AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

WHAT'S NEW IN NATIVE TITLE

JULY 2017

1. Case Summaries

Booth on behalf of the Kungardutyi Punthamara People v State of Queensland (No 2) [2017] FCA 844

28 July 2017, Costs Application, Federal Court of Australia, Queensland, Jagot J

In this matter, Jagot J ordered that the applicant pay the costs of Queensland South Native Title Services (QSNTS) and the applicants on behalf of the Wongkumara people in connection with the proceedings.

On 9 June 2017, Jagot J ordered that the proceedings be summarily dismissed on a number of bases including that the proceeding involved an abuse of process (*Booth on behalf of the Kungardutyi Punthamara People v State of Queensland* [2017] FCA 638). The remaining issue was costs, which is subject to s 85A of the *Native Title Act 1993* (Cth) (NTA). Her Honour concluded by stating that: 'In short, the conduct of the applicant in bringing this proceeding was unreasonable. In the circumstances disclosed in the principal judgment it involved a manifest abuse of process. The Wongkumara applicant and QSNTS ought not to have been put to the cost of having to file interlocutory applications to have the proceeding dismissed. They should be compensated for the applicant's unreasonable conduct by an order for costs in connection with the proceeding' at [7].

Kum Sing on behalf of the Mitakoodi & Mayi People #5 v State of Queensland [2017] FCA 860

28 July 2017, Replacement of Applicant, Federal Court of Australia, Queensland, Reeves J

In this matter, Reeves J ordered that pursuant to s 66B of the NTA, Edward Ah Sam, Pearl Connelly, Kay Douglas, Norman Douglas, Brian Douglas, Tanya Kum Sing and Ronald Major replace Brenda Lucas, Gabrielle Biffin, Karl Howard, Sharn Fogarty, George Kenny, Tanya Kum Sing and Emily Patricia Asse as the applicant on the Mitakoodi & Mayi people native title application.

This was the second relatively recent s 66B application to replace the current members of the authorised applicant for the Mitakoodi and Mayi application. The amended application was filed with the Court on 13 November 2015. It relates to an area of land and waters in the Cloncurry and Julia Creek districts, extending north from the Selwyn Range along the McKinlay, Fullarton, Cloncurry and Saxby Rivers to the Norman River, covering approximately 29,210 square kilometres.

This current native title determination application is the latest in a long series of such applications, filed with respect to the same claim area dating back to 1996. The first of those applications was lodged with the National Native Title Tribunal in October 1996. Thereafter, four further applications were filed with the Court, one each in November 2000, April 2003, July 2006 and November 2011. The original application and the first three of the aforementioned applications were dismissed by Dowsett J in December 2009 because of non-compliance with an order made in October 2008 ([2009] FCA 1528). The fifth and last application filed in November 2011 was dismissed by Dowsett J in December 2011 at the request of the applicant. The present application for replacement of the applicant was filed on 12 February 2016.

The authorisation meeting issue

One of two forms of decision-making process are to be followed when a native title claim group seeks to authorise an applicant. They are: the form that exists under the traditional laws and customs of the native title claim group concerned or, if that traditional form does not exist, whatever alternative form of decision-making that is agreed to, and adopted by, the members of the native title claim group.

His Honour held that s 251B of the NTA does not contain any requirement that a native title claim group must hold a meeting in order to authorise a person or persons to make a native title determination application on its behalf. It follows that s 251B does not require the agreement to, and adoption of, the alternative decision-making process, nor does it require the authorisation decision that follows the decision-making process so adopted, to be made at a meeting. Nonetheless, the practice of convening and conducting meetings for the purposes of authorising an applicant, or replacement applicant, under s 251B has become the most practical and effective

means of achieving that outcome: see *Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373 (*Burragubba*) at [29].

To achieve a valid authorisation of an applicant for the purposes of s 251B(b), such a meeting must be convened and conducted in a manner that results in a decision which is made by the whole of the native title claim group in question: see *Burragubba* at [22]. However, this does not mean that all of the members of the native title claim group have to attend the meeting, but rather that all of the members of the claim group have to be offered a reasonable opportunity to decide whether to attend the meeting: see *Burragubba* at [31].

Reeves J reiterated the guiding principle that the obligation imposed on the organisers of the Cloncurry meeting was to offer all the members of the Mitakoodi claim group a reasonable opportunity to decide whether to attend the December 2015 meeting. They were not obliged to convene a meeting of all the members of the Mitakoodi claim group. Reeves J concluded at [31] that, in the circumstances, there was nothing unreasonable in the location, or the date, the organisers chose for the meeting and this discharged the organisers' obligations. Reeves J rejected the current applicants' contentions that the failure to provide video-conferencing facilities to attend the December 2015 meeting had the consequence that that meeting was not properly constituted for the purposes of s 251B of the NTA.

The decision making process issue

Reeves J stated at [38] that the organisers of the meeting complied with their obligation to offer all the members of the Mitakoodi claim group a reasonable opportunity to decide whether to attend the meeting. The resolutions all accorded with the requirements of s 251B and therefore his Honour rejected the current applicants' contentions challenging the effectiveness of the decision-making process that was adopted and followed at the Cloncurry meeting. Reeves J considered that all of the replacement applicants had complied with each of the pertinent conditions set out by French J at [17] in *Daniel v State of Western Australia* [2002] FCA 1147. The third issue raised the question as to whether Reeves J should, in all the circumstances, exercise his discretion to make the order and his Honour concluded that he would for the reasons set out at [40] and he made the orders sought by the replacement applicants.

Woosup on behalf of the Ankamuthi People #1 v State of Queensland [2017] FCA 831; *Woosup on behalf of the Ankamuthi People #2 v State of Queensland* [2017] FCA 832; *Anderson on behalf of the Northern Cape York #3 Native Title Claim Group v State of Queensland* [2017] FCA 831

26 July 2017, Consent Determinations, Federal Court of Australia, Queensland, Greenwood J

On 26 July 2017 the traditional owners of the north western part of Cape York Peninsula saw the Federal Court of Australia make orders that finalised three native title claims (QUD6158/1998, QUD392/2014, QUD780/2016) by consent. The three determinations are related to the extent that they recognise native title held by persons either comprising, or belonging to, the Northern Cape York Peninsula Regional Society.

Background

On 29 October 1997, the Ankamuthi People lodged three separate applications with the National Native Title Tribunal (NNTT). By order of the Court on 21 July 1999 the three applications were combined to become application QUD6158/1998 (Ankamuthi People #1).

In 2014 the Court made orders determining the traditional rights and interests of the Northern Cape York #1 native title holding group constituted by the Angkamuthi Seven Rivers, the McDonnell Atampaya and the Gudang/Yadhaigana people: *Woosup on behalf of the Northern Cape York #1 Native Title Claim Group (No 3)* [2014] FCA 1148.

On 20 June 2014 a determination that native title exists was made by consent over the land and waters covered by the native title determination application QUD156/2011. On 30 October 2014 a determination that native title exists was made by consent over the land and waters covered by the native title determination application QUD157/2011.

Ankamuthi #1 and #2 claims

In these proceedings, Greenwood J recognised the exclusive native title rights and interests (other than in relation to water) of the Ankamuthi People in relation to the western Cape York Peninsula covering all land and waters within ML 6024 and ML 7024 including the land and waters of Albatross Bay and the rivers and creeks running into it; the land and waters of Port Musgrave and the rivers and creeks running into it; the land and waters of and within the Weipa township boundary and land and waters extending 3 nautical miles from the coastline or the Territorial Sea Baseline as specified in the Western Cape Communities Co-Existence Agreement.

The applicants, the State of Queensland and RTA Weipa Pty Limited (as an assignee from the Rio Tinto Aluminium, formerly Comalco Aluminium) are parties to the Western Cape Communities Co-Existence Agreement dated 14 March 2001,

which was registered on the Register of Indigenous Land Use Agreements (ILUA) as the Comalco ILUA on 24 August 2001. Respondent parties to these determinations include the State of Queensland, Cook Shire Council, Old Mapoon Aboriginal Corporation, Ergon Energy Corporation Limited, Alcan South Pacific Pty Limited, RTA Weipa Pty Limited, Rio Tinto Aluminium Limited and the Queensland Seafood Industry Association.

The Seven Rivers Aboriginal Corporation is to be the prescribed body corporate to hold the native title rights and interests in trust for the Ankamuthi people.

Northern Cape York #3 claim

The time frame within which this application was progressed to a proposed consent determination was short. The parties took less than one year to reach the position where they asked the Court to make orders under s 87 of the NTA. The respondent parties to the application are the State of Queensland, Cook Shire Council, Torres Shire Council, Old Mapoon Aboriginal Corporation, Alcan South Pacific Pty Ltd, RTA Weipa Pty Ltd and Rio Tinto Aluminium Limited.

