did not indicate on face value if it was filed in both Ngarrindjeri Part A and Ngarrindjeri Part B. At the directions hearing on 31 August 2017 counsel for the applicant indicated that he sought to be joined to both applications. Mr Birtwistle-Smith did not file an affidavit in support of his application but rather set out the bases of his application in the affidavit of Mr Andrew Jantke a solicitor employed by South Australian Native Title Services Ltd (SANTS).

At paragraph [17] Mr Jantke's affidavit discloses the basis upon which Mr Birtwistle-Smith seeks to be joined as a respondent.

a) five of the apical ancestors named in the Ngarrindjeri Native Title Claim are also persons named as apical ancestors in the claims of the First Nations of the South East

b) in the event that the foreshadowed consent determination is made in Ngarrindjeri Part A, the legal interests of Mr Birtwistle-Smith would be affected because:

    i) the determination would thereby identify the Disputed Apicals as ancestors of the Ngarrindjeri native title holders and members of the same society of which the native title holders are members

    ii) that identification would be inconsistent with the claims and evidence to be advanced by the applicants on behalf of the First Nations of the South East in support of their native title determination application

c) the *in rem* nature of a determination of native title may preclude Mr Birtwistle-Smith and other members of the First Nations of the South East People from advancing evidence in their claims which contradicts any determination of native title in the Ngarrindjeri Native Title Claim.

[18] In further support of his application, Mr Birtwistle-Smith also filed an affidavit from an anthropologist, Mr Clarke in support of his application. In the report annexed to Mr Clarke's affidavit, Mr Clarke expresses the view that five of the apical ancestors named in the Ngarrindjeri Native Title Claim are not apical ancestors for the Lower Murray/Ngarrindjeri People. He considers instead that each of the five persons is an apical ancestor for all Aboriginal groups based in the southeast at sovereignty. Mr Graham, an anthropologist employed by SANTS, expressed opinions to the same effect.

[20] Counsel also contended that Mr Birtwistle-Smith has an interest which could be affected by a determination in Ngarrindjeri Part A or Ngarrindjeri Part B, being his interest in maintaining that the forebears of the First Nations of the South East constituted a society separate and distinct from that of the Ngarrindjeri Claim Group and his interest in being able to contend that the five apical ancestors in question were not associated with the claim area for Ngarrindjeri Part A.

[21] Counsel elaborated upon that submission by reference to the *in rem* nature of a determination of native title rights and interests, referring to the decision of Drummond J in *Wik Peoples v Queensland* [1994] FCA 967. In particular, counsel submitted that any attempt by Mr Birtwistle-Smith or by the other applicants in the claims by the First Nations of the South East to establish facts contradicting the basis for a consent determination in Ngarrindjeri Part A *could* be characterised as an abuse of process of the kind discussed in *Dale v State of Western Australia* [2011] FCAFC 46 at [92][94], [112][114].

The State argued that Mr Birtwistle-Smith's interest should be characterised as an interest in the evidence to be given in the Ngarrindjeri Part A proceedings, an interest of a kind insufficient for the purposes of s 84(5), relying on paragraph [30] of

Wilson on behalf of the Bandjalang People v Department of Land and Water Conservation [2003] FCA 307.

[22] Both the Ngarrindjeri People [24] and the State of South Australia [23] disputed that Mr Birtwistle-Smith has an interest of the requisite kind.

[24] 'Counsel for the Ngarrindjeri Native Title Claim Group submitted that Mr Birtwistle-Smith does not claim any interest in the area claimed in Ngarrindjeri Part A, only an interest in the First Nation of the South East People's claim not being prejudiced by the proposed consent determination in Ngarrindjeri Part A. He also noted that Mr Birtwistle-Smith had not provided any evidence that he had any genealogical connection to any of the five apical ancestors in question, meaning the interest claimed by Mr Birtwistle-Smith could only arise by reason of his membership of the First Nations of the South East Claim Group.'

[25] White J found that the submissions did not preclude Mr Birtwistle-Smith from having a relevant interest. That is because the inclusion or exclusion of the five apical ancestors in question may be capable of bearing upon the identity of the society at sovereignty, now relied upon for the asserted native title rights and interests by the First Nations of the South East.

[26] - [27] His Honour did not consider the interlocutory proceedings appropriate for the determination of the abuse of process issue, but should be raised if and when it arises, in the context of an actual factual dispute. However, his Honour was prepared to assume that Mr Birtwistle-Smith has a relevant interest which may be affected by the determination in Ngarrindjeri Part A (at [27]), but held that it was not in the interests of justice to make an order joining him as a respondent party (at [28]).

Exercise of discretion

[29] White J reasoned that the Ngarrindjeri claim has been on foot for 19 years, a period in which Mr Birtwistle-Smith could have brought his application for joinder. The application was not brought until 31 August 2017, after the Court had made the arrangements for the consent determination in Ngarrindjeri Part A.

