

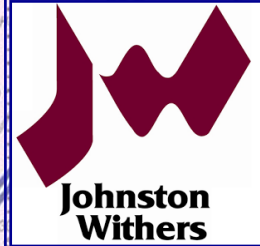
Reviving Native Title through Section 47A

Richard Bradshaw



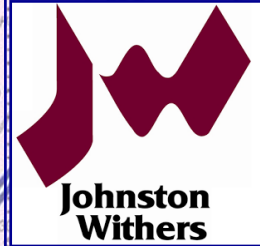
National Native Title Conference
Coffs Harbour NSW
3-4 June 2014

Overview

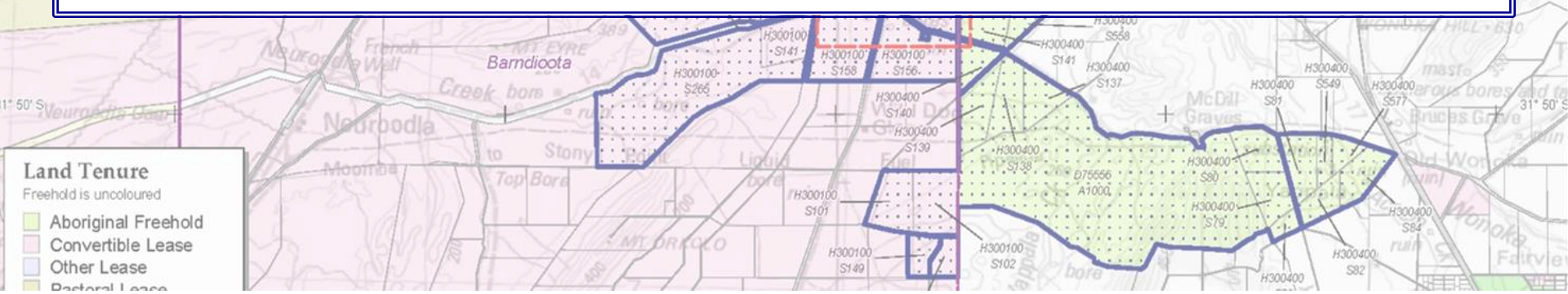


- ❖ 3 sections of the Native Title Act (NTA) provide for **revival of native title after extinguishment**.
- ❖ **Section 47A** addresses revival where land rights legislation, or something similar, exists.
- ❖ This section looks like it should be straightforward to apply, but has resulted in **differences of opinion** amongst Federal Court judges.
- ❖ In **Adnyamathanha People's Native Title Claim No. 3** Justice Mansfield's ruling in favour of s47A applicability appears to **clarify some of the outstanding issues**.

Why s47A is worth pursuing



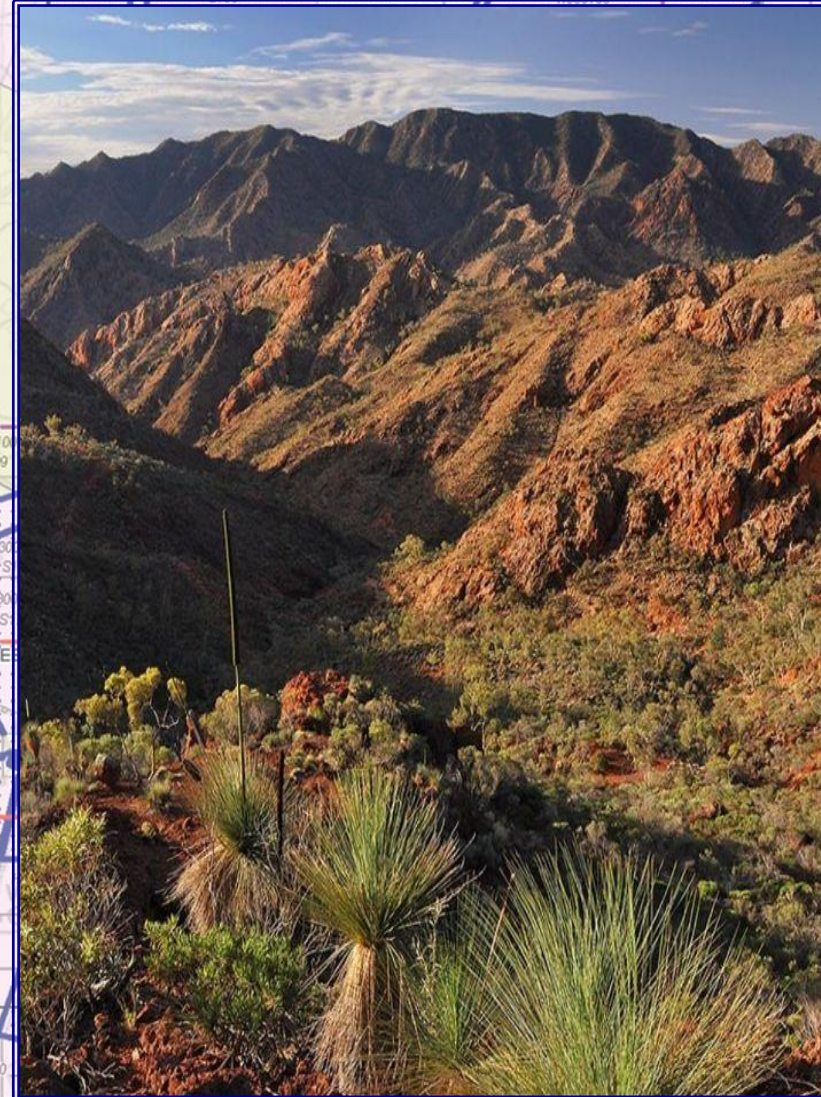
- ❖ If the claim is successful, the NTA provides rights in relation to **'future acts'** with respect to the area.
- ❖ This includes the **right to negotiate** (e.g., mining companies)