The determination area comprises part of Lot 8 on SP252492 north of the Ducie River and south of Palm Creek. The Court recognised the exclusive native title rights to possession, occupation, use and enjoyment of the area to the exclusion of all others, and in relation to water, the non-exclusive rights to hunt, fish and gather from the water of the area, take and use the natural resources of the water in the area, and take and use the water of the area, for cultural, personal, domestic and communal purposes. The applicant relied on the provisions of s 47A of the NTA to disregard prior extinguishment to part of the DOGIT land held by the Old Mapoon Aboriginal Corporation. The Court in having regard to Dr Redmond's reports, found that the requirement in s 47A(1)(c) that, at the time the application was made, one or more members of the claim group occupied the area, was satisfied.

The determination area does not include any part of the land or waters which are subject to the agreement known as the Western Cape Communities Co-existence Agreement. The Court determined that the native title must be held in trust by the Ipima Ikaya Aboriginal Corporation RNTBC.

Sandy on behalf of the Yugara People v State of Queensland [2017] FCAFC 108

25 July 2017, Appeal from Negative Determination, Full Federal Court of Australia, Queensland, Reeves, Barker and White JJ

In this matter Reeves, Barker and White JJ ordered that the Yugara appeal (QUD139/2015) and the Turrbal appeal (QUD1097/2015) of the decision in *Sandy on behalf of the Yugara People v State of Queensland (No 3)* [2015] FCA 210 (*Sandy No 3*) be dismissed.

In consolidated native title determination application proceedings brought, respectively, on behalf of the Turrbal People and the Yugara People under the *Native Title Act 1993* (Cth) (NTA), Jessup J answered in the negative a separate question whether but for any question of extinguishment of native title, native title existed in relation to any and what land or waters in a claim area encompassing modern day Brisbane (*Sandy on behalf of the Yugara People v Queensland (No 2)* [2015] FCA 15 (*Sandy No 2*)). As a result of that answer, there was no need for Jessup J to answer further separate questions concerning the identity of the persons or groups who held native title, or the nature and extent of any native title rights and interests. Subsequently in *Sandy No 3*, Jessup J, having considered further submissions from the parties, made a determination that native title does not exist in relation to any part of the land or waters in the claim area.

At trial, the Turrbal people, including Ms Barambah who appeared as their lay representative, claimed that they were direct descendants of an Indigenous man known as the 'Duke of York' in the early days of the colonial Morton Bay settlement (as Brisbane was then known), and held native title in the claim area. The other claimants, the Yugara People, who included members of the Sandy family, disputed the claim that the Turrbal People and only the Turrbal People held native title over the claim area at sovereignty, and contended that the Turrbal People were but a subgroup of the Yugara who held all native title rights and interests in the claim area at sovereignty, and today. The Yugara people (Yugara appellants) appealed from both the negative answer and the negative determination in their proceeding. The Turrbal people (Turrbal appellants) appealed from the negative answer in their proceeding, but not directly from the negative determination.

The question, in essence, that fell to be determined at the trial was whether, despite the colonial history, either – or both – of the claimant groups still possessed native title rights and interests today.

Each of the claims had its own pre-trial difficulties, which the Full Federal Court on appeal dealt with in relation to the negative determination issue. Neither claimant group had the benefit of a trained advocate at trial. It would appear that, so far as the exposition of their respective cases was concerned, each principally relied on the way its case had been framed by its expert anthropologist. The Court found that native title did not exist in the claim area and made the negative determination to that effect.

The 5 questions for the Full Court on appeal were as follows:

1. Should the Yugara Appellants have been given leave to adduce further evidence on their appeal?

Counsel for the Yugara appellants made an oral application to the appeal Court for the Court to receive further evidence in the appeal being an affidavit of Dr Powell made on 27 October 2016. The Court refused the application and provides its reasons in paragraphs [30]-[42].

2. Were the Yugara appellants denied procedural fairness?

The Court stated that (1) 'the principles concerning procedural fairness are directed to ensuring that the parties to litigation have a reasonable opportunity to present their respective cases' [45], (2) that the complaints made by the Yugara about evidence rulings were discretionary decisions for the trial Judge [46] and (3) the conduct of native title litigation like all other litigation must be conducted with reasonable efficiency and expedition to minimise delay and expense [47].The appeal Court found that there was no denial of procedural fairness by the trial Judge [51], [74] and that the ground of appeal was not made out at [76].

3. Did the Judge err in finding that the Yugara appellants had failed to prove continuity of connection to the claim area?

The trial Judge concluded that the Yugara case on continuity must be rejected and the appeal Court also found that 'no error is demonstrated by the Yugara appellants in relation to the fact finding of the Judge. His findings were open to him' at [164].

4. Did the Judge err in finding the Turrbal appellants had failed to prove continuity of connection to the claim area?

The Court found at [219] and [224] that the Judge did not err in any relevant aspect in relation to his findings on continuity.

5. Did the Judge err in making the separate determination?

The Yugara appellants challenged the separate determination that no native title existed in the area as one which no reasonable decision maker could make. The appeal Court found that the 'discretionary power of the Court to make a negative determination of native title is set out in *CG (deceased) on behalf of the Badimia People v State of Western Australia* [2016] FCAFC 67. The appeal Court rejected the Yugara appellant's contention that the Judge's negative determination judgment was unreasonable at [264]. The appeal Court also rejected the Yugara appellant's contentions that the Judge took an irrelevant consideration concerning the application of res judicata [265]. The appeal Court further rejected the Yugara appellant's argument that the Judge erred in making the negative determination judgment.

The Court ordered that the Yugara and Turrbal appeals be dismissed.

Northern Territory of Australia v Griffiths [2017] FCAFC 106

20 July 2017, Appeal from Compensation Application, Full Federal Court of Australia, North ACJ, Barker and Mortimer JJ

On 24 August 2016, Justice Mansfield made orders against the Northern Territory and the Commonwealth on an application brought by the Ngaliwurru and Nungali Peoples (the claim group) for compensation and damages for the loss, diminution of,

impairment or other effect of the act on their native title rights and interests: *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (*Griffiths No 3*). He awarded the claim group $512,400 compensation for the economic value of their extinguished native title rights, interest on this sum of $1,488,261. He also awarded the claim group $1,300,000 for solatium for the loss or impairment of those rights and interests. The primary judge made a declaration that three grants of freehold interests made by the Northern Territory were invalid future acts, and he awarded $19,200 damages together with interest of $29,397, making a total of $48,597 damages for those acts.

These proceedings concerned an appeal by the Northern Territory, a cross appeal to that appeal by the claim group and a separate appeal by the Commonwealth in relation to the orders. On 20 February 2017, Central Desert Native Title Services and Yamatji Marlpa Aboriginal Corporation, the NTRB interveners, were granted leave to intervene without opposition by the parties.

For a summary of *Griffiths (No 3)* see the August 2016 edition of *What's New in Native Title*.

The source and entitlement of compensation under the *Native Title Act* (NTA)

The right to claim compensation depends on the character of the act which the NTA validates. The source of the entitlement depends on whether the act validated was a past act, an intermediate period act, or a previous exclusive possession act within the meaning of Part 2, Division 2, 2A, and 2B of the NTA.

Different consequences flow from validation depending on the classification of the act. Relevantly for the appeals, validation of an exclusive possession act results in the extinguishment of native title, and validation of a category D past act attracts the non-extinguishment principle in s 238 of the NTA.

All but three of the lots in issue were initially, or ultimately, affected by exclusive possession acts. The remaining three lots were affected by category D past acts and the non-extinguishment principle applies to them. The entitlement to compensation for exclusive possession acts is in s 23J of the NTA.

The framework for the assessment of compensation

Compensation was claimed under two heads. One head of claim was the economic loss caused by the acts which deprived the claim group of their native title rights and interests or impaired those rights and interests. The other head of claim was the non-economic effect of those acts on the claim group.

The basis for distinguishing between the two elements of compensation was said to flow from the different nature of each element. The economic element reflects the loss of the material asset which flows from the acts of extinguishment. The non-economic element reflects the effects on the connection of the native title holders with their country. The assessment of the non-economic impact of the acts of extinguishment requires an understanding of the intense bond between Indigenous

people and their country. The evaluation of that element presents difficulty because of the unique nature of the spiritual link between the people and the land and the need to place a monetary value on the disruption to that connection. In this respect, their Honours considered it important to remember that the compulsory acquisition legislation is concerned with valuing land, whereas assessing compensation for the loss or impairment of native title rights and interests requires an evaluation of 'emotional' rather than pecuniary impact.