[31] His Honour found the explanation for lateness provided in Mr Jantke's affidavit unpersuasive. Mr Jantke did not assert any lack of awareness by Mr Birtwistle-Smith of the Ngarrindjeri Native Title Claim, nor of its progress within the Court, nor of the identity of the apical ancestors named in the Ngarrindjeri Native Title application. His Honour inferred that the existence of that claim is well known, particularly to SANTS, the legal representative for Mr Birtwistle-Smith and the First Nations of the South East claim group, and a party to the Ngarrindjeri Native Title Claim since 2008. His Honour found it particularly pertinent that at the hearing on 27 July 2017, neither SANTS nor Mr Birtwistle-Smith raised any objection to the Court putting in place the timetable for the Ngarrindjeri Part A consent determination.

[34] White J determined that there is a significant prospect of prejudice to the existing parties to Ngarrindjeri Part A if the joinder is allowed. White J stated at [37]

that in considering the potential detriment to the applicant he also had to consider the relative lateness of the application for joinder.

Counsel for Mr Birtwistle-Smith referred to the potential in that event for there to be a round of negotiations concerning the identity of the apical ancestors, a conference of experts and ultimately for a trial to resolve disputed issues of fact. His Honour considered at [34] that 'the very existence of that prospect, and the delay associated with it, illustrates the potential detriment to the parties in Ngarrindjeri Part A presently. That is especially so, given the significant work which has been done to date in preparing the matter for the consent determination.'

[41] Finally, his Honour found that joining Mr Birtwistle-Smith would cause significant delay to the resolution of the Ngarrindjeri claims and dismissed his application for joinder. White J also considered the overarching purpose of the civil practice and procedure provisions set out in section 37M of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) as well as the obligation for parties to act consistently with this overarching purpose as set out in section 37N of the FCA Act. The provisions empower the Court to take into account the public interest in having proceedings conducted with efficiency and economy.

[43] White J was not satisfied that the interests of justice require the Court to accede to the application of Mr. Birtwistle-Smith, even assuming that he does have the requisite interest. [44] Accordingly the interlocutory application filed 31 August 2017 was dismissed and the matter adjourned to the case management conference of 20 October 2017 and otherwise for the consent determination on 14 December 2017.

Deerubbin Aboriginal Land Council v Attorney-General of New South Wales **[2017] FCA 1067**

7 September 2017, Non-claimant Application, Federal Court of Australia, New South Wales, Griffiths J

In this matter, Griffiths J ordered that: (1) native title does not exist in relation to Lots 1, 2 and 4 in DP1226110 at North Parramatta in the Parish of Field of Mars, County of Cumberland in the State of New South Wales.

[1] The applicant seeks a determination pursuant to section 13(1)(a) and the related provision in section 61 of the Native Title Act (Cth) (NTA) that native title does not exist in relation to the land which comprises Lots 1, 2 and 4 in DP1226110 at North Parramatta in the Parish of Field of Mars, County of Cumberland in the State of New South Wales.

[2] The determination is sought in relation to the applicant's restrictions in dealing with the land as a result of ss 36 (9) and (42) of the Aboriginal Land Rights Act 1983 (NSW*) (***ALR Act***)*. The effect of section 36(9) is that the applicant's fee simple title to the Land is subject to any native title that existed in relation to it immediately prior to its transfer

to the applicant. The effect of s 42 of the ALR Act is that the applicant, as an Aboriginal Land Council in NSW, may not deal with land subject to native title rights and interests unless that land is subject to an approved determination of native title.

Summary of background matters

[4] The applicant is the freehold title holder over the Land which comprises Parramatta Gaol and some surrounding lands. The land has an approximate area of 63,200m2.

[5] On or about 24 February 2012, the NSW Aboriginal Land Council (NSWALC) made a claim to Parramatta gaol and the surrounding lands pursuant to section 36 of the ALR Act. The claim was refused by the Minister Administering the Crown Lands Act on or about 28 June 2013. [6] The NSWALC appealed against the refusal to the NSW and Environment Court pursuant to section 36(6) of the ALR Act.

[7] On 12 December 2014 the Land and Environment Court allowed the appeal. The Minister was ordered to transfer the Land to the applicant in fee simple within 24 months, or on some other timeframe as agreed between the parties.

[8] The Court was advised that the material before it and the purpose of the application is to enable the applicant to deal with the Land to the benefit of its members and other Aboriginal people in its area.

Procedural matters

[9] The notification period ended on 15 February 2017.

[10] In June 2017, NTSCORP Limited, the State native title representative body, and the Attorney-General of NSW, filed notices under s 86G of the NTA that they did not oppose orders in, or consistent with, the terms sought by the applicant. The Court made orders by consent on 13 June 2017 that the proceeding be determined unopposed in accordance with s 86G of the NTA without holding a hearing.

[13] In his affidavit, Mr Cavanagh, CEO of the Deerubbin Land Council, deposed that the land was previously within the external boundaries of the claim made by Gale and others on behalf of the Darug Tribal Aboriginal Corporation (Darug Tribal claim). That claim commenced in May 1997 and was discontinued in February 2011: *Gale on behalf of the Darug Tribal Aboriginal Corporation v New South Wales Minister for Land Water Conservation* [2011] FCA 77 (*Gale No 1*). The Deerubbin Land Council had opposed the discontinuance, submitting that maintaining the claim for such a lengthy period had prejudiced the performance of its statutory functions and that discontinuance would result in it having to make non-claimant applications such as in the current proceedings. The Court allowed the applicant in that matter to discontinue the Darug Tribunal claim in *Gale No 1*, but placed conditions on the commencement of any further native title claim on behalf of the Darug People.

