Options for resolving overlapping claims and filling in the gaps
National Native Title Conference – Townsville 2017

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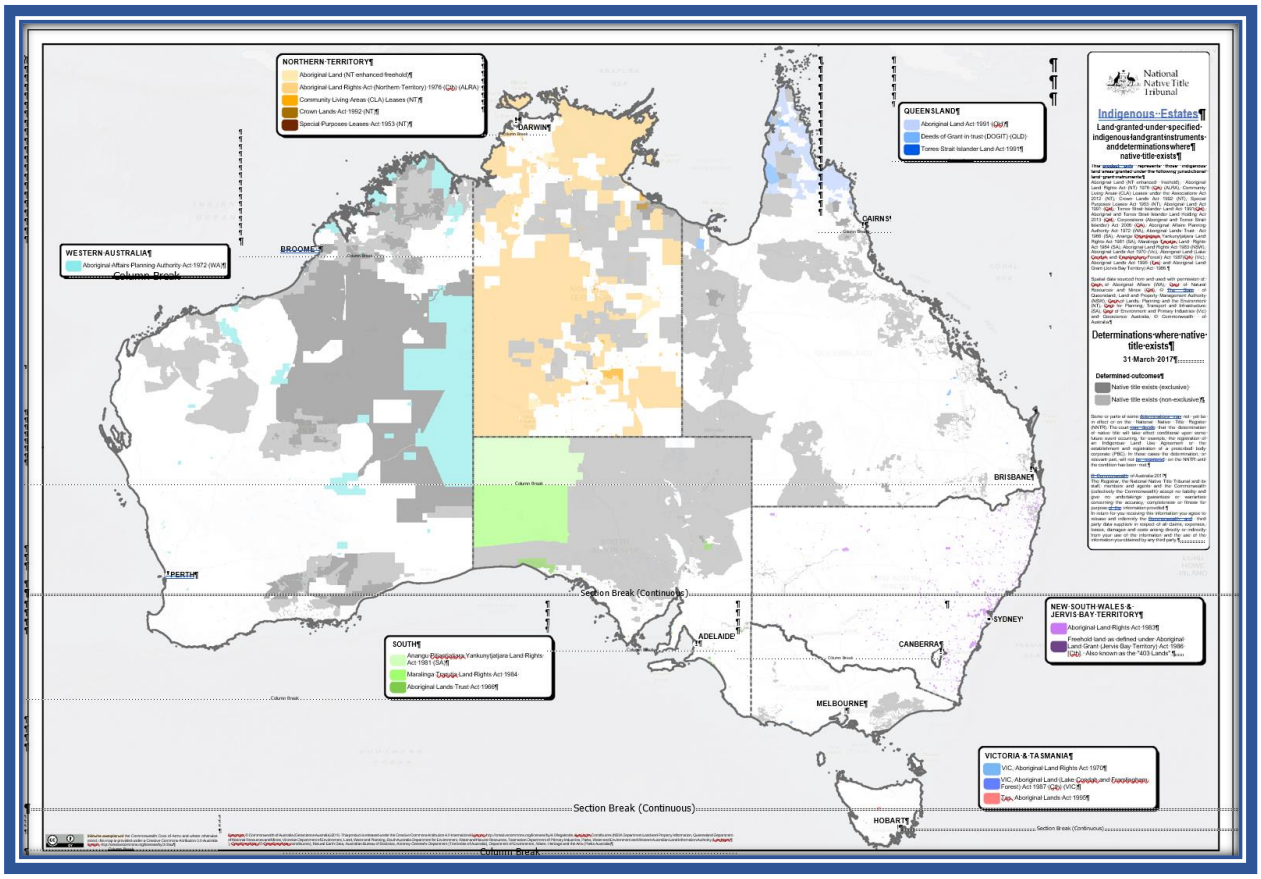

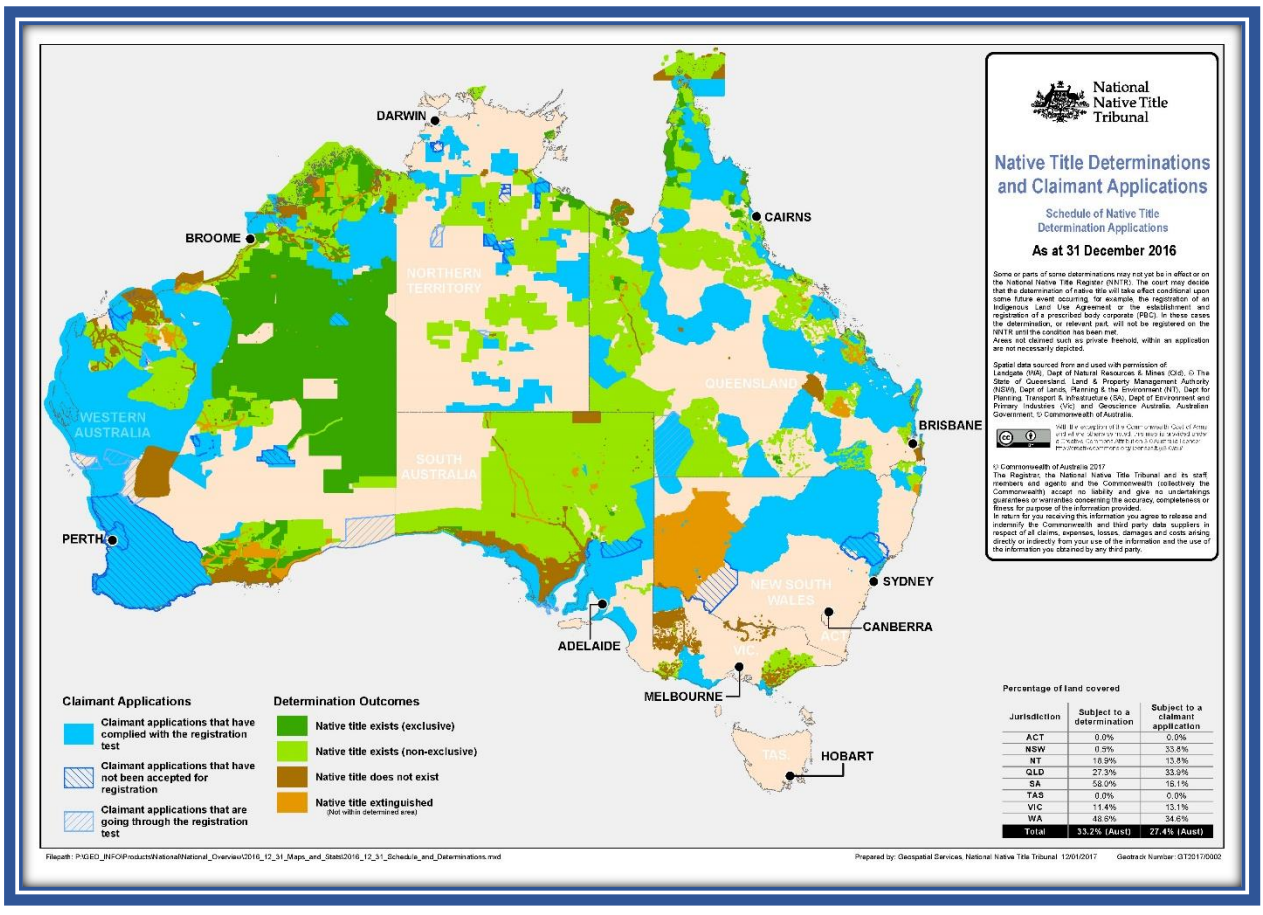

Contents

Introduction

1. This paper addresses some of the ways in which the gaps in the indigenous estate can be filled in to show the connection of traditional owners to their country. A significant number of options are relevant including variable state land rights schemes, indifferent cultural heritage protection measures at State and Federal levels, Indigenous political initiatives and diverse environmental conservation arrangements. This presentation analyses some of the emerging models under the *Native Title Act 1993* (Cth) which allow for greater complexity in the recognition of traditional ownership than is indicated by the boundaries which confine many of the determinations made in the first 23 years of the NTA. During the earlier phases of claims everyone involved was trying to figure out how this could work and, it could be said, frequently the most straightforward areas were resolved first.