The Court questioned whether the bifurcated approach adopted by the parties in this proceeding to the assessment of compensation under the NTA is the preferable approach. Their Honours suggested that it might be more appropriate to seek to place a money value on the one indissoluble whole. Such an approach would not render the market value of freehold irrelevant to the exercise, but would avoid the arguments about whether there has been double counting as the result of including factors in both the economic and non-economic categories [144].

The issues on appeal

Six major issues arose for the appeal court's consideration.

1. The first issue concerned Mansfield J's assessment of the economic loss element of the award of compensation.

Each of the parties made a different challenge to the economic value of the claim group's native title rights and interests determined by the primary Judge. Mansfield J assessed that element at 80% of the freehold value of the land – $512,400.[1]

The Full Court reasoned that the primary judge made a number of errors of principle which affected the valuation of the claim group's non-exclusive native title rights and interests. The assessment did not take into account the extent of the limitations on those rights of the 1882 grant of pastoral lease PL366 and the consequences of the loss of the right to control access to and make decisions for the land. The assessment included elements which should have properly been part of the valuation of the non-economic component of loss. It wrongly valued the rights by reference to the practical exercise of the rights rather than the legal content of them. By regarding the *Spencer v Commonwealth* (1907) 5 CLR 418 (*Spencer*) approach as inappropriate, the assessment wrongly failed to take into account the inalienability of the rights as a discounting factor and wrongly took into account the value to the Northern Territory of the surrender of the rights [132].

Each of the errors identified had the effect of overvaluing the economic loss of the claim group [134]. The Court explained that the starting point is an analogy of freehold with exclusive native title. Then, the value of non-exclusive native title can be derived by adjusting freehold value to account for the restrictions and limitations

[1] The Northern Territory contended that the appropriate measure is the sum of the usage value and the negotiation value. That method yields a value of $248,764. The Commonwealth contended that if all relevant factors were taken into account the native title rights and interests would have been assessed at about 50% of the freehold value of the land. The claim group contended that the appropriate measure of the value of their native title rights and interest was equal to the freehold value of the land.

applicable to the non-exclusive native title rights [137]. In this process of comparing the rights of the claim group with the rights of a holder of freehold title, no allowance is made for the attachment of the claim group to the land. The assessment of the economic element is confined to the material nature of the native title rights and interests [138]. Having identified the differences between the nature of the native title rights held by the claim group and the rights held by a holder of freehold title it is necessary to make an evaluative judgment of the reduction from freehold value which properly represents the comparative limitations on the native title rights and interests [139]. Contrary to the Commonwealth's submissions, the Full Court considered the legal content of the non-exclusive native title rights and interests is not so insubstantial as to represent only half of the freehold value of the land in question. Balancing the nature of the restrictions on the claim group's non-exclusive native title rights and interests, the economic value of those interests was reduced by the Full Court from 80% to 65% of the value of freehold title.

2. The second issue concerned the assessment of the value of some of the freehold lots.[2]

The full Court at [155] stated that the primary judge was entitled to accept the evidence of Mr Copland, the valuer for the Commonwealth.

3. The third issue concerned the prejudgment interest payable on the compensation awarded for economic loss.

Mansfield J held that the interest was part of the compensation and was to be calculated on the basis of simple interest at the rate set out in the Federal Court Practice Note CM 1. The claim group contended that interest should be calculated on a compound basis, either on the risk-free rate or the superannuation rate. The Commonwealth contended that the interest should have been awarded on, rather than as part of, the award of compensation. The full Court agreed with the primary judge that the scheme for the payment of compensation under the NTA does not exclude an award of compound interest in an appropriate case [199], but held that the claim group had failed to establish that the primary judge erred in awarding simple, rather than compound, interest [213].

4. The fourth issue concerned the calculation of non-economic loss which the primary judge fixed at $1.3 million.[3]

The Court explained that the primary judge considered matters relevant to the assessment of solatium. He did not make any errors in the selection or evaluation of those matters [394]. Having found that the primary judge did not fall into error in

[2] The Northern Territory contended that the primary judge should have preferred the valuation of Mr Wotton over the valuation of Mr Copland in respect of the two hectare lots (lots 20 – 23 and 26 – 32) and the large rural lots over four hectares (lots 16, 47, 75 and 79).

[3] The Northern Territory and the Commonwealth both challenged this amount and the reasoning by which the primary judge arrived at it. The Northern Territory contended that the amount should be 10% of the value of the land proposed by the Northern Territory producing a final figure of $93,848. The Commonwealth contended that, having regard to all the circumstances of the case, the amount of non-economic loss should have been assessed at $5,000 for each parcel of land, yielding a lump sum amount of $215,000.

fixing the award for solatium, no occasion arose for the Full Court to exercise its own discretion to fix the amount of the award for solatium [420].

5. The fifth issue concerned the order made by the primary judge, which provided for the Prescribed Body Corporate (PBC) to allocate the award monies within the claim group and to determine any disputes about entitlements to the monies.

The Commonwealth contended that s 94 of the NTA did not empower the Court to make that order. The Full Court determined that for the reasons expressed by the primary judge, there was no error in the making of the order to allocate the award monies within the claim group and to determine any disputes about entitlements to the monies [429].

6. The sixth issue concerned three invalid future acts.[4]

The issues raised by the damages claim were complex and novel. The Court explained that it is important that principles are established to deal with such circumstances [448]. The way in which the claims were made in this proceeding did not allow the Court to give proper consideration to the issues. The Court stated that although there may be good sense in the result arrived at by the primary judge, the Northern Territory and the Commonwealth were correct to identify the absence of a sound legal basis for his approach. On that basis the appeals against the order for damages for the invalid future acts was allowed [448].

The Court determined that the economic value of the native title rights and interests is 65% of the freehold value of the lots. The appeal against the damages claim for the invalid future acts was allowed; the remaining appeals and cross-appeal were dismissed. The parties were directed to file an agreed form of orders reflecting these reasons for judgment with the matter to return to the Court for case management on 17 August 2017.

Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia **[2017] FCA 803**

20 July 2017, Connection, Extinguishment and Estoppel, Federal Court of Australia, Western Australia, Rares J

In this matter Rares J determined that the Yindjibarndi people hold exclusive possession native title rights and interests in relation to the claimed area, located in the Pilbara in north-western Western Australia. The area is directly south of the area over which the group holds non-exclusive native title rights and interests: *Moses v Western Australia* [2007] FCAFC 78 (*Moses*). Rares J held that it was not an abuse

[4] The Northern Territory contended that there was no basis for the making of orders for the payment of damages for those acts. Alternatively, if there was a basis, the Northern Territory contested the calculation of damages at 80% of the freehold value of the land. The Commonwealth contended that there was no basis for the primary judge to grant relief of any kind that does not have as its premise the continuing existence of the claim group's non-exclusive native title rights and interests.

of process for the claim group to seek exclusive native title rights and interests in the claimed area, despite the earlier finding in *Moses*.

The claimed area comprises some areas over which there are current pastoral and mining leases as well as other areas, comprising the Yandeeyara Reserve and other unallocated Crown land. The pastoral leases are held by lessees of stations called Coolawanyah (that extends over the north-western boundary of the claimed area into the Moses land), Mount Florance (that also extends, to the east of Coolawanyah, over the mid-part of the northern boundary into the Moses land), Hooley (that is to the east and north-east of Mount Florance) and Mulga Downs (that is to the south-east of Mount Florance and extends over the southern boundary into Banjima country). The claimed area also extends in the north-east over the Mungaroona Range Nature Reserve 31429, the creation of which, the Yindjibarndi accept, extinguished native title in accordance with the decision in *Western Australia v Ward* [2002] HCA 28.[5]