[14] A second native title claim was filed on behalf of the Darug People in relation to a single parcel of land in the Lower Portland area of NSW and was heard and determined in *Gale v Minister for Land & Water Conservation for the State of New*

South Wales [2004] FCA 374 (*Gale No 2*). After a three day hearing, Mr Gale's solicitor advised the Court that his client wished to discontinue the proceedings. On 7 September 2004 the Court determined that there was no native title in relation to the land the subject of that claim.

The applicant argued that the decisions in *Gale No 1 & 2* make it 'extremely unlikely that "those who previously asserted native title in relation to land within boundaries that included Parramatta" will ever be able to establish a claim over the land' (at [32]). No application for a determination of native title was filed in response to the public notice of the non-claimant application given under s 66 of the NTA. The Land Council further submitted that any native title had been extinguished by previous exclusive possession acts attributable to the State of NSW, including the grants of freehold title and the erection of public works – the Parramatta Gaol, water mill and Lunatic Asylum.

[36] The State Attorney-General submitted that the formal requirements of the application were met. There was no evidence of a continued existence or otherwise of native title to the land, and even if there was, the applicant's primary documentary and secondary historical records provided reliable evidence that any native title in relation to the land had been extinguished. The State submitted that the evidence in relation to the Darug Tribal Claim and the Darug Lower Portland Claim was not material to the question of whether or not native title exists, as those claims related to neighbouring parcels of land (citing *Eden Local Aboriginal Land Council v NTSCORP Ltd* [2010] FCA 745 per Jacobson J) and should be disregarded by the Court.

[45]- [47] Griffiths J found that the formal notice requirements of the application were satisfied.

Proof of non-claimant applications

[48] There are two bases that the Court can be satisfied that native title does not exists in relation to land the subject of a non-claimant application:

(a) native title does not presently exist because it is not claimed or cannot be proved by a native title claimant. *Gandangara Local Aboriginal Land Council v Minister for Land for the State of NSW [2011] FCA 383* per Perram J

(b) Native title has been extinguished by prior acts of the Crown. *Gandangara Local Aboriginal Land Council v Attorney General of NSW [2013] FCA 646* per Griffiths J.
[49] The non-claimant applicant must prove on the balance of probabilities that no native title exists in relation to the land the subject of the application.

[54] The Court accepted the State Attorney General's submission that the evidence in relation to the Darug Tribal claim and the Darug Lower Portland claim is not material as to whether native title exists in this case, 'as it is not clear from the evidence whether the land the subject of those claims was in fact the Land.'

Griffiths J stated at [52] that where those criteria are met, the Court is 'normally 'entitled to be satisfied that no other claim group or groups assert a claim to hold native title to the land" and that finding "supports an inference of an absence of native title.' (*Worimi Local Aboriginal Land Council v Minister for Lands for NSW & Anor (No. 2)* [2008] FCA 1929 at [46] citing *Commonwealth v Clifton* [2007] FCAFC 190 at [59])'.

[54] The Court is satisfied that the remaining evidence establishes:

(a) that notice has been given and no native title claimants have come forward

(b) the NNTT report shows that there are no overlaps with any other claims

[55] Griffiths J made the orders as sought by the applicant.

Peterson on behalf of the Wunna Nyiyaparli People v State of Western Australia **[2017] FCA 1056**

5 September 2017, Appeal, whether notice of appeal authorised by the appellant, Federal Court of Australia, Western Australia, McKerracher J

In this matter, McKerracher J ordered that: (1) the appeal be dismissed (2) submission/s if any as to any additional relief to which the respondents contend that they may be entitled not exceeding three pages to be filed and served within 28 days (3) submission/s in response, not exceeding three pages are to be filed and served within 28 days thereafter and (4) unless the Court otherwise orders, any remaining issue will be determined on the papers.

[1] The appellant (the **Wunna Nyiyaparli)** appeals from a judgment in *Petersen on behalf of the Wunna Nyiyaparli v State of Western Australia* [2016] FCA 1528. The primary judgment was delivered on 16 December 2016.

> 'The notice of appeal was filed on 30 January 2017 complaining in essence of a breach of natural justice in the Wunna Nyiyaparli being precluded from leading evidence at the hearing. The central issue the applicant wishes to agitate is a denial of natural justice.

The two active opponents in the appeal are the **State** of Western Australia and the **Nyiyaparli** people. The **Nyiyaparli** people apply for the appeal's dismissal summarily on the basis of lack of competency. The State adopts the arguments advanced by the **Nyiyaparli** people.'

[2] McKerracher J in determining the application on behalf of the Full Court as a single Judge does so pursuant to s25 (2B) of the *Federal Court of Australia Act 1976* (Cth).