2. Intra-indigenous conflict about country, and some of the approaches to resolving that contest that have emerged, indicate more multifaceted models for holding native title are needed. I will shortly describe some that have appeared. People like to blame the native title system for some of that conflict, through the introduction of yet another regime imposing legislatively moulded criteria for identity on Indigenous people, in order to comply with non-indigenous arrangements. In some areas, native title is just a new field for an old game between well acquainted opponents.

3. As the native title system 'matures' and native title becomes an orthodox feature of reckoning the people with interests in land, the models for identifying who has a traditional interest have become more complex since the days when overlapping claims had to be resolved by a single boundary drawn through compromise[1] or legal battle.[2]

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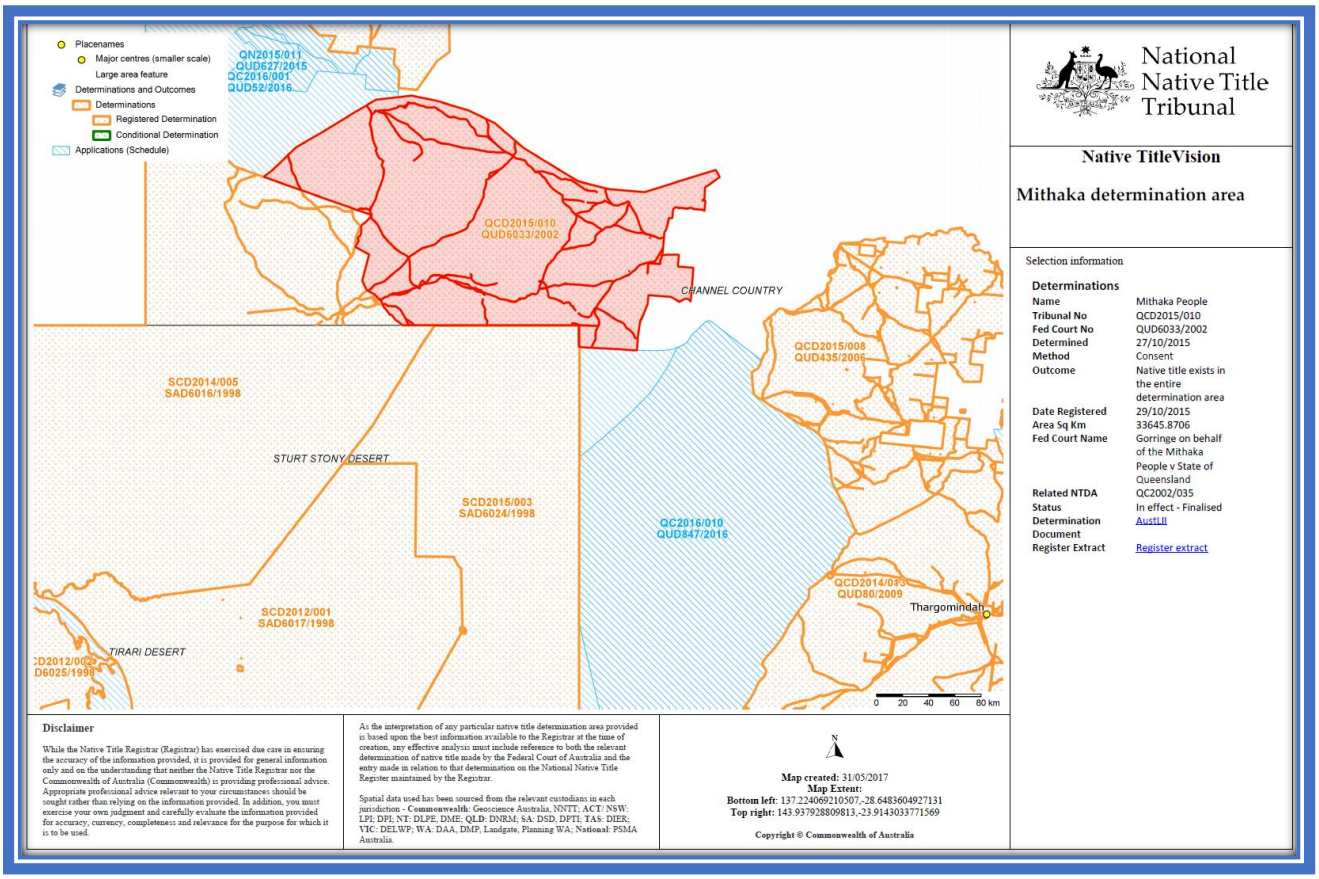
[1] See for example the boundaries of the determination areas in the Greater Mt Isa region drawn as a result of agreements reached in 2003 between the Kalkadoon, Indjilandji-Dhidhanu, Bularnu Waluwarra and Wangkayujuru People, Pitta Pitta and Yulluna peoples.

[2] For example *Daniel v State of Western Australia* [2005] FCA 536 and the contest between the Ngarluma, Yindjibarndi, Yaburara and Mardudhunera and Wong-goo-tt-oo Peoples.

4. Many contested claims involving rival native title claimants, have led to determinations that native title rights and interests have been lost. In proceedings of this kind, inter group conflict has been a contributing factor in determinations made that observation of traditional law and custom was lost, meaning native title rights and interests could not be recognised.[3]

5. The models by which overlaps have been solved in a manner that recognises native title, must inform groups who, after determination, turn to those areas which have been 'left out' of their determinations. Where recognition of country is incomplete, this has often occurred as a consequence of the compromises reached following the drive to eliminate overlaps that occurred, particularly during and after the Wongatha litigation.[4] The incentive to eliminate overlaps was also substantively driven by Commonwealth funding arrangements and pressure exerted by the Federal Court following the 1998 amendments to the NTA. Under that pressure, in many instances as a result of inter-group negotiation, overlap areas have been removed from claims to await solution after core country areas have been determined, or a claim has been allowed to proceed subject to understandings about access and recognition from one group to another, post determination.[5] Often non-cultural straight line boundaries have been adopted, in part through convenience and also influenced by the acquisition of significance by those straight lines due to immutability – such as state and property borders.



[3] See *Wyman on behalf of the Bidjara People v State of Queensland* [2015] FCAFC 108; *Sandy on behalf of the Yugara People v State of Queensland (No 3)* [2015] FCA 210; *Dale v Moses* [2007] FCAFC 82.

[4] *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31.

[5] See for example Clause [5(l)] of the Bularnu, Waluwarra and Wangkayujuru determination acknowledging the need for the presence of Indjalandji-Dhidhanu men for law business: http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/NNTR%20Extracts/QCD2014_009/NNTRExtract_QCD2014_009.pdf or the agreements with neighbours that allowed the Yandruwandha Yawarrawarrka determination to be made (see Mansfield J at [3] in his reasons for judgment in *Nicholls v State of South Australia* [2015] FCA 1407).

6. As examples of models successfully resolving overlaps, the resolution of two sets of overlapping claims in Western Australia and Queensland, by agreements reached by the native title parties with each other and the State, has led to recognition by consent that both groups hold native title in overlap areas between otherwise exclusively held lands. These two examples did not require any merger of identity into a single group for the purpose of securing recognition. Rather, each group was separately recognised as holding native title rights and interests in the same area.

7. This account, of some of these models, might prove useful for groups considering how to secure native title or compensation in areas of traditional interest beyond their 'core' countries and how to settle the form of recognition with neighbours who also assert connection to the same 'in-between' country.