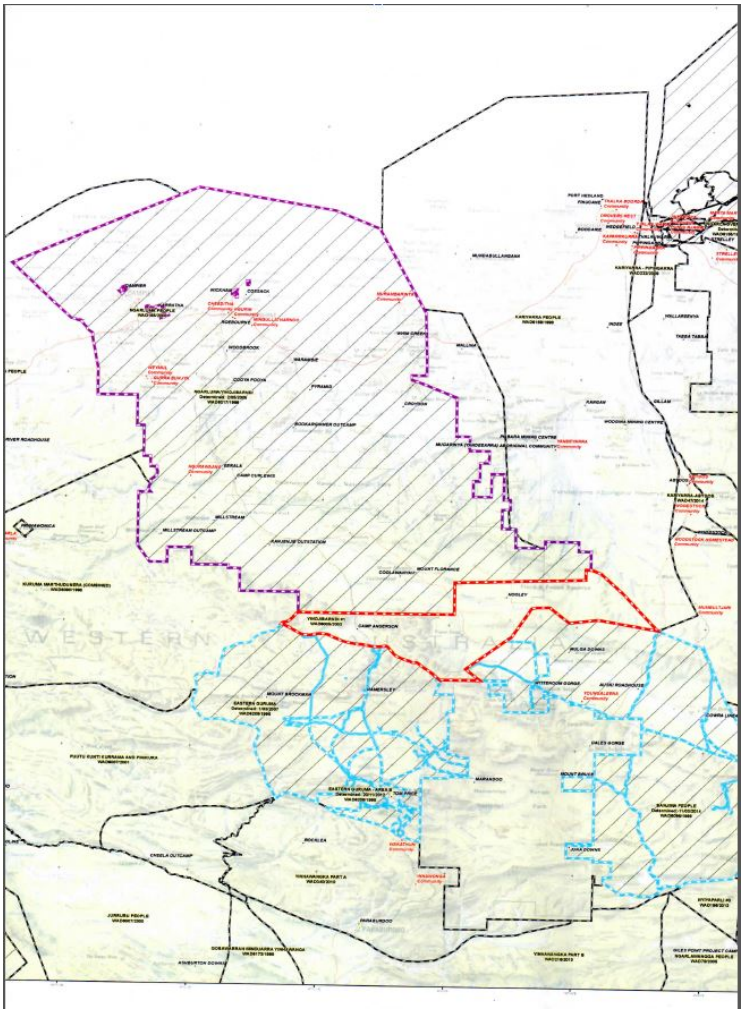

Figure 1: The claimed area (red),
the Moses land to its north (purple).[6]

[5] The mining interests are held by FMG, the Hancock parties and the Rio parties. FMG has an operating iron ore mine, known as the Solomon Hub mine, located in UCL 7 within the claimed area.
[6] *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803, 10.

Background

On 9 July 2003, this claimant application was filed. In it the applicant claimed, on behalf of the Yindjibarndi, that it is entitled to a determination of exclusive possession native title under s 225 of the *Native Title Act 1993* (Cth) (NTA).

In *Moses*, the Full Federal Court of Australia made an amended determination of native title in respect of a large area of land to the north (the Moses land) of the claimed area (the 2007 determination). The Full Court amended the original determination that Nicholson J had made earlier on 2 May 2005 (*Daniel v State of Western Australia* [2005] FCA 536) (the 2005 determination). His Honour ordered there that Yindjibarndi Aboriginal Corporation RNTBC (YAC) hold the Yindjibarndi's native title rights and interests in the Moses land in trust for the Yindjibarndi people. Nicholson J published his substantive reasons for that determination in July 2003 in which he held that the Yindjibarndi held non-exclusive native title rights over the Moses land: *Daniel v State of Western Australia* [2003] FCA 666.

Three sets of respondents took an active role in these proceedings namely, the first respondent, the State of Western Australia, the second respondent, FMG Pilbara Pty Ltd, Fortescue Metals Group Ltd, and the Pilbara Infrastructure Pty Ltd which are all members of the Fortescue Metals Group (together FMG), and the sixth respondent, Phyllis Harris (née Todd), Lindsay Todd and Margaret Todd (the three individuals collectively are referred to in the judgment as 'the Todd respondents'). Companies in the Rio Tinto mining group, Hamersley Exploration Pty Ltd and Robe River Mining Co Pty Ltd (the Rio parties), as well as Hancock Prospecting Pty Ltd and Georgina Hope Rinehart (the Hancock parties), and Yamatji Marlpa Aboriginal Corporation participated in the settling of the agreed issues in dispute before the trial and then adopted substantively the same position on those issues as the State.

The 2005 and 2007 determinations

In the proceeding that resulted in the 2005 determination, Nicholson J heard three separate, overlapping claims. The first was a combined claim made by both the Ngarluma people and the Yindjibarndi people, the second was a claim, that his Honour described as the Yaburara Mardudhunera claim, in respect of land and waters to the north of the Moses land and that has no present relevance, and the third was a claim made by a group that called itself the "Wong-Goo-TT-OO" (WGTO) applicant.

Nicholson J decided that the Ngarluma people had non-exclusive native title rights and interests in the northern part of the Moses land, that the Yindjibarndi had non-exclusive native title rights over the southern part (down to the boundary that is contiguous with the claimed area) and that they both shared non-exclusive rights over an area in the middle. In the 2007 determination, the Full Court made some variations to the 2005 determination.

Relevantly, after the appeal, the 2007 determination provided that the native title rights and interests did not confer possession, occupation, use and enjoyment of

land or waters on the native title holders to the exclusion of others. The determination did not include any rights for the Yindjibarndi to control access to, or use of, land and waters in, or to take or use, for commercial purposes, the resources of, the claimed area. Importantly, in 2003 Nicholson J decided that the practice of seeking permission to enter onto Yindjibarndi lands was a matter of respect rather than in recognition of the right to control: *Daniel* [2003] FCA 666 at [292].

Issues

There were six issues for Justice Rares to address in these proceedings:

1. The exclusive possession issue – have the Yindjibarndi proved that they are entitled to a native title right to control access (or exclude others), equivalent to a right of exclusive possession?

Rares J heard from a number of Yindjibarndi witnesses and accepted at [69] that neighbouring groups including Banjima, Eastern Guruma and Nyiyiparli observed the practice of requesting permission to come on to Yindjibarndi country. Rares J also accepted the expert anthropologist report of Dr Palmer.

His Honour stated at [105]: 'The imperative need to show that "respect" is and was a native title right or interest, under Yindjibarndi law and custom, broadly equivalent to the common law concept of trespass to land (and trespass to goods, if things be taken from the land and waters such as ochre or animals). That understanding demonstrated that the need to show such "respect" under Yindjibarndi laws and customs was in the nature of a real proprietary right equivalent to the common law right of exclusive possession, as did the ancient normative consequence that a transgression was punishable by death or spiritual harm. The Yindjibarndi had and continue to have a normative responsibility to care for and protect their country from unauthorised access to it by a manjangu.'

At [110] Rares J accepted that the evidence establishes a native title right of exclusive possession: '[f]or the reasons I have given, I am satisfied that those rights and interests include a right to control access equivalent to the right of exclusive possession in respect of the claimed area.' Rares J rejected the counterarguments of FMG and the State at [118].

Rares J observed at [126] that: 'The gradual evolution of law and custom, by adaptation and change, within a traditional system of laws and customs ordinarily will not entail that the society or group within which those laws and customs existed has ceased to acknowledge or observe the traditional laws and customs. Any society of human beings, over time, must adapt and change its social structures, including its laws and customs, to current or more modern conditions when changes in or to earlier conditions and circumstances occur. In doing so, the society can retain a coherence with its traditions, and remain recognisable, or it can transform radically.'

His Honour continued at [132]: 'I am of opinion that such changes and adaptations, as the evidence reveals have occurred since sovereignty to the traditional laws and traditional customs, relating to a manjangu seeking permission from Yindjibarndi to

access or conduct activity on Yindjibarndi country have not affected the essential normative character of those laws and customs or their observance at the present time. The right to control access that the Yindjibarndi assert is, in substance, the same as they have possessed continuously since before sovereignty under their traditional laws and customs.'

2. The extinguishment issue

In order for the each of ss 47A(2) and 47B(2) to operate to disregard prior extinguishment and preserve native title on particular parts of the claimed area, the Yindjibarndi had to firstly establish that none of the miscellaneous licence and each of the six exploration licences is a permission or authority under which the whole or any part of the land and waters covered by the particular licence 'is to be used…for a particular purpose' within the meaning of s 47B(1)(b)(ii) and, secondly, that one or more members of the claim group occupied particular land and waters at the time the application was made on 9 July 2003 within the meaning of ss 47A(1)(c) or 47B(1)(c) of the NTA.

Rares J found that the miscellaneous licence is a permission or authority and was excluded from the operation of s 47B. His Honour stated at [178] that 'the parties did not address whether non-exclusive native title rights and interests in that corridor have ceased to subsist and, subject to any submissions to the contrary, I would infer that they continue to exist.'

Rares J found at [195] that 'none of the five exploration licences gave any permission or authority that required any particular part of the licensed land, let alone the whole, to be used for a particular purpose: *Western Australia v Brown* [2014] HCA 8 at [63]. Each of the five licences gave the licensee an option to come onto, and do limited exploration on, one or more parts of the land, if and when it chose to do so.' His Honour found at [197] that s 47B applies to the lands covered by the 6 licences and operates to preserve native title rights and interests in those lands and waters.