[3] The notice of objection to competency having been filed, the Wunna Nyiyaparli sought to file a supplementary or amended notice of appeal on 4 May 2017. It was not accepted for filing but McKerracher J permitted it to be filed in Court without prejudice to the Nyiyaparli being able to pursue their application.

McKerracher J made the following observations: [4] The Wunna Nyiyaparli have been confused as to the relevant procedure and allowance was made for them as struggling self-represented litigants. However the assistance needed to be commensurate so as not to occasion any prejudice to the other party or parties involved in this litigation. In this instance the Nyiyaparli have been trying to proceed with a native title claim for some time and are being impeded in the progress of the claim in part by the fact that the Wunna Nyiyaparli have failed to or been unable to comply with the directions of this Court.

[5] 'The primary Judge was resolving a dispute about the existence of a native title claim group. The dispute affected three proceedings in the Court. The first was the application for a determination of native title filed in 1998 on behalf of the Nyiyaparli in respect of an area of about 40 square kilometres in the Pilbara district of Western Australia including the town of Newman (**the 1998 claim).**'

[6] The second proceeding was an application filed in 2012 'on behalf of the Wunna Nyiyaparli People' (the **Wunna Nyiyaparli claim)**. 'The Wunna Nyiyaparli claim sought a determination of native title in respect of an area, coinciding substantially if not precisely with the Roy Hill pastoral lease. The lease is wholly within the area to which the 1998 claim relates.'

[7] 'The third proceeding was that of the Nyiyaparli in respect of two separate areas contiguous with the south western boundary of the area the subject of the 1998 claim.'

[8] The essential dispute being dealt with by His Honour was the exclusion of members of the Coffin family from the claim group on whose behalf the claim was brought by the Nyiyaparli. 'The Wunna Nyiyaparli are descendants of William (Bill) Coffin (**Bill Coffin junior)** and it is asserted that he obtained his Nyiyaparli identity through his paternal grandmother **Maggie**. Maggie was the mother of Bill Coffin's Junior's father also named William (Bill) Coffin (**Bill Coffin Senior).** It was that claim that put Maggie's status as a Nyiyaparli person at the heart of the Wunna Nyiyaparli claim. The Wunna Nyiyaparli asserted in addition that Bill Coffin Junior was generally identified within the Western Desert society as a Nyiyaparli man and that he had been accepted as Nyiyaparli by other Nyiyaparli.'

[9] The three proceedings are in the docket of Barker J, but His Honour directed that the preliminary question be heard separately from any other questions in the Nyiyaparli and Wunna Nyiyaparli proceedings namely:

> 'was the paternal grandmother (that is father's mother) of William (Bill) Coffin (born circa 1903), being a woman described by the Wunna Nyiyaparli applicant as Maggie, a Nyiyaparli person, that is, a person descended from Nyiyaparli ancestors or possessing rights and interests in the land and waters comprised in the area of the Wunna Nyiyaparli claim and with a connection to those land and waters, both in accordance with tradition [sic] laws acknowledged and traditional customs observed by the Nyiyaparli People?'

Orders were made by Barker J that the participating parties in the trial of the separate question be the Wunna Nyiyaparli applicant, The Nyiyaparli applicant, the State and any of the respondents who gave notice of intention to participate. Additionally, orders were made programming the matter and with respect to the manner in which the hearing of the separate question was to be conducted. Barker Made orders as to the effect of the Court's determination of the separate question in these terms:

> 'In the event that the Court answers the separate question negatively, and decides that the paternal grandmother of William (Bill) Coffin ...being a woman described by the Wunna Nyiyaparli applicant as Maggie, was not a Nyiyaparli person, that is, not a person descended from Nyiyaparli ancestors or possessing rights and interests in the land and waters comprised in the area of the Wunna Nyiyaparli claim and with a connection to those land and waters, both in accordance with traditional laws acknowledged and traditional customs observed by the Nyiyaparli"
>
> a) the claimant application in WAD 22 of 2012 should be dismissed; and
> b) [Ms] Roy, [Ms] Drage and [Mr] Coffin shall be removed as respondents to WAD 6280 of 1998
>
> [28] The orders to be made if the Wunna Nyiyaparli applicant receives an affirmative answer to the separate question shall be subject to further consideration at a directions hearing on 9 November 2015'.

Procedural background

[11] Of critical importance to the assertion of the lack of natural justice, are the steps taken prior to the hearing of the separate question as set out in some detail by the primary Judge who determined the process. In November 2015 Barker J made orders as to the hearing of the separate question broadly as follows:-

In July 2016 The Court would hear opening submissions and the evidence of witnesses on country: then the anthropologists retained by Wunna Nyiyaparli and the Nyiyaparli would confer in a conference with the Registrar towards the preparation of a joint statement; and further that the anthropologists would then provide concurrent evidence with the parties make their final submissions in late August 2016.