Nyangumarta and Karajarri

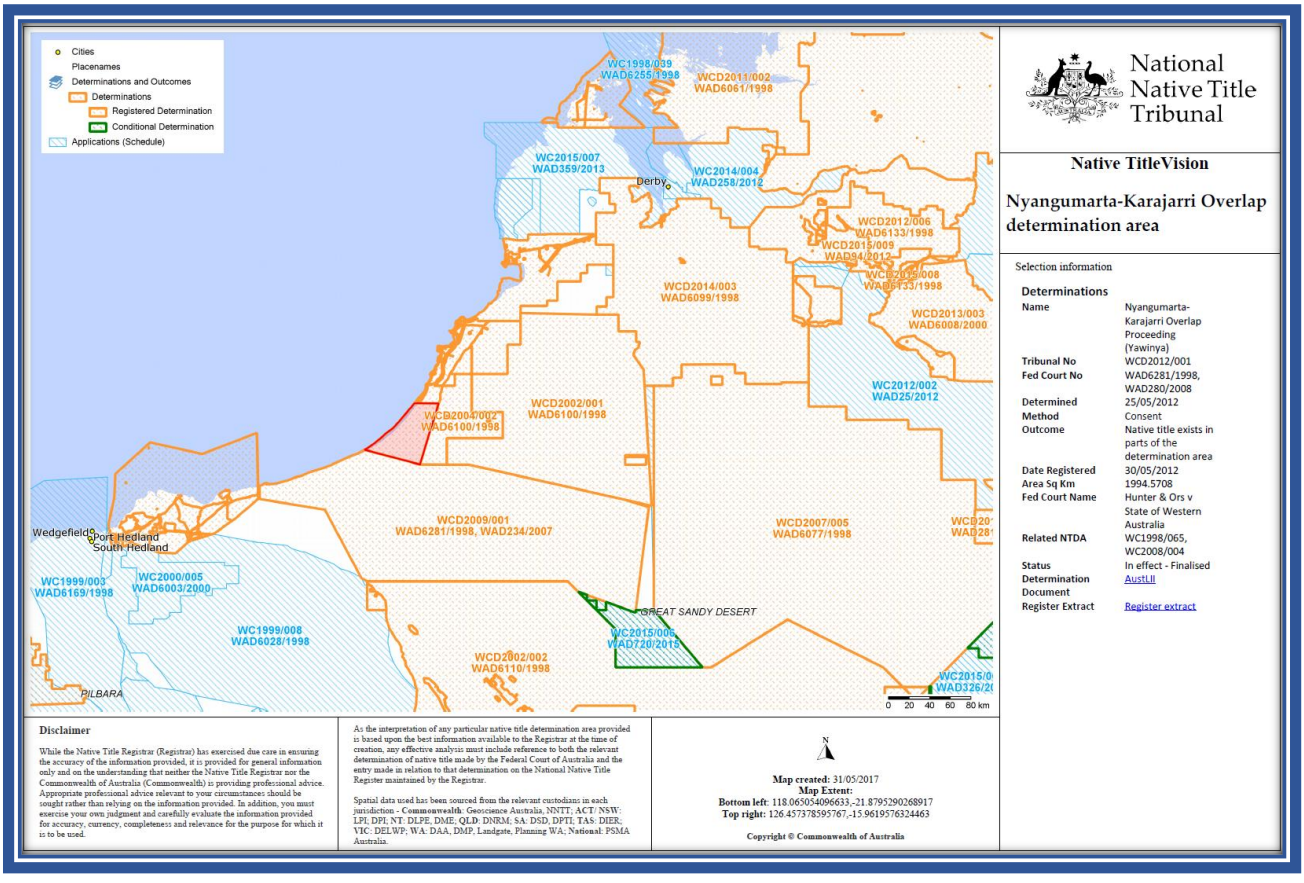
Hunter v Western Australia [2012] FCA 690

8. In *Hunter v State of Western Australia* [2012] FCA 690 a consent determination resolved the two claims on behalf of separate groups that each covered the entire area the subject of the proceedings.

Background

9. In September 1998 a native title claim was filed by the Nyangumarta people over their country east of Port Hedland (WAD 6281 of 1998). In November 2007, a further claimant application was filed by the Nyangumarta people (WAD 234 of 2007) over country adjoining the first claim. These applications covered a large area including what became the overlap area.

10. In December 2008, a claimant application was filed by the Karajarri people (WAD 280 of 2008) over part of the area covered by the Nyangumarta claims, creating the overlap area. The overlap area was known as Yawinya and ran inland from the coastline of 80 Mile Beach between Broome and Port Hedland. The Nyangumarta and Karajarri claims were each filed on behalf of differently described people.



11. Immediately to the north and east of the Yawinya area, Karajarri People were native title holders, following the decision in *Nangkiriny v State of Western Australia* [2002] FCA 660, a Part A determination settled by consent after evidence was heard. The Karajarri Part B area was then determined by consent in 2004 in *Nangkiriny v State of Western Australia* [2004] FCA 1156.

12. As both applications covered the same area, on 12 December 2008, the Court ordered, under s 67(1) NTA that both applications would be dealt with in the same proceeding, known as the Nyangumarta-Karajarri (Yawinya) Overlap Proceeding.

13. In 2009 the court determined by consent that, except for the overlap area, Nyangumarta held native title in the area subject to their claims, in *Hunter v State of Western Australia* [2009] FCA 654.

14. As the State had agreed that both groups were native title holders in the areas abutting the overlap area, that they were peoples with systems of traditional laws and customs under which they held rights and interests, the key to resolving the Yawinya claim was finding the method by which they could **both** hold native title rights and interests over the **same** area.

The process

15. Following the combination of the claims, a process was set out in which the parties engaged, at times reluctantly, which led to agreement. That process involved the applicants engaging an independent expert anthropologist to give an opinion about the nature of their respective interests in the overlap area. The respondents agreed to this proposal and, after it had been considered by the native title parties, a (slightly redacted) copy of the expert's report was provided to the respondents.

16. The report provided the basis for agreement between the Karajarri and Nyangumarta peoples and later, the State and respondents' acceptance, that both groups held rights and interests in the overlap area. In May 2012, the parties filed an Agreed Statement of Facts which explained the process by which agreement was reached. The applicants advised the Court and the respondents that they would seek a joint determination of native title.

17. For the determination to be made by consent the parties considered and resolved:
    a. whether exclusive native title rights could be recognised to an area within the 40 metre strip of unallocated Crown land that lay between the boundary of the pastoral lease and the high water mark, pursuant to s 47B NTA;
    b. the manner in which rights of access by the applicants to the land subject to pastoral leases within the overlap area would be enjoyed; and crucially
    c. the nature and constitution of the Prescribed Body Corporate to hold the applicants' native title rights and interests.

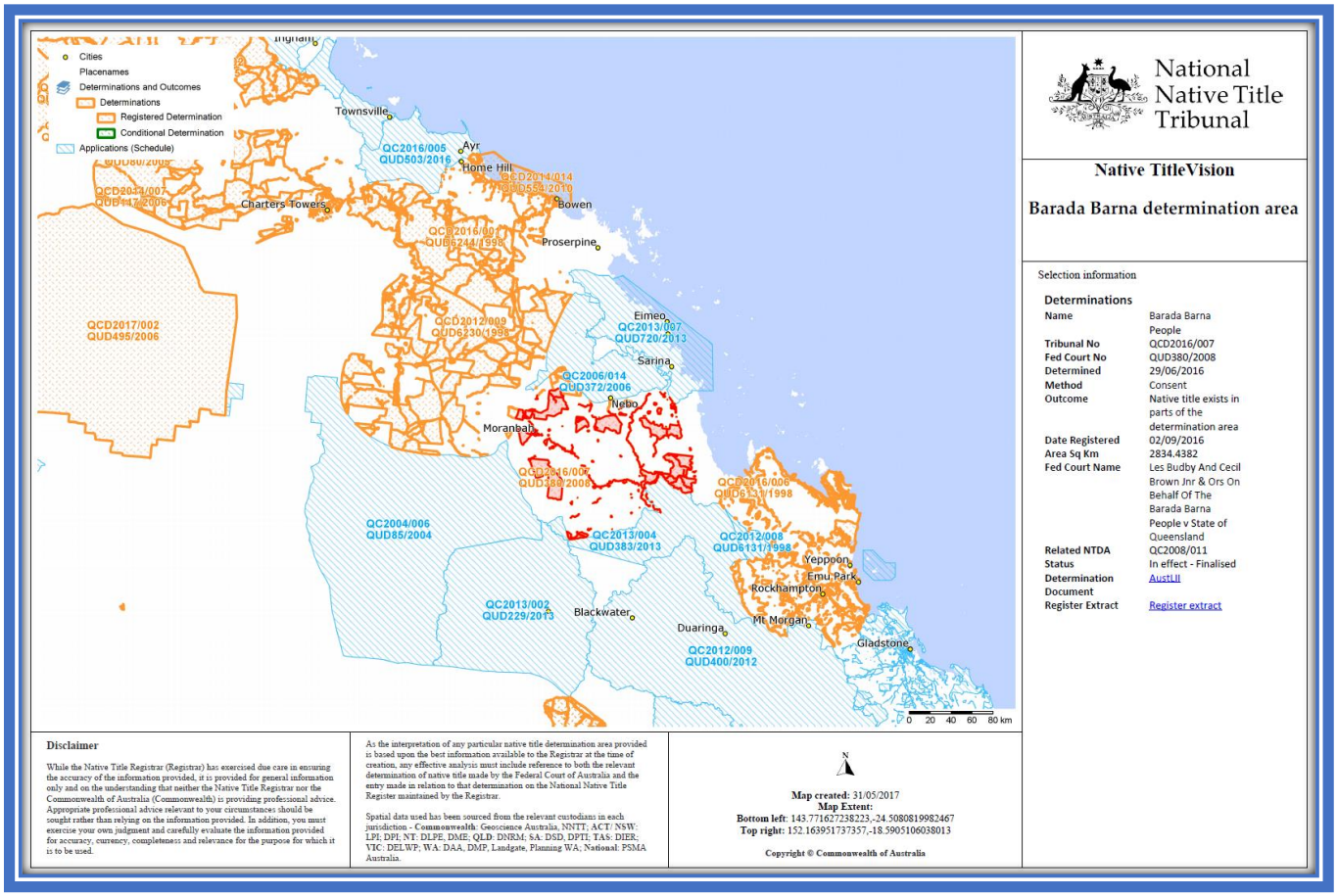
18. A particular concern of the native title parties was not to be 'lumped together' as if they were one mob and to have to make the same decisions as each other with respect to the Yawinya area. A particular concern of the respondents was the ability to deal in the future with **one** body corporate representing the holders of native title over the Yawinya area. These concerns were accommodated in the proposed constitution of the Prescribed Body Corporate. The State gave agreement in principle to the provisions set out in the draft rule book of the Nyangumarta Karajarri Aboriginal Corporation before it was formally adopted by the groups and submitted for registration with ORIC. Approval by the State of the native title holding arrangement, was a pre-condition to the State consenting to the determination being made.