There were two further substantive issues in relation to whether the 2012 exploration licence extinguished native title. First, whether the grant of that licence was valid notwithstanding the failure of the State to give the applicant notice under ss 29(2)(b)(i), (7) and 32 of the NTA that the proposed act of granting the licence may have attracted the expedited procedure under s 32 of that Act. That question arises because ss 24OA and 28 had the effect that, ordinarily, a failure to comply with ss 29 and 32 of the Act rendered a future act invalid to the extent that it affected native title. Secondly, whether the grant of the 2012 licence is a valid future act or other interest for the purposes of s 225(d) of the Act and, if so, how it should be recorded in the determination of native title.

His Honour found at [216] that the State's failure to give the Yindjibarndi notice in November 2011 in accordance with ss 29(7) and 32 of the NTA of its proposal to utilise the expedited procedure, rendered the 2012 licence wholly invalid pursuant to

ss 24OA and 28(1)(c), to the extent that the 2012 licence affected the Yindjibarndi's native title: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [93] per McHugh, Gummow, Kirby and Hayne JJ.

In the event that his Honour's conclusion and ruling as to the validity of the licence is wrong, or the 2012 licence does not affect the Yindjibarndi's native title, Rares J also concluded at [226] that 'there would be no inconsistency between the Yindjibarndi's non-exclusive native title rights and interests and the rights of FMG under the 2012 licence.'

3. The occupation issue – have the Yindjibarndi established that one or more members of the claim group occupied the four parcels of unallocated Crown Land (UCL) within the meaning of s47B(1)(c) at the time the application was filed?

Rares J found at [265] that 'the evidence of regular maintenance of the witnesses' spiritual connection to Yindjibarndi country by the visits to it and the exercise of traditional rights, rites and practices, amounted to occupation of each of areas 1, 2, 3 and 4, as well as the Reserve, by one or more Yindjibarndi within the meaning of ss 47A(1)(c) and 47B(1)(c). That is because each such visit evinced substantively the individual Yindjibarndi visitor's exercise of their traditional (and possessory) rights over not just the particular named place where they camped or attended, but also over both any on country routes that they used to get there and the whole of the surrounding locale where they believed the spirits with whom (or which) they were communicating were: *Banjima* at [104]-[105].' His Honour was also satisfied that one or more Yindjibarndi was or were 'established' in each of areas 1, 2, 3 and 4 and the Reserve in the sense explained in *Moses* at [216].

4. The abuse of process issue[7] – if issue 1 is answered in the positive, are the Yindjibarndi precluded from obtaining an exclusive possession determination of native title because of the 2005 and 2007 determinations that they had only a right of non-exclusive possession over the Moses land?

In July 2015 the State brought an interlocutory application seeking further and better particulars from the applicant in relation to their witness statements. During that hearing, the State explained that it proposed to argue at the final hearing, set down to commence on country on 7 September 2015, that the Yindjibarndi were estopped from seeking, or would be engaging in an abuse of process if they sought to claim, an exclusive right to control access to the claimed area, in light of the determination of non-exclusive rights and interests in *Daniel*. Neither issue had been set out in the State's contentions or the agreed issues, which had merely not admitted the existence of the asserted exclusive possession native title right. The State then filed a further interlocutory application seeking leave to amend its statement of contentions.

[7] Only the State and FMG pursued the abuse of process issue.

His Honour considered it in the interests of justice to grant leave to the State and FMG to amend their contentions as the issues raised matters of public importance in the administration of the NTA and in respect of the certainty of determinations of native title and land tenure under that Act [330]. Rares J noted that if the abuse of process issue been decided in favour of the State and FMG, his Honour would have asked for submissions as to why the Court ought not to order that each of the State and FMG pay the Yindjibarndi's costs of the preparation of all their evidence on that question [331]-[332].

His Honour considered it 'important to appreciate that a determination of native title under s 225 is essentially declaratory of what the Court has found to be the factual and legal position as to what interests exist in the determination area...A determination under s 225, and an application under s 13(1), do not themselves, or in some other way, initiate a process to create or extinguish native title or other rights or interests' at [349]. The *Native Title Ac*t itself is structured on the basis that, by reason of the power to revoke or vary an approved determination of native title, such a determination is not necessarily final, even though, ordinarily, it will be [377].

Rares J further noted that the grounds for an application to revoke or vary an approved determination of native title in s 13(5) include not only that subsequent events have occurred that cause the determination no longer to be correct, but also that the interests of justice require such a variation or revocation [373].

Since the decision in *Moses*, the developing common law of native title led to the Full Federal Court of French, Branson and Sundberg JJ in *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*) finding that 'if control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of native title rights and interests as exclusive' at [127].

The evidence and argument before Nicholson J in *Moses* proceeded on an understanding of the facts and law that did not address the Full Court's development or exposition of the law relating to the right to control access in Griffiths, decided nearly three months after the 2007 determination in *Moses*.

His Honour stated at [366] that 'a determination under s 225 expresses a conclusion about rights and interests that exist over particular land and waters, but does not express any necessarily binding conclusion about the general rights and interests (including native title) of any persons with particular rights and interests in land and waters other than those the subject of the determination.' At [368]: 'Thus, a non-exclusive determination does not determine, necessarily, the content of the traditional laws and customs of a claim group so as to deny or preclude their recognition as supporting a claim to exclude others from, or control access to, different land or waters in respect of which no partial extinguishment had occurred…Accordingly, there would be no necessary inconsistency between two determinations of native title over different land and waters where the same claim group had exclusive rights over one determination area, but only non-exclusive ones

over another. The inconsistency, would arise not because of a difference in the claim group's acknowledgment and observance of their traditional laws and customs by which they had a connection with the land or waters in the two separate determination areas, but because of the governmental acts creating partial or complete extinguishment of native title in one of the areas but not in the other.'

Rares J concluded at [358]: 'I am of opinion that in the particular circumstances of this matter it is not an abuse of the process of the Court for the Yindjibarndi to litigate their claim of a right to control access to, or exclude others from, the claimed area, despite the apparent inconsistency of that claim with pars 4(a) and 7(k) of the 2007 determination and Nicholson J's factual findings that underpinned those paragraphs.

In relation to the issue estoppel question, FMG accepted that Rares J was bound to reject its argument by reason of the decision in *Dale v Western Australia* [2011] FCAFC 46 [355]. FMG could not rely on a finding in the proceedings before Nicholson J, to which it was not a party or a privy to a party, as creating an issue estoppel in this proceeding. Issue estoppel requires, as Dixon J said in *Blair v Curran* [1939] HCA 23, in a passage that French CJ, Bell, Gageler and Keane JJ described as a classic expression of the primary consequence of its operation (*Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28 at [22]): '[a] judicial determination directly involving an issue of fact or of law [that] disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies.'

5. The Todd issue – are the Todd respondents members of the Yindjibarndi claim group?

The Todd issue arose in a context that involved an internal division that emerged relatively recently within the Yindjibarndi people over whether they should co-operate with FMG developing and operating what is now the Solomon Hub mine. On one side were those opposed to co-operating with FMG, who had a voting majority within YAC (which held the Moses land on trust, under the 2005 and 2007 determinations) led by Michael Woodley, while on the other side were the minority within YAC, who, with FMG's financial support, established Wirlu-Murra Yindjibarndi Aboriginal Corporation (WMYAC) in 2010. Notably, so far as appeared in the evidence before His Honour, prior to the Todd respondents becoming involved in the circumstances described below, all the members of both YAC and WMYAC, many of whom were members of both corporations, were Yindjibarndi and recognised each other as Yindjibarndi. That is because each of YAC and WMYAC had a rule requiring that, to be a member of the respective corporation, a person had to be Yindjibarndi.

This proceeding involved earlier stages in the battle to control both YAC and those who comprise the applicant. The Todd respondents are part of a large family who would be entitled to be admitted as members of YAC if the Todd respondents succeed in establishing that they are Yindjibarndi persons. The votes of the Todd respondents' family members would likely be decisive in bringing about a change of control of YAC and the claim group, as the WMYAC members have attempted, unsuccessfully, to do in the past.

Rares J did not find the Todd respondents to be part of the claim group. His Honour preferred 'the evidence of the applicant's witnesses to those called by the Todd respondents on the issue of whether the Todd respondents and their direct ancestors were, or were recognised as, Yindjibarndi' at [504]. His Honour found it persuasive that none of the Yindjibarndi elders, or anyone else, in the authorisation meetings for both the present proceedings and those before Nicholson J ever suggested that the Todd respondents or their family were part of the claim group [515].

6. The relief issue – what other native title rights and interests are the Yindjibarndi people entitled and how should the native title holders be described?