Adnyamanthanha Native Title Claims (SA)



- ❖ The Adnyamathanha People are the TOs of the **northern Flinders Ranges region** of South Australia.
- ❖ **5 claims in all:** 3 we are representing; 1 withdrawn; 1 handled by another firm due to a conflict of interest.
- ❖ 2 sets of **consent determinations** involving NT applications 1 & 2. Hoping for 3rd (final) this year.



Land Tenure
Freehold is uncoloured

- Aboriginal Freehold
- Convertible Lease
- Other Lease
- Pastoral Lease



Wilpena Resort



A joint venture between the
**Adnyamathanha People and
Indigenous Business Australia (IBA).**





Adnyamanthanha No. 3 (2010)



- ❖ **Is a Section 47A claim.**
 - ◆ Specially filed on the basis that it would give rise to **'test case'** issues.
- ❖ Native title had been extinguished in relation to substantially all of this claim area by the grant of (25) **perpetual leases** in the 19thc.
- ❖ The **Indigenous Land Corporation** (ILC) acquired these under the ATSI Act in February 2000 for the purposes of transferring them to Viliwarinha Yura Aboriginal Corporation(VYAC), comprising some Adnyamathanha people.
- ❖ **Transfers to VYAC** occurred in 2001 and 2002 under the ATSI Act.
- ❖ VYAC surrendered (9) of the transferred leases to the State **in exchange for freehold grants.**

SAD69/10 (SC10/1)
Adnyamathanha People
Native Title Claim No. 3

-  SAD69/10 Adnyamathanha People Native Title Claim No. 3 (SC10/1)
-  Hundred

NOTE: To determine areas subject to claim within the external boundary, reference to the application description is necessary.

Map created by: Geospatial Services,
National Native Title Tribunal (16/06/2010)

Application boundary data compiled by NNTT based on data sourced from DEH (SA).

Non-Freehold data sourced from the Department of Environment and Heritage, SA (February 2010).

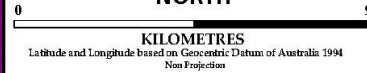
Cadastral data sourced from the Public Sector Mapping Agency (February 2010).

Hundreds data sourced from the Department of Environment and Heritage, SA (September 2004)