19. The key to the arrangement was the adoption of a single prescribed body corporate for the Yawinya area. Nyangumarta and Karajarri each already had a PBC and each wanted their own PBC to be the primary

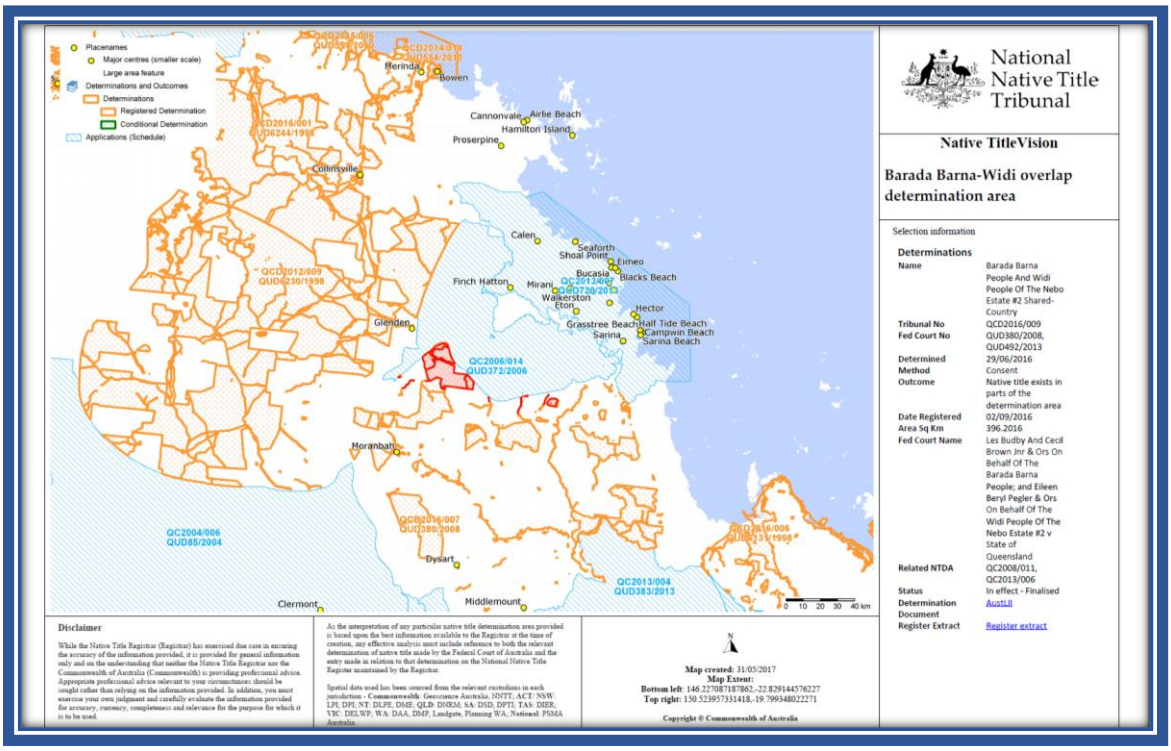
decision making body for their interest in that area. The State required a single entity with which to communicate and single decision maker regarding any future acts in the Yawinya area. The native title parties agreed to have a single PBC for the overlap area on the basis that if one group said "no" in response to a proposed future act, then it was "no" for both. The PBC rules provided that there would otherwise be a minimal role for the PBC and a bare minimum of members – but it would be a single 'letterbox' for future act notices and communication in response. Each group's existing PBC would nominate the persons who would be members of the joint PBC. The joint PBC's membership comprises only those members of each group delegated by their PBCs, not all members of both claim groups.

Widi and Barada Barna

20. Over in Queensland, on 29 June 2016 Dowsett J determined that the Widi and Barada Barna peoples held native title over an area in central Queensland, each exclusively over their separate countries and together for an area between, in a determination recorded in 3 parts:
    - *Budby on behalf of the Barada Barna People v State of Queensland (No 6)* [2016] FCA 1267 concerning the exclusively Barada Barna area;
    - *Budby on behalf of the Barada Barna People v State of Queensland (No 7)* [2016] FCA 1271 concerning the shared areas; and
    - *Pegler on behalf of the Widi People of the Nebo Estate #2 v State of Queensland (No 3)* [2016] FCA 1272, concerning the exclusively Widi areas.



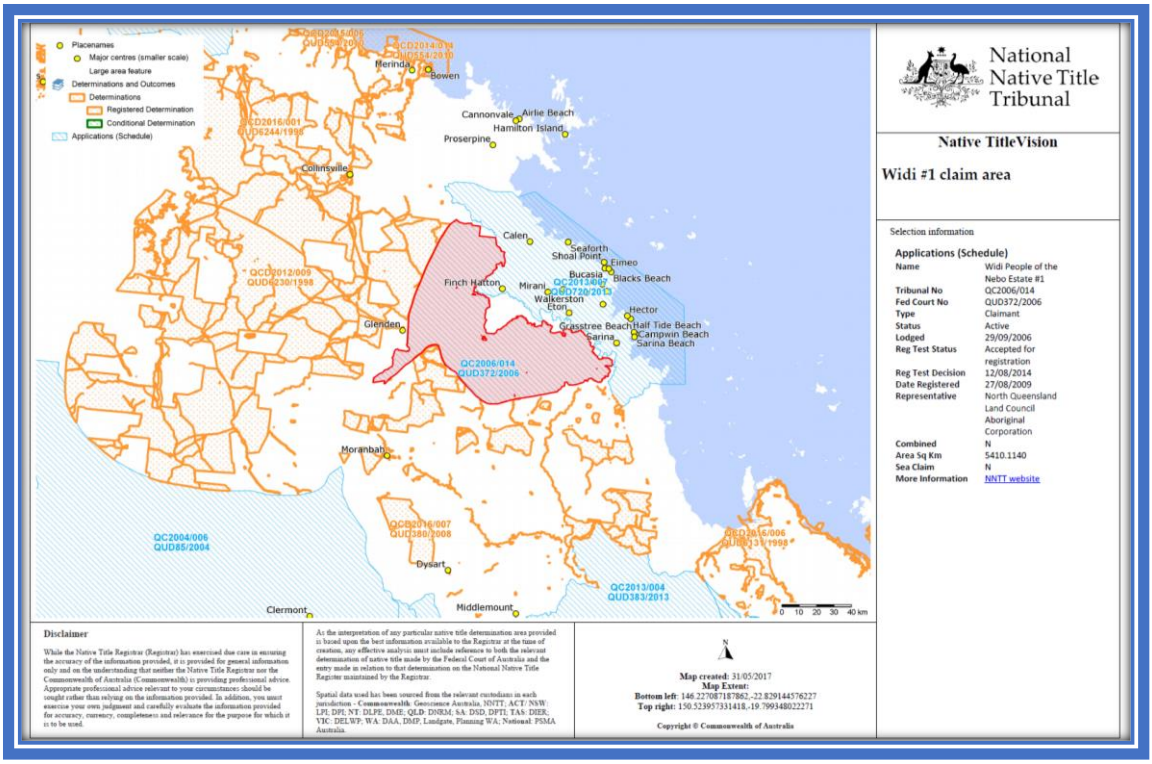
The exclusively Barada Barna determination areas