Conduct of the separate question hearing

[12] Three members of the Wunna Nyiyaparli attended the hearing of the separate question on 11 July 2016 as they did before McKerracher J on this application. They were Ms Roy, Ms Drage and Mr Coffin who were not legally represented. They did not provide notice to the Nyiyaparli applicants that they were intending to appear and there was some confusion as to their intentions. The Nyiyaparli applicant objected to the Wunna Nyiyaparli being permitted to lead evidence given that they had proceeded on the basis that written affidavits were required and not the attendance of their witnesses at the hearing. Counsel for the Nyiyaparli applicants also indicated that he had not prepared to cross examine the Wunna Nyiyaparli witnesses. Finally

counsel said that YMAC had not taken instructions in response to the foreshadowed evidence of the Wunna Nyiyaparli and would need the opportunity to do so. The Court determined that the Nyiyaparli applicants' submissions were sound and that it would occasion the vacating of the 11 July 2016 hearing which was determined to be inappropriate and the Court ruled that the Wunna Nyiyaparli applicant should not be permitted to lead evidence at the hearing. This meant that the trial proceeded without the Wunna Nyiyaparli adducing evidence although they were permitted to make submissions on the evidence presented by the Nyiyaparli.

The Nyiyaparli applicant was the only party to tender a number of affidavits as evidence. No witnesses were required for the purposes of cross examination. The Nyiyaparli applicant and the State of Western Australia also submitted that particular regard should be given to the preservation of evidence hearing conducted on 11-13 June 2014. The Nyiyaparli applicant also relied on the evidence of two anthropologists: Kirsty Wissing and Kim McCaul.

Reasoning of the primary Judge

[13] His Honour paid particular regard to the evidence of anthropologist Mr McCaul.

[14] His Honour then considered the separate question identified two alternative means by which Maggie could be held to be a Nyiyaparli person either (a) by descent or (b) as a person possessing rights or interests in the land and waters observed by the Nyiyaparli. [15] His Honour approached the question on the balance of probabilities and addressed the laws and customs of the Western Desert people and Society [15] – [16]. [17] Importantly his Honour accepted all of the evidence and noted that there had been 'some intermingling of Western desert people with Nyiyiparli as the Western Desert people came out of the desert and on to Nyiyaparli land.

[19] 'The primary judge concluded that the Wunna Nyiyaparli had not established on the balance of probabilities that Maggie was a Nyiyaparli person by descent. [20] His Honour then considered the separate limb of the separate question namely that of obtaining rights and interests in land through pathways other than descent and turned to the evidence of Mr McCaul. [21] His Honour concluded that none of the evidence supported a conclusion that Maggie was a Nyiyaparli person whether by descent or otherwise and answered the separate question in the negative.

Objections as to the competency of the appeal

[26] The fourteen Respondents (Nyiyaparli) objected to the competency of the appeal. Their five grounds forming the notice of objection to competency are set out in this paragraph. The Respondents asked for the question of competency to be heard and determined before the hearing of any appeal.

Authorisation of the notice of appeal dated 30 January 2017

[27] McKerracher J agreed to hear the competency issue before the appeal.

[29] The question of authorisation relied in part between communications between members of the Wunna Nyiyaparli and their solicitors which ordinarily would have

attracted legal professional privilege but they were voluntarily sent to the Court and others with a view to responding to the argument as to the lack of authorisation. Any privilege in those communications was therefore waived.

[31] The issue in relation to authorisation arises because on the footer of the first page and at the bottom of the second page it says that the document was prepared and signed by Ernest William Coffin as the appellant-however the signature actually appears to read **HopgoodGanim** Lawyers, who indicated that they had signed the notice of appeal on behalf of Wunna Nyiyaparli given they were not able to obtain Mr Coffin's signature in time. [33] The respondents rely on provisions within the Court's rules that provide that a person must not be named as an appellant without their consent and they also queried if all of the persons who make up the applicant have consented to the filing of the notice of appeal. The respondents rely on the reasoning in *McGlade v Native Title Registrar* (2017) 340 ALR 419 (at [234]-[238]) per North and Barker JJ and (at [379], [438]-[439]) per Mortimer J.

[34] By the time of the application before McKerracher J there was no indication that all of the applicants/appellants had authorised the filing of the notice of appeal dated 30 January 2017. [43] The notice of appeal was not served on the respondents and the supplementary notice of appeal was accepted for filing in Court on 4 May 2017. [44] McKerracher J determined that the notice of appeal dated 30 January 2017 was not authorised and the Wunna Nyiyaparli would require leave in order to file the document.

Whether leave to appeal is required

[46] McKerracher J decided that leave to appeal would be required but had not been sought. [47] His Honour reasoned that if for argument's sake there was appropriate authorisation for appeal or the application for leave to appeal the separate question was answered in three native title claim proceedings as the same issue arose in all three claims. Two of those claims the Wunna Nyiyaparli claim and the 1998 claim wholly overlapped and it was necessary that they be dealt with in the same proceeding. The Wunna Nyiyaparli was designated as the 'lead proceeding' and all orders made and documents filed and all evidence received in the lead proceeding were taken to also be orders made, documents filed and evidence received in the Nyiyaparli claims. Therefore any appeal in relation to the answer to the separate question must be an appeal in relation to all three of the native title claim proceedings.

[48] That is consistent with the fact that the notice of appeal (the first and supplementary versions) indicates that the Wunna Nyiyaparli appeal from the whole of the judgment and all of the orders of the Court made on 16 December 2016. 'Assuming that this is so, the proper characterisation of the orders seems to be that they were interlocutory in nature and as such leave to appeal is required pursuant to s 24(1A) of the *Federal Court Act*.