The parties did not address any submissions about the way in which the Yindjibarndi's native title rights and interests, other than those relating to their right to control access, should be described. Since his Honour's finding that the Yindjibarndi have that right may affect the way in which the determination needs to be expressed, his Honour directed that the parties consult, if need be with the assistance of a native title Registrar, to prepare a draft determination. In the event that no agreement on those matters can be achieved, it will be necessary to have a further hearing. Rares J did not consider it appropriate to change the description of the persons holding the group rights comprising the native title from that used by Nicholson J and approved by the Full Court in *Moses* at [362] and [375], namely that: '"Yindjibarndi People" are Aboriginal persons who recognised themselves as, and are recognised by other Yindjibarndi People as, members of the Yindjibarndi language group.'

In light of His Honour's finding that the Todd respondents are not Yindjibarndi, he considered that it may be best to make a declaration to that effect under s 21 of the *Federal Court Act 1976* (Cth). However, it may be that such a declaration could be included under s 225(a) of the NTA. His Honour gave the parties the opportunity to consider this issue and, if need be, deal with it at a further hearing [519].

At [521], his Honour also noted that the parties should consider, before the making of any final order, whether there are errors of fact or issues that have not been considered. If there are, they should file brief submissions identifying those so that they can be addressed in order to avoid unnecessarily complicating any appeal.

Graham on behalf of the Ngadju People (Ngadju Part B) v State of Western Australia **[2017] FCA 795**

17 July 2017, Consent Determination, Federal Court of Australia, Western Australia, Griffiths J

In this matter Griffiths J recognised the native title rights and interests of the Ngadju peoples in relation to a piece of land in an area that extends from the Nullarbor to the Great Western Woodlands. In 2014 the Federal Court recognised more than 100,000km^2 of land east of Norseman as Ngadju land in an exclusive possession

native title determination (Ngadju Part A). On 17 July 2017 Griffiths J handed back the final piece of Ngadju country excluded from the previous 2014 Ngadju native title determination.

Griffiths J made orders by consent recognising that the Ngadju People have always had native title rights and interests in land within the area the subject of the determination. On the authorisation issue (seven of the ten named persons as the Applicant were deceased), Griffiths J, having regard to the joint submission of the State and the applicant, considered that in the interests of justice and in accordance with the purposes of s 37M of the *Federal Court of Australia Act 1976* (Cth) that an order be made under s 84D(4) of the NTA.

Miller v State of South Australia (Far West Coast Sea Claim) **[2017] FCA 790**

3 July 2017, Interlocutory proceedings for representation, Federal Court of Australia, South Australia, White J

In this matter the Court ordered that the application of the Bunna Lawrie Respondents pursuant to s 85 of the NTA for leave to have Mr Alan Oshlack appear on their behalf was refused.

The Far West Coast Sea Claim (FWC Sea Claim) is an application for a determination of native title over the sea between the South Australian-Western Australian border in the west and Streaky Bay in the east and between the low water mark and (generally) the three mile nautical limit. The claim abuts the land that was the subject of a consent determination on 5 December 2013 by the Court in *Far West Coast Native Title Sea Claim v State of South Australia (No 7)* FCA 1285.

The FWC Sea Claim was filed on 9 March 2016 by seven applicants (the Applicant) who stated that they were authorised by the native title claim group to make the application. On 16 January 2017, Alan Oshlack from the Indigenous Justice Advocacy Network filed a corresponding notice on behalf of seven persons, being Bunna Rupert Lawrie, Dorcas Miller, Robert Lawrie, Michael Laing, Rose Miller, Megan Sparrow and Robert Miller (the Bunna Lawrie respondents.) The effect was pursuant to s 84 (3) of the NTA that those persons became parties to the proceedings.

On 1 May 2017 the Applicant sought an order that the Bunna Lawrie respondents be removed as parties. On 2 May 2017 Alan Oshlack from the Indigenous Justice Advocacy Network filed an application seeking the striking out of the FWC Sea Claim due to a lack of proper authorisation. On 3 July 2017 Mr Oshlack applied pursuant to s 85 NTA for leave to represent the Bunna Lawrie respondents. The leave application was opposed by the Applicant. Under s 85 NTA a person other than a legal practitioner requires the leave of the Court to represent a native title party in proceedings. An Applicant who applies for a grant of leave pursuant to s 85 must also demonstrate to the Court that the grant is appropriate.

White J granted leave to Mr Oshlack to make the application, however a number of matters raised concerns about Mr Oshlack's ability to be of assistance in the present proceedings. For the reasons set out in paragraphs [13] to [27] White J refused leave to Mr Oshlack to appear for the Bunna Lawrie respondents.

Oil basins Limited v Watson [2017] FCAFC 103

6 July 2017, Costs Appeal, Federal Court of Australia, Western Australia, North ACJ, Dowsett and Rares JJ

In this matter the Full Federal Court ordered that the appeal from *Watson on behalf of the Nyikina Mangala People v State of Western Australia (No7)* [2015] FCA 1404 brought on behalf of Oil Basins Limited (Oil Basins) be dismissed. The primary Judge also dismissed the application for review of the taxation of a bill of costs.

On 24 February 2014, Gilmour J made orders in favour of the respondents who were the applicant in a claimant application for a determination of native title under the *Native Title Act 1993* (Cth) (NTA). His Honour ordered that Oil Basins pay the respondent's costs of the interlocutory application dated 6 May 2013 on an indemnity basis. On 17 November 2014, the costs orders were confirmed on appeal: *Oil Basins Limited v Watson* [2014] FCAFC 154. On 22 May 2015, Registrar Trott taxed the respondent's bill of cost and signed a certificate in the sum of $161,248.23. On 17 June 2015 Oil Basins filed the application for review of the taxation under r 40.34(2) of the *Federal Court Rules 2011*. On 2 October 2015 Oil Basins filed an amended application for review of the taxation.

The Kimberley Land Council (KLC) as the Native Title Representative Body (NTRB) for the region was the respondent's solicitor on the record.

In the proceedings before Gilmour J, Oil Basins had argued that the KLC were not entitled to charge legal fees. In his reasons for judgment Gilmour J referred to the judgment of Mansfield J in *Far West Coast Native Title Claim v State of South Australia (No 8)* [2014] FCA 635 (*Far West Coast)*. In that matter the applicant for a native title determination sought costs of certain interlocutory applications against a Mr Robert Victor Miller. Mr Miller argued that South Australian Native Title Services (SANTS) was an NTRB funded by the Commonwealth for its functions and it could not charge the applicant for its services. Mansfield J made an order that Mr Miller pay the applicants' costs on a party and party basis save for the disbursements already incurred by the applicant which had already been incurred on an indemnity basis. Mansfield J explained that the NTRB was entitled to charge for providing legal services as a consequence of its statutory functions, that the applicant although not expecting to pay these costs, may have such a liability as a result of the relationship between the applicant and the representative body (at [13]). Gilmour J applied *Far West Coast*) to reach his conclusion that the respondents were entitled to be indemnified.

In these proceedings North ACJ, Dowsett and Rares JJ said that a NTRB such as the KLC has statutory facilitation and assistance functions under s203BB(1) of the NTA. In performing those functions in relation to an application under s 61 of the Act, an NTRB must act in a way that promotes an orderly, efficient and cost effective process for making such applications pursuant to s 203BC(3) at [18]. The Secretary of the Department administering the Act on behalf of the Commonwealth provides funds to NTRBs so that it can carry out its functions. The Court found that the situation in this matter was most closely analogous to when a Minister is represented in his or her official capacity by a solicitor or lawyer acting for the Crown.

The Full Federal Court found that Ms Cole was the solicitor on the record and even though employed by the KLC, the KLC had incurred costs (that it paid from money granted to it) through her acting and retaining counsel in the proceedings in which Oil Basins was ordered to pay costs.

Oil Basins challenged the existence of a retainer and alleged that the respondents were never expecting to receive a bill of costs. However in applying *Far West Coast* Gilmour J did not make any specific findings of fact on that issue and proceeded on the basis that no such concession had ever been made and that the respondents should never expected to have received a bill of costs. The Court further stated at [39] that: 'A party that challenges the existence of a retainer bears the onus of establishing its absence'.

The Court found that there is a strong presumption arising that a solicitor has a contract of retainer with the person who is the party for whom the solicitor appears on the record of proceedings. A solicitor who acts on instructions for party on the record is presumed to be entitled to look to that party for costs.

In the result Oil Basins did not discharge their onus of proof in establishing that the respondents had made a concession that they would not be liable to pay legal costs incurred by the KLC in representing them in the interlocutory applications the subject of the order of Gilmour J. As that was the only basis upon which the appeal was argued, the appeal failed on the narrow evidentiary basis on which it was brought (at [43]).

The NTA recognises that Aboriginal and Torres Strait Islander peoples will often need and should have entitlements to financial and other assistance in bringing their claims under the Act. One thing that is clear in the Act is that it does not presume that Indigenous peoples are necessarily indigent or without the financial capacity to retain lawyers for valuable consideration payable by them to those lawyers to make claims under the Act.