The shared Widi and Barada Barna determination areas

21. The determinations were preceded by many judicial decisions involving multiple parties. There are at least 14 judgments by the Court in relation to the Widi (formerly Wiri) proceedings and at least 8 judgments in relation to the Barada Barna proceedings.

22. Dowsett J determined that in land to the north of the Barada Barna determination area, both the Barada Barna and Widi People held native title. The third determination that the Widi People hold native title over land to the north and east of the shared area covered small parcels immediately adjoining the larger Widi #1 claim. It is anticipated that the Widi #1 claim over the balance of their traditional country will now be resolved by consent.



The remaining Widi #1 claim area

23. The determinations provide that each group has a separate prescribed body corporate which, for each group, includes the shared area. The view of the groups was that if one said "no" to a future act it was likely to have the effect of "no" for both so communication once a future act notice was received was in both groups' interests.

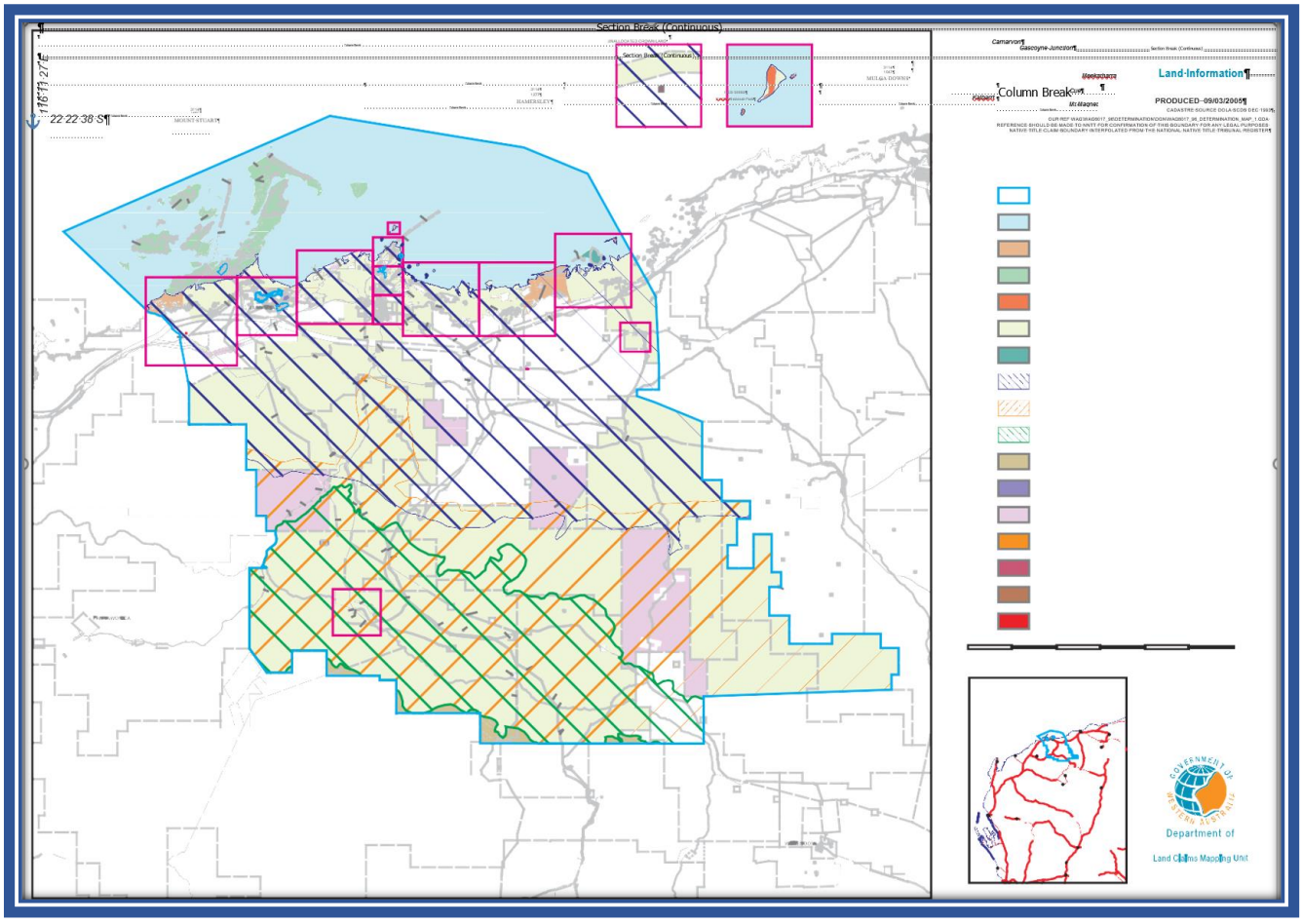
24. The form of determinations was a breakthrough for Queensland, as they resolved, with the consent of the State and other respondents, formerly contested native title claims as between the two native title claim groups. Overlaps with a third group to the south of the Barada Barna area, the Barada Kabalbara Yetimarala People, were resolved by the withdrawal of the overlapping part of the BKY claim, adopting a single line boundary.

25. On the same day as the Barada Barna and Widi determinations, McKerracher J handed down his reasons following contested proceedings in *Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 5)* [2016] FCA 752 where his Honour held that two opposing groups had each established they held native title rights and interests in the same area. Yilka was run in the long shadow cast by Wongatha.

How is native title to be held by separate groups in the same area?

26. The most thorough exploration of 'the mechanics' of how a determination in favour of two groups with overlapping native title rights and interests can be made under the NTA occurs in *Daniel v State of Western Australia* [2004] FCA 849.

27. In *Daniel v State of Western Australia* [2003] FCA 666 and *Daniel v State of Western Australia* [2003] FCA 1425 the Court determined that the Ngarluma and the Yindjibarndi peoples held native title both separately and in a shared area between their two exclusive countries.



Daniel v State of Western Australia [2004] FCA 849

28. In a decision which followed the judgments that native title existed in the claim areas, in *Daniel v State of Western Australia* [2004] FCA 849 ('*Daniel*') further argument was heard regarding how the peoples' native title should be held. Nicholson J considered the options of separate and overlapping determinations and whether there should be three or only two prescribed bodies corporate for Ngarluma and Yindjibarndi.