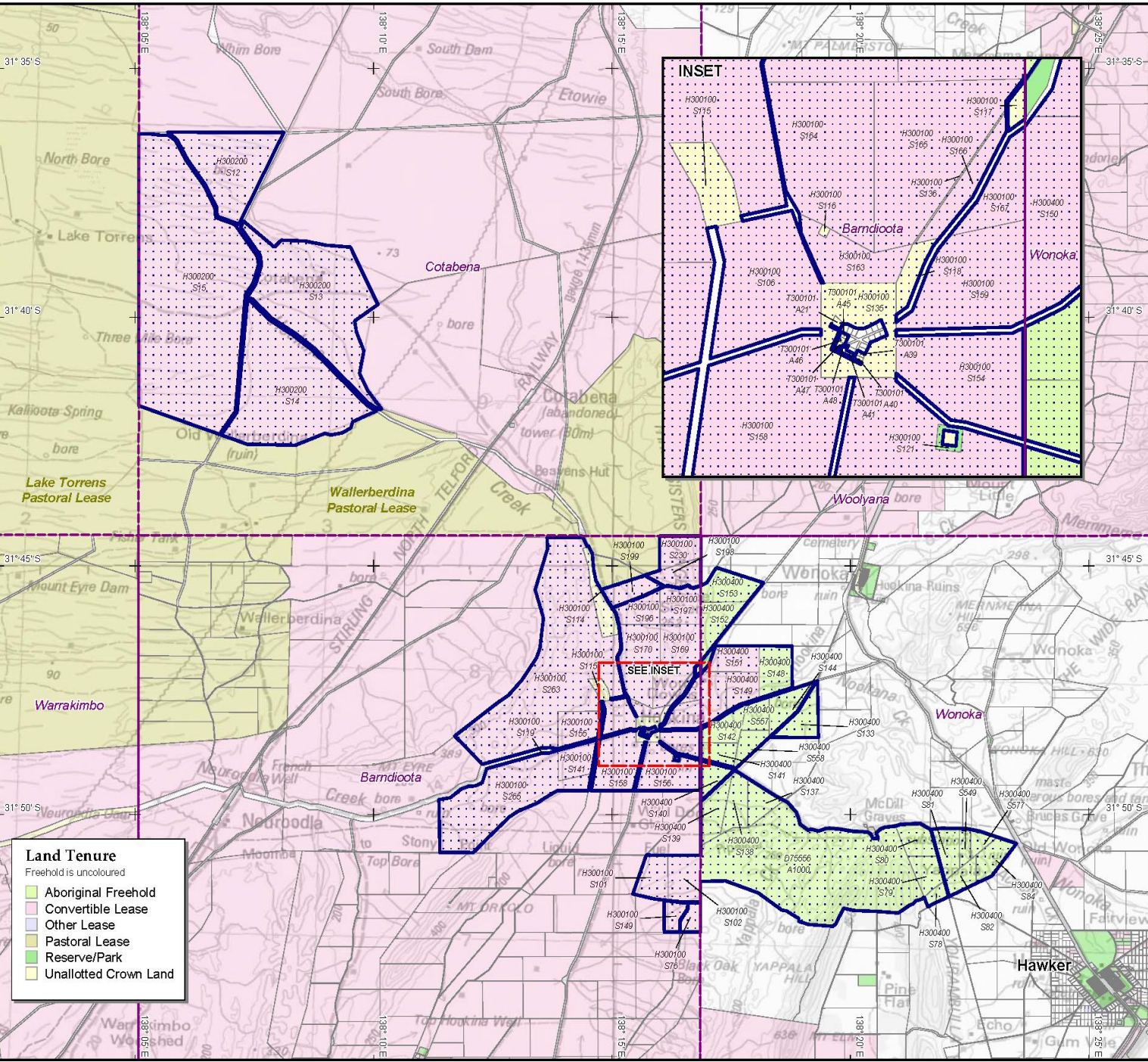
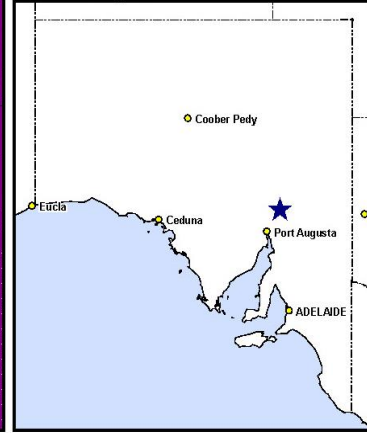
Topographic image data is © Commonwealth of Australia and is used under licence from Geoscience Australia

NOTE: Topographic images should be used as a guide only.