[51] McKerracher J observed that the orders made in the Nyiyaparli claims answering the separate question in the negative are not 'final' because those

proceeding are continuing and the separate question has resolved only one of a number of issues. That is by definition an interlocutory determination.

[52] The other complication for the Wunna Nyiyaparli is that the only other order made in those proceedings, apart from answering the separate question adversely to the Wunna Nyiyaparli, was the removal of certain persons, namely the members of the Wunna Nyiyaparli applicant as respondents and there is no appeal from such an order by virtue of the provisions in s 24(1AA)(B)(i) of the *Federal Court Act*. Finally McKerracher J determined that as a result of the decision in *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 54 ALR 767 that in circumstances where an appeal is brought against a number of orders some of which are final and some of which are interlocutory, leave is required.

Should leave to appeal be granted if it were to be sought?

[54] Whilst there was not yet any application for either an extension of time to appeal or for leave to appeal McKerracher J set out the relevant criteria for leave to appeal:

(a) the primary decision was attended with sufficient doubt to warrant it being reconsidered on appeal; and

(b) if leave was refused substantial injustice would occur, assuming the original decision to have been wrong.

McKerracher J stated that [55] it is clear that the Wunna Nyiyaparli notice of appeal addresses the natural justice complaint however His Honour observes at [56] that the further materials filed by the Wunna Nyiyaparli were not in any way relevant to the notice and His Honour accepted the submissions of the Nyiyaparli and the State that no weight can be given to those materials in the present application.

[57] As to the substantive question of a lack of natural justice or procedural fairness in refusing to allow the Wunna Nyiyaparli to adduce any evidence at the hearing of the separate question on 11 July 2016, McKerracher J determines that the Wunna Nyiyaparli were given ample opportunity to participate at the hearing of the separate question.

McKerracher J:

> [58] 'in the context of contested proceeding initiated by a litigant in person, while a reasonable opportunity to assist a litigant in person is usually necessary, this does not extend to disadvantaging a represented litigant to its prejudice. Moreover, to guarantee procedural fairness is not open ended. The requirement for procedural fairness is a requirement that a party may be given reasonable opportunity to present its case, not every opportunity.'

[59] The question of whether or not further opportunity to adduce evidence should be given is a discretionary judgment and an appeal in respect of the exercise of discretion requires compliance with the principles set out in *House v The King* (1936) 55 CLR 499 (at 504-505).

McKerracher J concluded that:

> [60] ‘the primary judge’s reasons for exercising discretion were set out with clarity and detail and were plainly correct. It is quite clear that there is not sufficient doubt about the correctness of the judgment under appeal to warrant consideration by the Full Court. Further His Honour stated that ‘there is real doubt as to whether substantial injustice would occur, assuming the original decision not to allow further evidence had been wrong.’[61]

McKerracher J concludes at [64] that the appeal is unauthorised and, in any event, incompetent and the objection to competency was upheld.

2. Legislation

Victoria

Yarra River Protection (Wilip-gin Birrarung murron) Bill 2017

Status: The Bill passed the Legislative Council on 21 September and received Royal Assent on 29 September.

Stated purpose: The main purposes of this Bill, which will form a new Act, are to make a declaration protecting the Yarra River as one living and integrated natural entity; provide for the development and implementation of a Yarra Strategic Plan as an overarching policy and planning framework for the Yarra River and certain land in its vicinity; to establish the Birrarung Council to report to the Minister on the development and implementation of the plan and generally act as the voice of the Yarra River; and to provide for the declaration of the Greater Yarra Urban Parklands.

Native title implications: The preamble to the Bill highlights the connection of the traditional owners of the land through which the Yarra River flows to the river and their past and ongoing stewardship of it. The preamble is partly written in the language of the traditional owners, the Woi-wurrung language.

The Birrarung Council has the function of advocating for the protection and preservation of the Yarra River. It is intended that the Council will act as a voice for the Yarra River. It will report to the Minister on the development, implementation, operation and effectiveness of a Yarra Strategic Plan and advise the Minister generally in relation to the protection and preservation of Yarra River land. The Council will consist of up to 12 members comprising at least two nominees of the Wurundjeri Tribe Land and Compensation Cultural Heritage Council; one representative of an environment group and of an agriculture industry group; two skill-based members; one representative of a local community group; and an appropriately skilled chairperson.

Clause 12 sets out the cultural principles of the Bill. It states that Aboriginal cultural values, heritage and knowledge of Yarra River land should be acknowledged, reflected, protected and promoted; and the role of traditional owners as custodians of Yarra River land should be acknowledged through partnership, representation and involvement in policy planning and decision-making.

For further information please see the Second Reading Speech from the Legislative Council.