The Full Court stated at [46]-[47] that: 'Rather the Act in s 85A(1) provides a presumption that each party to proceedings under the Act 'must bear his or her own costs'. If Oil Basins' argument were correct, namely that in circumstances where a representative body such as the KLC undertook the function under s 203BB(1)(b) of representation of persons in proceedings relating to a native title application, the

presumption in s 85A(1) would be misconceived. That is because one party namely the person or person who held or claimed to hold native title would never bear his her or their own costs as they would never be liable for such costs in the first place. It follows that the appeal is dismissed'.

Northern Land Council v UAU Pty Limited [2017] FCA 784

5 July 2017, Application for Interlocutory Injunction to restrain the respondent from entering on land within the area of a Land Trust, Federal Court of Australia, Northern Territory, White J

In this matter White J ordered that the respondent whether by itself, its officers, employees, agents or contractors howsoever be restrained from:

a) Entering or remaining on or crossing any land within the Waanyi/Garawa Aboriginal Land Trust Area (the Aboriginal Land) which surrounds Mineral Lease 585 for the purpose of or relating to obtaining access to Mineral Lease 585;
b) Causing damage to Aboriginal Land;
c) Committing any activity on the Aboriginal Land, including the carrying out of exploration or mining activities, camping the creation or construction of roads or tracks or accessing or taking water or any activities ancillary to these matters without either:
    i. Express agreement
    ii. In the event that the Respondent and the Northern Land Council fail to agree, a determination by an arbitrator appointed by the Minister.

The costs of an incidental to the application for the interlocutory injunction were reserved.

Directions were made with respect to the filing and serving of evidence and the matter was adjourned to 5 September 2017 with liberty to apply to the Court to relist the matter for further directions if necessary.

In these proceedings White J was dealing with an application for an interlocutory injunction to restrain a mining company from entering on and within the area of the Waanyi/Garawa Aboriginal Land Trust in the Northern Territory. The first applicant was the Northern Land Council (NLC) and the second applicant was the Waanyi/Garawa Aboriginal Land Trust. The respondent to the application UAU was the mining company that had recently acquired Mineral Lease 585 (ML 585).

Section 70 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) prohibits a person from entering on to or remaining on Aboriginal land. Section 70(4) ALRA provides for a means of access to land which is landlocked by Aboriginal land. Extensive correspondence between the NLC and the respondent to negotiate an access agreement were unsuccessful. The NLC sought the injunction to prevent any unauthorised access to the land.

The principles relating to the Court's granting of an interlocutory injunction are set out in *Samsung Electronics Company Limited v Apple Inc.* [2011] FCAFC 156. An applicant for an interlocutory injunction must identify the legal or equitable rights which it seeks to have determined at the trial and for which final relief is sought. When such a right has been identified the Court has regard to two principal matters: (1) whether the applicant has made out a prima facie case in the sense that if the matter was referred to trial there is a possible entitlement to the relief sought and (2) whether the balance of convenience favours the granting of the injunction. It is sufficient if the applicant shows a likelihood of success to justify in the present case the preservation of the status quo pending the trial of the action.

White J rejected at [25] the respondent's offer of an undertaking as being insufficiently precise to dissuade the Court from issuing the injunction. In summary, White J found that the applicants have established a strong prima facie case and that the balance of convenience favoured the applicant. On that basis the interlocutory injunction was granted.

2. Legislation

There were no current Bills before the Federal, state or territory parliaments, or relevant previous Bills that received Royal Assent or were passed or presented during the period 1-31 July 2017.

3. Native Title Determinations

In July 2017, the NNTT website listed 3 native title determinations.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC/ PBC
Wulli Wulli People	Anderson on behalf of the Wulli Wulli People v State of Queensland (No 4)	18/7/2017	Qld	Native title exists in the entire determination area	Consent	Claimant	Wulli Wulli Nation Aboriginal Corporation RNTBC
Yinhawangka People Part A and B	Jones on behalf of the Yinhawangka People v State of Western Australia	18/7/2017	WA	Native title exists in parts of the determination area	Consent	Claimant	Yinhawangka Aboriginal Corporation
Ngadju Part B	Graham on behalf of the Ngadju People (Ngadju Part B) v State of Western Australia	17/7/2017	WA	Native title exists in the entire determination area	Consent	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 31 July 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	81	5
South Australia	15	0
Tasmania	0	0
Victoria	4	0
Western Australia	42	3
NATIONAL TOTAL	**174**	**11**

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

Source: http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx and Registered Determinations of Native Title and RNTBCs as at 31 July 2017.

5. Indigenous Land Use Agreements

In July 2017, 11 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
25/7/2017	Fossil Downs Station ILUA	WI2016/014	Body Corporate	WA	Pastoral, Access
25/7/2017	Mt House Station ILUA	WI2016/015	Body Corporate	WA	Pastoral, Access
25/7/2017	Napier Downs Station ILUA	WI2016/016	Body Corporate	WA	Pastoral, Access
25/7/2017	Brooking Springs Station ILUA	WI2016/017	Body Corporate	WA	Pastoral, Access
25/7/2017	Jubilee Downs Station ILUA	WI2016/018	Body Corporate	WA	Pastoral, Access
25/7/2017	Quanbun Downs Station ILUA	WI2016/019	Body Corporate	WA	Pastoral, Access
25/7/2017	Kimberley Downs Station ILUA	WI2016/020	Body Corporate	WA	Pastoral, Access
25/7/2017	Blina Station ILUA	WI2016/021	Body Corporate	WA	Pastoral, Access
25/7/2017	Glenroy Station ILUA	WI2016/022	Body Corporate	WA	Pastoral, Access
13/7/2017	Jinibara-Cedar Hill Plant Harvesting ILUA	QI2017/004	Body Corporate	Qld	Government, Development
11/7/2017	Peninsula Developmental Road ILUA	QI2016/049	Area Agreement	Qld	Infrastructure, Government

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

6. Future Acts Determinations

In July 2017, 10 Future Acts Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
26/7/2017	Raymond William Ashwin (dec) and Others on behalf of Wutha and K2 Advisory Partners Pty Ltd and Western Australia	WO2016/0516 WO2016/0517 WO2016/0519	WA	Objection - Expedited Procedure Applies	Member Shurven found there was insufficient evidence to support a finding under s 237 of the NTA. Ms Shurven was not satisfied that the acts were likely to directly interfere with the Wutha's community or social activities; areas or sites or particular significance to Wutha; or involve, or create rights whose exercise is likely to involve, major disturbance.
24/7/2017	David Doolan & Ors on behalf of the Andado, Pmere Ulperre, New Crown and Therreyererte family groups and Tri-Star Energy Company and Northern Territory of Australia	DO2016/0001 DO2016/0002 DO2016/0003 DO2016/0004 DO2016/0005 DO2016/0006 DO2016/0007 DO2016/0008 DO2016/0009 DO2016/0010 DO2016/0011 DO2016/0012 DO2016/0013 DO2016/0014 DO2016/0015 DO2016/0016 DO2016/0017 DO2016/0018 DO2016/0019 DO2016/0020	NT	Objection - Expedited Procedure Applies	The Tribunal found that the evidence established that social and community activities are carried out on the licence area, but was insufficient to support a finding that the licence is likely to interfere with those activities. Member McNamara took into account the previous exploration interests in the area and the conditions that the Territory intends to impose on the licence. The native title party contended that the grant of the proposed mineral authorities was likely to interfere with areas or sites of particular significance to the claim group. In particular, the native title party say there are 19 registered sacred sites within the tenement areas as well as sites that have been recorded by the Aboriginal Areas Protection Authority and others that are neither registered nor recorded under the Northern Territory *Aboriginal Sacred Sites Act* but are nonetheless of particular significance to the native title holders. Member McNamara found that 7 of the sites or areas are of particular significance according to the traditions of the native title party. The Tribunal was satisfied that there is no real risk of interference, given the protection regime and conditions of grant, and Tri-Star's intentions with respect to the work program and heritage protection. Regarding s 237(c), Member McNamara considered it unlikely that any disturbance to the land under the licence will be of any greater significance than the previous and existing use of the land.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
21/7/2017	Raymond William Ashwin (dec) and Others on behalf of Wutha and Beacon Mining Pty Ltd and Western Australia	WO2016/0452	WA	Objection - Expedited Procedure Applies	Member McNamara found that in failing to provide any specific contentions or evidence in support of their objection, the Wutha were unable to satisfy the criteria of s 237. Member McNamara noted that eight endorsements and six conditions will be placed on the grant of the licence, at least seven of which relate directly to the activities Beacon Mining may or may not do on the land or waters on the licence.
20/7/2017	Raymond William Ashwin (dec) and Others on behalf of Wutha and Mark Selga and Western Australia	WO2016/0908	WA	Objection - Expedited Procedure Applies	Member McNamara found that in failing to provide any specific contentions or evidence in support of their objection, the Wutha were unable to satisfy the criteria of s 237. Member McNamara noted that nine endorsements and four conditions will be placed on the grant of the licence, at least seven of which relate directly to the activities the grantee may or may not do on the land or waters on the licence.
13/7/2017	Kevin Allen and Others on behalf of Njamal People and Grant Fitton and Western Australia	WO2016/0138	WA	Objection - Expedited Procedure Applies	Member Shurven found there was insufficient evidence in relation to s 237(b) and that provided in support of s 237(a) was not specific enough to support a finding. Njamal did not make contentions in relation to s 237(c). Member McNamara noted the contentions filed by the grantee party that they will consult with the native title party on ways of minimising any disturbance.
13/7/2017	Kevin Allen and Others on behalf of Njamal People and Gijsbertus Marinus John Merks and Western Australia	WO2016/0479	WA	Objection - Expedited Procedure Applies	Member Shurven considered there to be insufficient evidence in relation to s 237(b), and no contentions were made in relation to s 237(c). Member Shurven found that Njamal undertake social or community activities on the licence area, but the evidence did not establish that the activities are likely to be interfered with by the grantee's activities. The grantee indicated that Njamal people use the area most regularly during the wet season, while his activities will occur during the cooler months. The grantee also submitted that the area was subject to a previous licence and cleared for work with no heritage issues.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
6/7/2017	IS (Name withheld for cultural reasons) & Others on behalf of Wajarri Yamatji and Cullen Exploration Pty Ltd and Western Australia	WO2016/0630	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the claim 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. Ms 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.
6/7/2017	IS (Name withheld for cultural reasons) & Others on behalf of Wajarri Yamatji and Eric Kong and Western Australia	WO2016/0536	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the claim 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. Ms 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.
6/7/2017	Kevin Allen & Others on behalf of Njamal and Gijsbertus Marinus John Merks and Western Australia	WO2016/0787	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the claim 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. Ms 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.
5/7/2017	Kevin Allen & Others on behalf of Njamal and Liquid Lithium Pty Ltd and Western Australia	WO2016/0941	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the claim 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. Ms 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.