Whether native title held severally by two groups

29. The State had argued that, in respect of the overlap area, the two distinct native titles were held severally by the two groups rather than one native title held collectively by the two groups. This contention was adopted in the following way. Nicholson J found that the Court should make one determination that native title exists as required by s 225, with subsidiary determinations in relation to each group holding rights that comprise the native title.[6] His Honour held that the overlap in a geographical area was relevant only to the extent of the rights of each group and did not support the making of a determination of one native title held by two groups.[7]

30. In an approach which differs from the one later taken by Dowsett J in the Barada Barna Widi determinations, Nicholson J explained the application of the relevant provisions of the NTA as follows:[8]

> *…..Section 94A of the NTA requires a determination to set out the details of the matters mentioned in s 225. Section 225 provides that a determination of native title 'is a determination whether or not native title exists in relation to a particular area (the determination area) of land or waters'. It further provides that if it does exist there has to be a determination of, among other things, 'who the persons, or each group of persons, holding the common or group rights comprising the native title are'. This supports the view that there should be a determination in relation to the determination area, which will include within it a determination of who holds common or group rights. There are thus two levels of determination: the principal determination being a determination of whether native title exists in relation to the particular area, and the subsidiary determinations being a determination of the matters set out in pars (a) – (e) of s 225. Where different groups are found to hold different native titles, necessarily there is a requirement for more than one subsidiary determination. Those paragraphs require determination of who holds native title and the nature and extent of the native title rights and interests. This statutory language accommodates variations in entitlement to rights between applicants and groups of applicants.*
>
> *This is supported by reference to s 61 which provides that persons who may make application for native title are authorised persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed. Therefore, the application is directed to 'the particular native title claimed' even though not all the claimants claim the same rights. As the July reasons state at [60], the first applicants initially brought a claim that there was a single composite community known as the Ngarluma and Yindjibarndi peoples but subsequently abandoned that claim in favour of one that there were two groups, namely, the Ngarluma peoples and Yindjibarndi peoples holding rights comprising native title rights. The findings in the July reasons accepted that position subject to exclusions and issues of extinguishment and any other qualifications set out in the text of each finding.*
>
> *A plain reading of ss 61, 223 and 225 supports the view that the determination should be approached on the basis that the Court should make a single principal determination in which subsidiary*

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[6] *Daniel* at [7].
[7] Ibid.
[8] *Daniel* at [5]-[7].

determinations are made on the issues raised in pars (a) – (e) of s 225. That approach may, in appropriate evidentiary circumstances, lead to a finding that different persons or groups of persons hold common or group rights comprising the native title. The statute requires the subsidiary determinations to be made in relation to each group: the focus is to be on the holder group rather than a geographical area (such as an overlap area). Importantly s 225 directs attention, in respect of a particular determination area, to who holds native title and to the nature and extent of the rights and interests so held. Looked at from the perspective of each group, the fact of overlap in a geographical area is relevant only to the extent of rights of each group and does not support the making of a determination in respect of a so-called overlap area of a determination of one native title held by two groups.

Whether two determinations in respect of two determination areas

31. Nicholson J rejected the contention that there should be two principal determinations. His Honour held that s 225 requires the Court to make 'a determination of native title'. Following a determination that native title exists in the area, the determination appropriate for the Ngarluma and the Yindjibarndi peoples then required subsidiary determinations to identify the persons or group of persons holding common or group rights comprising the native title in the overlap area. His Honour held that:[9]

    ….each subsidiary determination may vary as to its terms depending on the findings of fact concerning the native title rights and interests held by each claimant group. Nevertheless, there will still be one principal determination in respect of the determination area.

    This view is supported by the use of the description 'the determination area' as it appears in s 225(b) and s 225(c). That description is a reference to the particular area of land and waters in relation to which the claim was made and a determination is required; it does not require a focus only on the area where any native title is found to exist. Furthermore, the underlying rationale of ss 13, 67 and 68 of the NTA is that the issue of whether native title exists in any particular area is to be determined once only in respect of a determination area (i.e. in the one proceedings; subject to any revision application or appeal). For that reason the principal determination must relate to the determination area. Variations in native title holding by groups within the area are matters to be addressed in subsidiary determinations.

Whether only one PBC for a determination

32. Following the determinations that native title existed, various models for holding the native title were proposed by the parties as follows:
    a. one determination and one PBC;
    b. two overlapping determinations each with its own PBC;
    c. three determinations (one for Ngarluma, one for Yindjibarndi and one for the overlap area) with two PBCs (one for Ngarluma and one for Yindjibarndi, with both PBCs for the overlap determination);[10]
    d. three determinations (one for Ngarluma, one for Yindjibarndi and one for the overlap area) with three PBCs.

33. After considering the application of ss 55, 56 and 57 NTA his Honour found there would be one determination and there could be two PBCs – a combination of options A and B:[11]

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[9] *Daniel* at [8] – [9].
[10] This was the option adopted by Dowsett J in the Widi and Barada Barna determinations.
[11] *Daniel* at [21] – [23].

> *… Where the common law holders do not all hold the same native title, it is possible for the intention of each group of common law holders to be different from each other. The possibility of different groups holding native title under the one principal determination flows from the provisions of s 225(a).*
>
> *..... the proper application of s 56(2)(a) and s 57(2)(a) read in the context of s 225(a) necessitates the Court extending an invitation to nominate a PBC to a representative of each of the persons comprising the groups it proposes to include in the determination. That being the case, it becomes possible that two PBCs could be nominated, one for each group of common law holders.*
>
> *… [The NTA] would permit the nomination of the same PBC by each of the groups of common law holders referred to in the principal determination. I do not consider it necessitates that such should be the case.*

34. This approach was later opposed by the State of Western Australia in the resolution by consent of the overlapping claims of the Nyangumarta people and Karajarri people in *Hunter*.[12] In relation to the Nyangumarta and Karajarri peoples, one PBC was the only solution to which the State would consent. Creating the PBC rules so that the groups did not have to deal with each other over issues unnecessarily, was one of the challenges.

35. In *Daniel* the Yindjibarndi applicants had nominated their PBC at the time of the determination but the Ngarluma had not. Arrangements were made to allow for this to occur post determination[13] noting that had occurred in *James v State of Western Australia (No 2)* [2003] FCA 731 ('*James*') where French J made a determination that a particular PBC was to hold native title rights and interests on behalf of the Martu people and, by arrangement, with the Ngurrara people.[14] The Martu determination also involves an overlap area resolved in favour of two groups Martu and Ngurrara who have opted for a single PBC on which both groups are represented.[15]

36. In *Daniel* the Court also considered how the native title holders should be described. Nicholson J accepted the submissions made for the first applicants that the Ngarluma and Yindjibarndi peoples be defined simply by their language group and not by a number of criteria. His Honour held this was consistent with the approach taken in for example: *Mabo*, *Ward*, *Mabuiag*, *Poruma*, *Masig*, *Wik* and *Kaurareg* which identify the common law holders by reference to the group to which the holders belong.[16] This means that Ngarluma and Yindjibarndi people, with multiple and interconnected lines of descent, can be members of the group with whom they identify rather than having to specify in other details the means by which that identity has been acquired.

37. Schedule 1 to this paper sets out a number of determinations in which the designation of the native title holders as "The X People" occurs. The effect of the registration test means that few groups now proceed to determination without adopting the naming of apical ancestors as the means by which members of the claim group are ascertained. This formula has proven to be problematic pre and post determination as it fixes the native title holders' identity in a way which constrains their capacity, in the future, to admit as members people they otherwise may regard as belonging to their group. The apical ancestor formula, in determinations of who the native title holders are, may mean people are included who assert membership on the basis only of descent, without actually ever having previously identified as a member of the society determined to hold native title.

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[12] *Hunter v State of Western Australia* [2012] FCA 690.
[13] *Daniel* see Order 3.
[14] *James* at [6].
[15] *James* at [11].
[16] *Daniel* at [49] – [53].

Hughes (on behalf of the Eastern Guruma People) v State of Western Australia [2007] FCA 365

38. The Eastern Guruma model is different to the *Daniel* model in that for the 3 different groups involved the co-existence of their interests was resolved by two intra-indigenous agreements which are annexed to the Eastern Guruma determination:
    a. Attachment 1 – Intra-indigenous deed of agreement between Eastern Guruma Native Title Claimants and Kuruma Marthudunera Native Title Claimants ('KM'); and
    b. Attachment 2 – Intra-indigenous deed of agreement between Eastern Guruma Native Title Claimants and Puuntu Kunti Kurrama and Pinikura Native Title Claimants ('PKKP').

39. The Agreements provided that a determination be made in favour of the Eastern Guruma group over the overlap area subject to the rights of the other two groups to have access to the areas of interest to them (the areas of interest to the KM were different to the areas of interest to the PKKP). The operative provisions in each agreement (at [2.1 – 2.3] of each agreement) provide that either KM or PKKP (as the case may be) have the following rights:

    2.1 The KM claimants have the right to access the area of special KM interest including for the purposes of hunting, fishing, camping, collecting bush medicines and bush tucker and to practice traditional law and culture there ("the Traditional Rights") and the Eastern Guruma claimants acknowledge and agree to respect the exercise of Traditional Rights of the KM people in the area of special KM interest.