3. Native Title Determinations

In September 2017, the NNTT website listed 2 native title determinations.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC / PBC
Yilka and Yilka #2 AND Sullivan Family	Harvey Murray and Western Australia & Ors (Yilka and Yilka #2) AND G.S. (dec'd) & Ors and Western Australia & Ors (Sullivan Family)	27/09/2017	WA	Native title exists in the entire determination area	Litigated	Claimant	N/A
Deerubbin Local Aboriginal Land Council	Deerubbin Aboriginal Land Council v Attorney-General of New South Wales	7/09/2017	NSW	Native title does not exist	Unopposed	Non-claimant	N/A

4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate

The Native Title Research Unit within AIATSIS maintains a RNTBC summary document which provides 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 19 October 2017 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 nativetitle.org.au. For a detailed summary of individual RNTBCs and PBCs see 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	3
Queensland	82	5
South Australia	15	0
Tasmania	0	0
Victoria	4	0
Western Australia	43	1
NATIONAL TOTAL	**176**	**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 19 October 2017.

5. Indigenous Land Use Agreements

In September 2017, 1 ILUA was registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
14/09/2017	Dauan Island Torres Strait Social Housing ILUA	QI2017/006	Body Corporate	Qld	Government, Infrastructure, Residential

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

6. Future Act Determinations

In September 2017, 8 Future Act Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
29/09/2017	Barbara Sturt & Ors on behalf of Jaru and Northgate Resources Pty Ltd and Western Australia	WO2016/0904	WA	Objection – Dismissed	Member Shurven did not receive any contentions from the group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Member Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays. The objection application was dismissed pursuant to s 148(b) of the *Native Title Act 1993* (Cth).
26/09/2017	Raymond William Ashwin (dec) & Others on behalf of Wutha and Resource Assets Pty Ltd and Western Australia	WO2016/0891	WA	Objection – Dismissed	Member Shurven did not receive any contentions from the group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Member Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays. The objection application was dismissed pursuant to s 148(b) of the *Native Title Act 1993* (Cth).

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
19/09/2017	Wanjina-Wunggurr (Native Title) Aboriginal Corporation and Macallum Group Limited and Western Australia	WO2016/0616	WA	Objection – Expedited Procedure Does Not Apply	Member Shurven found that the areas of rock art, white ochre, remains and burial sites within the Napier Range are of particular significance to the native title group. Member Shurven considered that Barker Gorge in the Range is marked clearly on mapping, and could be avoided by Macallum Group in its exploration activities. Member Shurven held that the clear spiritual importance of the area, the fact that the locations of the sites and areas of significance are not disclosed to those outside the community, and their importance in relation to the deaths of members of the community, it is likely that even inadvertent interference with them would lead to interference for the purposes of s 237(b). Macallum Group stated that they will conduct low level exploration in the initial stages of the grant, however there was nothing in their contentions about their intentions for the later stages, or how they would avoid interference with sites of particular significance. Given that there is likely to be interference with sites of particular significance, notwithstanding the State's regulatory regime, Member Shurven concluded that the expedited procedure should not apply to the act.
11/09/2017	Bunuba Dawangarri Aboriginal Corporation RNTBC and Baracus Pty Ltd and Western Australia	WO2017/0092	WA	Objection – Dismissed	Member Shurven did not receive any contentions from the group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Member Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays. The objection application was dismissed pursuant to s 148(b) of the *Native Title Act 1993* (Cth).

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
11/09/2017	Raymond William Ashwin (dec) & Others on behalf of Wutha and Murchison Gold Mines Pty Ltd and Western Australia	WO2016/0697	WA	Objection – Dismissed	Member Shurven did not receive any contentions from the group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Member Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays. The objection application was dismissed pursuant to s 148(b) of the *Native Title Act 1993* (Cth).
8/09/2017	Name withheld for cultural reasons & Others on behalf of Yinhawangka and Glenn Douglas Archer and Western Australia	WO2017/0009	WA	Objection – Expedited Procedure Does Not Apply	Member Shurven found Barngunha to be a site of particular significance to the Yinhawangka people due to it being associated with dreamtime stories; a permanent water hole containing an active mythological being; an increase site; and as it contains culturally significant resources that continue to be utilised by Yinhawangka on a regular basis. Member Shurven also determined the ochre sites in the vicinity to hold that status. The grantee party submitted that the licence activity would be limited to the Rocklea Pittado area, located 2–3 kilometres from Barngunha. No instrument had been executed between the parties to agree on an exclusion zone, and the evidence suggested to Member Shurven that taking stones, the predominant activity proposed under the licence, from the licence area would cause substantial interference. Member Shurven found that even if the licence activity was restricted to Rocklea Pittado, given the complex nature of Barngunha and its significance to the Yinhawangka people, Mr Archer's activities may interfere, even if inadvertently, with the sites of particular significance. Member Shurven was not satisfied the State's regulatory regime would be sufficient to preclude interference to sites of particular significance to the Yinhawangka people. Member Shurven concluded that the expedited procedure should not apply to the act

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
8/09/2017	Raymond William Ashwin (dec) & Others on behalf of Wutha and Resource Assets Pty Ltd and Western Australia	WO2016/0902 WO2016/0903 WO2016/0907 WO2016/0947	WA	Objection – Dismissed	Member Shurven did not receive any contentions from the group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Member Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays. The objection application was dismissed pursuant to s 148(b) of the *Native Title Act 1993* (Cth).
1/09/2017	Walalakoo Aboriginal Corporation RNTBC and Kallenia Mines Pty Ltd and Western Australia	WO2016/0420	WA	Objection – Expedited Procedure Does Not Apply	Member Shurven found that Kallenia Mines' exploration activities, including strangers accessing the licence area, would likely cause direct and substantial interference with social and community activities of the Nyikina Mangala people, due largely to the significance of these nearby locations. On this basis, it was determined that the expedited procedure does not apply. Member Shurven did not consider it likely that the nearby sites of particular significance will be interfered with, as they are not located on the licence and the evidence did not establish the necessary nexus between the two areas.