7. Publications

Aboriginal Studies Press

Against Native Title

'Against native title' by Dr Eve Vincent is about a divisive native title claim in the town of Ceduna where the claims process has thoroughly reorganised local Aboriginal identities over the course of the past decade. The central character in this story is senior Aboriginal woman Sue Haseldine, who, with her extended family, have experienced native title as an unwelcome imposition: something that has emanated from the state and out of which they gained only enemies. But this is not simply a tale of conflict. Threaded throughout is the story of a twice-yearly event called 'rockhole recovery'; trips that involve numerous days of four-wheel drive travel to a series of permanent water sources and Dreaming sites. Through rockhole recovery Sue Haseldine and her family continue to care for, and maintain connections to country, outside of the native title process.

This book pursues a controversial and much neglected line of enquiry in which native title is not necessarily seen as a force for recognition and Indigenous empowerment.

To purchase, please visit the AIATSIS website.

Central Land Council

Land Rights New – Central Australia

The August edition of Land Rights New – Central Australia is now available. To download, please visit the CLC website.

Centre for Aboriginal Economic Policy Research, Australian National University

Emerging strategic issues in native title: future political and policy challenges

This discussion paper by Michael Dillon explores questions about the future of native title policy: ‘What next? Where will native title policy be in 25 years' time? What are the emerging issues which will most shape that future?’

This paper attempts to answer those questions from a public policy perspective, adopting an explicitly political frame of analysis from international development theory, political settlement theory. Emerging issues of national, regional and local significance are considered and assessed from both the perspective of public policymakers, and Indigenous interests.

To download, please visit the CAEPR website.

Kimberley Land Council

Newsletter

The July edition of the Kimberley Land Council's newsletter is now available. To download, please visit the KLC website.

Northern Land Council

Land Rights News – Northern Edition

The July edition of Land Rights New – Northern Edition is now available. To download, please visit the NLC website.

North Queensland Land Council

Message Stick

The July edition of Message Stick is now available. To view, please visit the NQLC website.

University of Toronto Press

Entangled Territorialities: Negotiating Indigenous Lands in Australia and Canada

Entangled Territorialities edited by Françoise Dussart and Sylvie Poirier offers ethnographic examples of how Indigenous lands in Australia and Canada are tangled with governments, industries, and mainstream society. Most of the entangled lands to which Indigenous peoples are connected have been physically transformed and their ecological balance destroyed. Each chapter in this volume refers to specific circumstances in which Indigenous peoples have become intertwined with non-Aboriginal institutions and projects including the construction of hydroelectric dams and open mining pits. Long after the agents of resource extraction have abandoned these lands to their fate, Indigenous peoples will continue to claim ancestral ties and responsibilities that cannot be understood by agents of capitalism. The editors and contributors to this volume develop an anthropology of entanglement to further examine the larger debates about the vexed relationships between settlers and indigenous peoples over the meaning, knowledge, and management of traditionally-owned lands.

For more information, please visit the University of Toronto Press website.

Yamatji Marlpa Aboriginal Corporation

Newsletter

Issue 33 of YMAC News is now available. To download, please visit the YMAC website.

8. Training and Professional Development Opportunities

Australian Institute of Aboriginal and Torres Strait Islander Studies

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

The Aurora Project

Aurora internship program

Now in its 13th year of operation, the Aurora Internship Program has contributed to capacity building for Indigenous and Indigenous-sector organisations by placing over 2,000 interns. The overall aim of the program is to facilitate individual professional development by building career experiences and opportunities in the broader Indigenous sector, and to strengthen the capacity of organisations by attracting and retaining talented Aboriginal and Torres Strait Islander and non-Indigenous candidates.

Applications for the summer 2017/18 round of internships will be accepted online via the Aurora website between 9am AEST Monday 31 July through to 5pm AEST Friday 25 August 2017.

For more information and how to apply please visit the website at http://auroraproject.com.au/about-applying-internships. For information regarding Scholarships available to Aboriginal and Torres Strait Islander applicants, please see http://auroraproject.com.au/indigenous-applicants.

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.

Date: 11 - 15 December 2017

Location: University of Adelaide

The call for papers closes 24 July 2017. For more information, 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.

The call for abstracts is open until 31 August 2017, with early bird registration fees closing on 29 September 2017.

Date: 6-8 December 2017

Location: La Trobe University, Melbourne

For more information, please visit the conference website.

Australian Society of Archivists

Diverse Worlds – 2017 National Conference

The ASA Conference 2017 program will explore questions on the diversity of archives, as well as exploring the impact and potential of information technologies in indigenous communities and on traditional knowledge.

The conference seeks to examine the commonalities and differences between sectors, collections and communities, as well as the many different worlds represented within them. The concept of **Diverse Worlds** – inclusive of the non-binary, different and divergent – also challenges notions of cohesion and a singular professional identity. It recognises that the community is not fully representative, and collections are not discoverable, accessible or understandable to many. Delegates will explore how to go beyond mere consultation and engagement, and question whether supporting true diversity involves relinquishing authority, custodianship and control.

Date: 25-28 September 2017

Location: University of Melbourne

Registrations close 14 September, with early bird registrations closing on 11 August. To register or view the program, please visit the ASA website.

Information Technologies Indigenous Communities Symposium 2017

The ITIC Symposium will be held with the support of and in conjunction with ASA National Conference. It will incorporate, as one of its streams, the 16th Symposium on Indigenous Music and Dance of the National Recording Project for Indigenous Performance in Australia.

The program includes a session on the challenges associated with archiving native title records held by the Federal Court of Australia and the National Native Title Tribunal.

Date: 27-28 September 2017

Location: University of Melbourne

To register or view the program, please visit the ASA website.

North Australia Research Unit, Australian National University

2017 Public Seminar Series – Tenure, trade and transactions: an updated look at tenure reform in communities on Aboriginal land

Dr Leon Terrill is a senior lecturer at the UNSW Law School and will present on the particular choices that the Australian Government has made with respect to land tenure reforms in communities on Aboriginal land, such as township leasing and housing changes. He will argue that those reforms do something different to what is suggested in government publications, and in particular take a different approach to the economy of remote communities. The changes they implement are nevertheless significant and reflect ongoing shifts in the way that governments are approaching their role in Aboriginal communities.

Date: 24 August 2017

Location: NARU Campus, Darwin

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.