    2.2 The Eastern Guruma claimants will not do anything or agree to anything with anyone else which could lessen the KM people's Traditional Rights in the area of special KM interest without first consulting and providing all available information to the KM people about anything which could have that effect and giving consideration to what the KM people say, including, giving to KM people the reasonable opportunity to address the Eastern Guruma claimants at meetings of the Eastern Guruma claimants at which decisions may be made about matters which will lessen the KM's Traditional Rights in the area of special KM interest

    2.3 The KM Traditional Rights in the area of special KM interest will continue in full force and effect if the Eastern Guruma claimants are determined by the Federal Court of Australia to hold native title rights and interests in the area of special KM interest of any part of it.

40. The PBC – the Wintawari Guruma Aboriginal Corporation - provides that membership is open to Aboriginal people who are:

    a. are at least 18 years of age; and,

    b. identify and are identified by other members of the native title holding group as Mundulgura Guruma; and

    c. have a connection with the land and waters in the determination area, in accordance with the traditional laws acknowledged and the traditional customs observed by the Mundulgura Guruma.

Other multiple group determinations

41. There are a number of other models for recognition of more than one group in determination areas eg:

    a. The determination by the full Court that native title exists in the area where native title rights are held by the Miriuwong and Gajerrong People and in respect of that part of the determination area known as Booroongoong (Lacrosse Island), native title is also held by the Balangarra Peoples: *State of Western Australia v Ward* [2000] FCA 611;

    b. The combination of formerly separate claims by the Ngarinyin, the Wunambal and the Worrorra

language groups in *Neowarra v State of Western Australia* [2003] FCA 1402;

c. The separate determinations made on behalf of sub groups within an acknowledged overarching regional Birri Gubba society in:

   i. *Prior on behalf of the Juru (Cape Upstart) People v State of Queensland* (No 2) [2011] FCA 819;

   ii. *McLennan on behalf of the Jangga People v State of Queensland* [2012] FCA 1082;

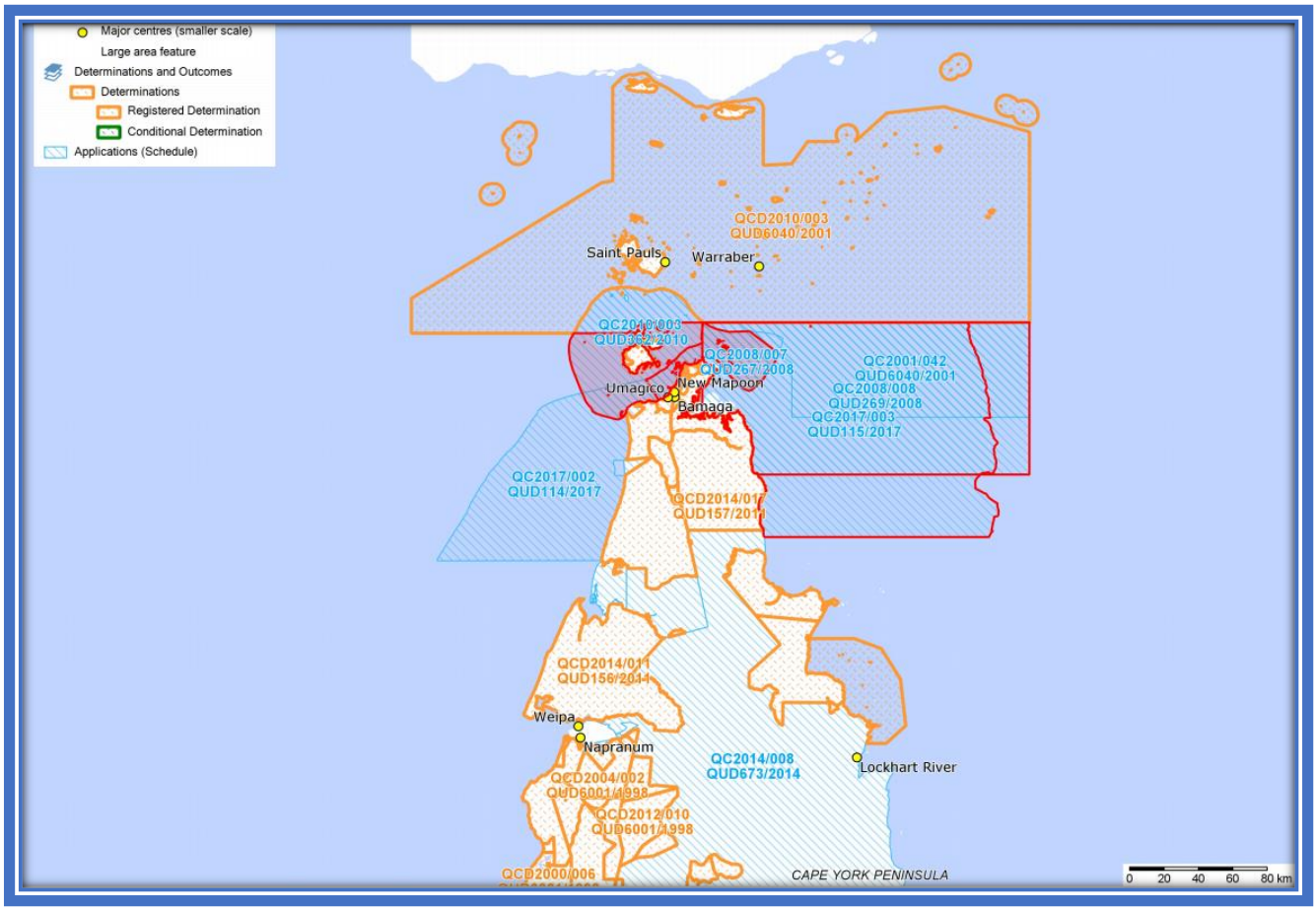
   iii. *Lampton on behalf of the Juru People v State of Queensland* [2014] FCA 736; and

   iv. *Miller on behalf of the Birriah People v State of Queensland* [2016] FCA 271.

d. The determination affecting three interconnected groups in *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v State of Queensland (No 2)* [2014] FCA 528, (2014) 317 ALR 432 and the related Lake Nash determination *Samardin on behalf of the Ilperrelhelam, Malarrarr, Nwerrarr, Meyt, Itnwerrengayt and Ampwertety Landholding Groups v Northern Territory of Australia* [2012] FCA 845.

e. The shared sea country for otherwise distinct groups determined in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643;

42. Issues arising in the Torres Strait Regional Seas Claim have not all been resolved by the different *Akiba* decisions. Overlaps in the sea country between the Torres Strait Islanders, the Kaureg People and the Gudang Yadhukenu People have still to be resolved.



The Torres Strait includes 14 determinations and 8 existing claims

Revision

43. There is not time in this presentation to address the option of revision to determinations to incorporate arrangements made between groups in the future to allow for access or other traditional interests of neighbouring groups. However it needs to be born in mind as a possible outcome of resolving who holds interests in the 'in-between' country. Following the discussion in this paper, one basis for revision could be boundary and rights adjustments when groups, within a regional system who have secured separate determinations, acknowledge the rights neighbouring groups have despite culturally inappropriate boundaries adopted for the purpose of securing the determination.

44. As a corollary of efforts in this respect there may be the need to revise the claim group description. The States' and respondents' attitudes to such an application is of course another question.

45. As an alternative to revision, groups may enter into ILUAs or other arrangements to recognize, as amongst themselves, traditional relationships between them and the land.

46. There are a number of bases now apparent which suggest that many determinations need reconsideration if not revision.

47. Some of those bases have emerged following the High Court's decision in *Brown*[17] and *Akiba*[18] and Federal Court decisions giving them effect at first instance, such as *Rrumburriya Borroloola*[19] and *Yilka*[20] concerning the right to resources and trade.

48. So many consent determinations, particularly those following the Full Court's decision in *De Rose*[21] carry the limitation on resource use typically as follows:

> *"take, use, share and exchange Traditional Natural Resources from the Determination Area for non-commercial cultural, spiritual, personal, domestic or communal purposes"*.[22]

49. Now that the Court has clarified that the **purpose** to which a resource is put is not determinative of the **right** to take resources the limitations in consent determinations should be re-examined.