7. Publications

AIATSIS

Prescribed Body Corporate Research Snapshot Series

The Native Title Research Unit (NTRU) has published papers in the Prescribed Body Corporate (PBC) research snapshot series, developed to share findings from the NTRU's investigation into the constitutions and financial reports of PBCs. This research forms part of the PBC Capability project which aims to develop a long-term national picture of the PBC sector.

PBC Financial Growth

The National Picture snapshot provides an overview of the NTRU's analysis of the publicly available financial data submitted to the Office of the Registrar of Indigenous Corporations (ORIC), and examines the financial growth and development of PBCs from the financial year 2010-11 to 2015-16.

The Size and Wealth Distribution snapshot examines the distribution of wealth and growth of PBCs by size between the years 2010-11 and 2015-16 calculated in terms of net totals and growth rates in the areas of income, assets, equity and staff.

PBC Constitutions

The National Picture snapshot provides an overview of the main findings from this research and identifies key areas where PBCs have adapted their constitutions from the default rules offered by the Office of the Registrar of Indigenous Corporations (ORIC).

The Dispute Management snapshot looks at the dispute management processes within PBC constitutions, examining the use of NTRBs, independent mediation and elder's councils to resolve disputes.

The Decision-making snapshot examines the decision-making processes identified by PBCs within their constitutions including voting processes, quorum requirements and the use of independent directors.

Kimberley Land Council

The September 2017 edition of the KLC's newsletter is now available.

To view, please visit the KLC website.

North Queensland Land Council

Message Stick

The September 2017 edition of Message Stick is now available.

To view, please visit the NQLC 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.

Australian National University

Fourth Annual North Australia Forum

ANU will be holding the 4th annual North Australia Forum. Attendees will be invited to give a brief (5 minute, 3 slide) presentation on relevant research, with preference given to presentations from first time attendees, early career researchers, PhD students and Indigenous researchers.

Date: Friday, 17 November 2017, 9:30am – 1:00pm

Location: Hedley Bull Seminar Room, ANU, Canberra

Please RSVP with intention to attend and/or present by the 10th of November by emailing Bhavani.Balakishnan@anu.edu.au. An agenda will be available closer to the date.

9. Events

Australian Anthropological Society (AAS), Association of Social Anthropologists (ASA) and Association of Anthropologists of Aotearo/New Zealand (ASAANZ)

AAS / ASA / ASAANZ Conference 2017 - Shifting Shapes

Three anthropology associations (AAS, ASA and ASAANZ) are collaborating to put on an international conference in December 2017, bringing together anthropologists and members from across Australia, New Zealand, the UK and Commonwealth and beyond. The conference includes a number of panel sessions on native title, including 'Australian anthropology and post-colonialism' and 'The Australian Nation State and Native Title', as well as the AAS Pre-Conference Forum for Native Title Practitioners. Keynote speaker, Suzi Hutchings will deliver 'Inside Out: Indigeneity in the era of Native Title in Australia'.

Date: 11 - 15 December 2017

Location: University of Adelaide

To view the program and register, please visit the conference website.

Australian Archaeological Association

Island to Inland: Connections across land and sea – 2017 Conference

The AAA2017 Conference will be hosted by La Trobe University, coinciding with its 50th Anniversary. The conference theme is 'Island to Inland: Connections across land and sea.' Island to Inland represents the journey of the First Australians through Wallacea to Sahul. Since then, people have successfully adapted to life in the varied landscapes and environments that exist between the outer islands and arid interior. Despite this diversity, connections run deeply through Australia and its surrounding islands. These include connections to objects and places, across generations, between landscapes and seascapes, and to Country. The conference theme aims to encourage exploration of connections that transcend across time and space, from island to inland.

Date: 6-8 December 2017

Location: La Trobe University, Melbourne

For more information and to register, please visit the conference website.

Australian Indigenous Governance Institute

Indigenous Women in Governance Master Class

Featuring Indigenous women experienced in governance and leadership, this one day Masterclass focuses on effective strategies for promoting gender equality and cultural diversity.

The masterclass will include presentations from keynote Speakers June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Jackie Huggins AM, Co-Chair of National Congress of Australia's First Peoples, and Michelle Deshong, CEO of the Australian Indigenous Governance Institute. Panel discussions will be held with a range of Indigenous female CEO's of community organisations as well as a practical workshop on gender strategies in governance.

Date: 30 November 2017

Location: Lendlease, International Towers, Sydney

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.