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Location Diagram



- Land Tenure**
-  Freehold is uncoloured
 -  Aboriginal Freehold
 -  Convertible Lease
 -  Other Lease
 -  Pastoral Lease
 -  Reserve/Park
 -  Unallotted Crown Land

s47A(1): Applicability (3 criteria)



(a) a claimant **application** is made in relation to an area; and

(b) **when** the application is made:

- (i) a freehold estate exists, or a lease is in force, over the area or the area is vested in any person, if the grant of the freehold estate or lease or **the vesting took place under legislation** that makes provision for the grant or vesting of such things only to, in **or for the benefit of, Aboriginal peoples or Torres Strait Islanders**; or
- (ii) the area is **held expressly for the benefit of**, or is held on trust, or reserved, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; and

(c) when the application is made, **one or more members** of the native title claim group **occupy** the area.

s47A(2): Disregard prior interests



If the 3 requirements under s47A(1) are satisfied:

- ❖ Substantially all prior interests are to be ignored in determining whether native title exists.
 - ◆ For example, previous freehold grants and leases, including current ones.
- ❖ This means that the extinguishment that took place with those grants is no more for the purpose of determining native title. *

MAJOR BENEFIT : Rights in relation to “future acts”.

* Traditional rights, interests and connection under traditional laws and customs still to be shown.

s47A(1)(b)(i): Previous interpretations



Prior to Adnyamathanha No. 3

- ❖ Seeking revival under s47A(1)(b)(i) **effectively limited** to grants of freehold or leases or vesting under Commonwealth, State or Territory “land rights” legislation.
- ❖ **Not considered in other contexts.** For example, Aboriginal community living areas legislation in the Northern Territory.
- ❖ **Most interest** in seeking revival under s47A(1) focused on **(b)(ii).**



s47A(1)(b)(i): What Justice Mansfield did



In Adnyamathanha No. 3, Justice Mansfield found that:

- ❖ The perpetual leases had not been **granted** under 'land rights legislation', as 'grant' is limited to the entity making the original grant (Grantor), i.e., the State, under Crown Lands legislation.
- ❖ However, the perpetual leases had been **vested by the ILC** in VYAC under the Aboriginal and Torres Strait Islanders (**ATSI**) Act, which he treated as legislation satisfying (b)(i).
- ❖ On the other hand, the **freehold grants** made by the State in exchange for 9 of the perpetual leases **had not been granted** under such legislation.

s47A(1)(b)(ii): Previous interpretations



Prior to Adnyamathanha No. 3

- ❖ **Differences of opinion** among Federal Court judges: the ‘perspective issue’.
- ❖ **CONSENSUS VIEW** (e.g., Olney J., Mansfield J., Full Court in *Moses*) appeared to restrict the issue to the **perspective of the entity making the original grant** (Grantor), e.g., the State.
- ❖ **ALTERNATIVE VIEW** (e.g., Sundberg J., Merkel J.) considered the issue from the **perspective of the entity now holding the area**, purportedly for the benefit of Aboriginal people or Torres Strait Islanders.



s47A(1)(b)(ii): Previous interpretations(2)



Why the ‘consensus’ view was the consensus, and why the ‘alternative’ was unlikely to become the consensus.

- ❖ Apparent consistency of consensus view with the **Explanatory Memorandum** relating to the s47A addition to the NTA in 1998.
- ❖ Concern about possible manipulation through **short-term ATSI holding** of interest (see *Moses*).
- ❖ “Expressly” for the benefit of ATSI **clearly not the intention** of the State at the time of the original grant of the interest.



s47A(1)(b)(ii): What Justice Mansfield did



In Adnyamathanha No. 3, Justice Mansfield:

- ❖ Effectively **shifted his position** to one that is more nuanced.
- ❖ Considered that (b)(ii) addresses **the basis of the current occupancy, or right to occupancy** of the area, which is relevant to s47A(1)(c)
- ❖ Found that **VYAC was not only an Aboriginal Corporation** restricted by its rules and the CATSI Act as to objects and composition, **but also as the holder** of the perpetual lease and freehold land areas under the restrictive provisions of the ATSI Act and ILC Deeds.
- ❖ **Ruled that (b)(ii) applied to the perpetual leases AND freehold land.**



s47A: The take-home



- ❖ Justice Mansfield has **expanded the recognized scope** of (b)(i).
- ❖ Following *Moses* (2007), a s47A claim relying for success solely on the ‘alternative’ view of (b)(ii) was **unlikely to succeed**.
- ❖ Mansfield J’s more nuanced position is a **better interpretation** of what s47A actually says than the existing ‘consensus’ view, and is thus likely to form the **basis of a new consensus**.
- ❖ It may **still limit (b)(ii)** to where the relevant interest is held under binding restrictions ensuring ATSI long-term benefit.



Adnyamathanha Consent Determination, Wilpena HS
(25-02-14)

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