50. Through revision, groups may seek to make determinations a better expression of their traditional laws and customs and theirs and their neighbours' connection to country. We should not be afraid of this option.

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[17] *Western Australia v Brown* (2014) 253 CLR 507.

[18] *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 250 CLR 209 and *Akiba (on behalf of the Torres Strait Islanders of the Regional Seas Claim Group) v Queensland (No 2)* (2010) 204 FCR 1.

[19] *Rrumburriya Borroloola Claim Group V Northern Territory* [2016] FCA 776; see the determination made in *Rrumburriya Borroloola Claim Group v Northern Territory of Australia (No 2)* [2016] FCA 908 determines the right to resources as the right "*to access and to take for any purpose the resources of the areas*" at Clause [11] of the determination

[20] In *Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 5)* [2016] FCA 752 (see [643] et ff) the plaintiffs pleaded their right to resources was to "take from the area anything that is useful and use it for any purpose" – see the points of claim annexed to the judgment at Annexure 1.

[21] *De Rose v State of South Australia (No 2)* [2005] FCAFC 110.

[22] *Kuuku Ya'u People v State of Queensland* [2009] FCA 679.

Outline of the paper

AUTHORITIES

Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2) (2010) 204 FCR 1; (2010) 270 ALR 564; [2010] FCA 643

Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia (2013) 250 CLR 209; (2003) 87 ALJR 916; (2013) 300 ALR 1; [2013] HCA 33

Budby on behalf of the Barada Barna People v State of Queensland (No 6) [2016] FCA 1267

Budby on behalf of the Barada Barna People v State of Queensland (No 7) [2016] FCA 1271

Clarrie Smith v State of Western Australia (2000) 104 FCR 494; [2000] FCA 1249

Dale v Moses [2007] FCAFC 82

Daniel v State of Western Australia (2004) 138 FCR 254; (2004) 208 ALR 51; [2004] FCA 849 at [5-7], [7], [8-9], [21-23], [49-53]

Daniel v State of Western Australia [2003] FCA 666

Daniel v State of Western Australia [2003] FCA 1425

Daniel v State of Western Australia [2005] FCA 536

De Rose v State of South Australia (No 2) [2005] FCAFC 110

Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v State of Queensland (No 2) (2014) 317 ALR 432; [2014] FCA 528

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9) (2007) 238 ALR 1; [2007] FCA 31

Hughes (on behalf of the Eastern Guruma People) v State of Western Australia [2007] FCA 365

Hunter v State of Western Australia [2012] FCA 690

Hunter v State of Western Australia [2009] FCA 654

James on behalf of the Martu People v State of Western Australia [2002] FCA 1208

James on behalf of the Martu People v State of Western Australia (No 2) [2003] FCA 731 at [6], [11]

Kaurareg People v State of Queensland [2001] FCA 657

Kuuku Ya'u People v State of Queensland [2009] FCA 679

Lampton on behalf of the Juru People v State of Queensland [2014] FCA 736

Mabo v Queensland (No 2) (1992) 175 CLR 1; (1992) 66 ALJR 408; (1992) 107 ALR 1; 42 FLR 32; [1992] HCA 23

Mabuiag People v State of Queensland [2000] FCA 1065

Masig People v State of Queensland [2000] FCA 1067

McLennan on behalf of the Jangga People v State of Queensland [2012] FCA 1082

Miller on behalf of the Birriah People v State of Queensland [2016] FCA 271

Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 5) [2016] FCA 752

NGALPIL v STATE OF WESTERN AUSTRALIA [2001] FCA 1140

Nangkiriny v State of Western Australia (2002) 117 FCR 6; [2002] FCA 660

Nangkiriny v State of Western Australia [2004] FCA 1156

Neowarra v State of Western Australia [2003] FCA 1402

Nicholls v State of South Australia [2015] FCA 1407

Pegler on behalf of the Widi People of the Nebo Estate #2 v State of Queensland (No 3) [2016] FCA 1272

Outline of the paper

Poruma People v State of Queensland [2000] FCA 1066

Prior on behalf of the Juru (Cape Upstart) People v State of Queensland (No 2) [2011] FCA 819

Rrumburriya Borroloola Claim Group v Northern Territory [2016] FCA 776

Rrumburriya Borroloola Claim Group v Northern Territory of Australia (No 2) [2016] FCA 908

Samardin on behalf of the Ilperrelhelam, Malarrarr, Nwerrarr, Meyt, Itnwerrengayt and Ampwertety Landholding Groups v Northern Territory of Australia [2012] FCA 845

Sandy on behalf of the Yugara People v State of Queensland (No 3) 325 ALR 668; [2015] FCA 210

The State of Western Australia v Ward [2000] FCA 611 at [14-15]

Western Australia v Brown (2014) 253 CLR 507; (2014) 88 ALJR 461; (2014) 306 ALR 168; 7 ARLR 380; [2014] HCA 8

Wik Peoples v State of Queensland [2000] FCA 1443

Wyman on behalf of the Bidjara People v State of Queensland (2015) 235 FCR 464; (2015) 324 ALR 454; [2015] FCAFC 108

SCHEDULE 1 – SOME OF THE DETERMINATIONS WHERE NATIVE TITLE HOLDERS DEFINED AS "THE PEOPLE"

1. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 – the Meriam people
2. The Full Court in *State of Western Australia v Ward* [2000] FCA 611 had proposed at [14] – [15] a determination that 'native title existing in the determination area is held by the Miriuwong and Gajerrong People and in respect of that part of the determination area known as Booroongoong (Lacrosse Island), native title is also held by the Balangarra Peoples'
3. *Mabuiag People v State of Queensland* [2000] FCA 1065 at Order 2 – 'The persons holding the communal and group rights comprising the native title ("the common law holders") are the Gumulgal (the Mabuiag people)'
4. *Poruma People v State of Queensland* [2000] FCA 1066 at Order 2 – 'The persons holding the communal and group rights comprising the native title ("the common law holders") are the Warraberalgal (the Warraber people).'
5. *Masig People v State of Queensland* [2000] FCA 1067 at Order 2 - 'The persons holding the communal and groups rights comprising the native title ("the common law holders") are the Masigalgal (the Masig people).'
6. *Smith v State of Western Australia* (2000) 104 FCR 494 at Order 2.2 – 'Native title existing in the determination area is held by the community of Nharnuwangga, Wajarri and Ngarlawangga people, …'
7. *Wik Peoples v State of Queensland* [2000] FCA 1443 at Order 2 – 'The native title is held by the Wik and Wik Way peoples for their respective communal, group and individual rights and interests in the determination are in accordance with the traditional laws acknowledged and traditional customs observed by them …'
8. *Kaurareg People v State of Queensland* [2001] FCA 657 at Order 3 – 'The native title is held by the Kaurareg People who are the descendents of the Kaurareg People who were the traditional owners of the Determination Area prior to the assertion of British sovereignty as common law holders.'
9. *Ngalpil v State of Western Australia* [2001] FCA 1140 – In the third schedule it is said:
    a. *'the common law holders known as the "Tjurabalan People" are those people who hold in common the body of traditional law and culture governing the Determination Area and who:*
        (a) are members of the Walmajarri, Jaru or Nyininy language groups; and
        (b) have common and inclusive cultural and geographic association with the determination area which includes: … .'
10. *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208 – In the third schedule, it is said:
    a. *'the common law holders are those people known as the Martu people. The Martu people are those Aboriginal people who hold in common the body of traditional law and culture governing the determination area and who identify as Martu and who, in accordance with their traditional laws and customs, identify themselves as being members of one, some or all of the following language groups: …'*
11. In *Nangkiriny v State of Western Australia* (2002) 117 FCR 6, the Karajarri people were described in the fourth schedule as:
    a. *'those people who refer to themselves as Karajarri, being persons who:*
        (a) are of Karrijarri descent;
        (b) identify as Karajarri and are accepted as such by Karajarri;
        (c) adhere to Karajarri customs and traditions; and
        (d) *are by Karajarri laws and customs entitled to the use or occupation of the Karajarri lands irrespective of whether or not the traditional entitlement is qualified as to place, time, circumstances, purpose or permission and includes those persons having native title thereto under common law.'*