AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

WHAT'S NEW IN NATIVE TITLE

APRIL 2018

1. Case Summaries

Finlay on behalf of the Kuruma Marthudenera Peoples v State of Western Australia [2018] FCA 548

26 April 2018, Consent Determination, Federal Court of Australia – Western Australia, Rangiah J

In this matter the Court ordered that:

1. WAD 6090 of 1998 and WAD 370 of 2016 are to be determined together.
2. In relation to the determination area, there be a determination of native title in WAD 6090 of 1998 and WAD 370 of 2016 in terms of Attachment A (of the determination).
3. In so far as WAD 6090 of 1998 and WAD 370 of 2016 relate to land and waters outside the determination area, WAD 6090 of 1998 and WAD 370 of 2016 are dismissed and no determination is made in relation to the land and waters comprised in that area.
4. The Kuruma Marthudunera Aboriginal Corporation RNTBC shall hold the determined native title in trust for the native title holders pursuant to s 56(2)(b) of the *Native Title Act 1993* (Cth).
5. There be no order as to costs.

[1] The applicants in the Kuruma Marthudunera native title application (KM application) and the Robe River Kuruma application (RRK application) sought a determination of native title pursuant to ss 61 and 225 of the *Native Title Act 1993* (Cth) (NTA). [2] The applicant, the claim group and claim area for each application is the same. The claim area is located in the Pilbara region of Western Australia in the vicinity of the town of Pannawonica. [3] The parties propose that the Court should determine that the Robe River Kuruma People are the holders of native title in part of the area covered by these applications.

Rangiah J stated at [5] that 'one of the objectives of the Act is the resolution of claims for the recognition of native title by agreement. That has been facilitated by amendments to s 87 brought about by the *Native Title Amendment Act 2009* (Cth). It is, therefore, consistent with the objects of the Act that the parties have agreed to the terms of orders to be made by consent pursuant to s 87 of the Act.'

Rangiah J continued stating that: [7] 'This is an occasion when the Court is to make orders declaring that a group of Aboriginal persons in the applications were and are the traditional owners of that land. By the Court's orders, the Australian community collectively recognises that status. It is important to emphasise that the Court's orders do not grant that status. The Court is merely recognising what exists and has existed since well before European settlement.'

The procedural history of the KM Application is set out in paragraphs [8] – [17] of his Honour's reasons for judgment. [18] On 1 November 2016, the Court made a determination of native title in respect of part of the land and waters the subject of the KM Application: *Finlay on behalf of the Kuruma Marthudunera People v State of Western Australia (No 2)* [2016] FCA 1260 (*Finlay*). [19] That part of the KM Application covering land and waters not the subject of the determination in *Finlay* was designated 'KM Part B'. Pursuant to s 64(1B) NTA, following the determination in *Finlay*, the KM Application was deemed to be amended to remove the area covered by the determination and, accordingly, the area of the KM Application consists only of the area designated as KM Part B.

The procedural history of the RRK application is set out in paragraphs [20] – [22], with Rangiah J noting that the principal significance of the filing of the RRK application was in connection with the potential application of ss 47A and 47B of the NTA. [23] Part B of the KM Application was set down for hearing on 27 April 2016 pursuant to orders made by the Court. The RRK Application was set down for hearing, together with the KM Application, pursuant to orders made on 12 September 2016. The active participants in the hearing were the Applicants, the State of Western Australia, and the Commonwealth of Australia. The documents and evidence filed in the proceedings are set out in paragraph [24].

[25] The hearing commenced on 24 April 2017 with the hearing of opening submissions at the town of Pannawonica, before moving to Parlapuuni (Pannawonica Hill) for the hearing of lay evidence from 24 April to 27 April 2017.

Further lay evidence was taken in the town of Roebourne on 28 April 2017. In that week, evidence was taken from Neil Finlay, Naomi Bobby, Brian Tucker, Trevor Parker, Brendan Bobby, Tuesday Lockyer, Kimberley Slattery, Darielle Lockyer, Ms M Hyland, Anne Robin Wally, and Dorrie Wally. Some of the evidence taken was gender-restricted to men. [26] On 11 and 12 July 2017, a conference of experts was convened by two Registrars of the Court and attended by Dr Burke and Dr Brunton. A record of that conference was produced by the Registrars, and placed on the Court file.

Details of the negotiations and the referral to case management are set out in paragraphs [27]–[29]. Consequently, on 20 November 2017, his Honour made orders vacating all programming orders in the proceedings, and adjourned the proceedings to a case management conference before the Registrar. Subsequent to that case management conference taking place on 5 February 2018, the proceedings were listed for a consent determination before his Honour on 26 April 2018.

[30] The parties to the KM Application reached an agreement as to the terms of a determination and the form of orders (KM Part B Determination) appropriate to provide recognition of the native title rights and interests held by members of the Robe River Kuruma People in relation to part of the land and waters covered by the KM Application and the RRK Application (Determination Area). [31] In support of the agreement reached, the State filed a minute of proposed consent cetermination of which has been signed by each of the parties with an interest in the determination area. [32] In addition, the applicants and the State filed joint submissions in support of the proposed consent determination.

[33] The minute records that the parties have been unable to agree that native title exists and is held by the Robe River Kuruma People over parts of the land and waters of the KM and RRK Applications – that is, those areas not within the determination area – and have therefore agreed to the dismissal of the balance of the applications. [34] The parties agree that native title should be recognised in relation to the determination area, except in those parts identified in Schedule Four of the determination which are shown as generally shaded pink on the map in schedule two.

Rangiah J noted that: [67] ‘the Minute includes an agreement by the parties that the registered native title body corporate may seek a variation of the determination of native title as it relates to the application of s 47B of the Act, in the event the High Court, or another Full Federal Court from which there is no pending appeal or application for special leave to appeal to the High Court, decides subsequently to this determination that the presence of exploration or prospecting licences or permits does not prevent the disregarding of extinguishment under s 47B(2) in respect of land or waters covered by such licences or permits. The Minute includes an agreement by the parties that, but for prior extinguishment, native title rights in four areas would have been those set out in [4] of the determination. However, on the

basis of the decision of the Full Court of the Federal Court in *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8,[1] s 47B(2) NTA cannot apply to those areas – notwithstanding that the parties are agreed that one or more members of the native title claim groups 'occupied' those areas (within the meaning of paragraph 47B(1)(c) of the Act) – because the areas were, at the relevant times, covered by exploration licences or prospecting licences.'

[68] The agreement reached by the parties was recorded in the minute provides that, in the event of such a variation application being made within 12 months of delivery of the relevant decision of the High Court or Full Federal Court, or such further period as may be agreed by the parties to this proceeding, each of the parties to this proceeding which is a party to the variation application will consent to the variation application being argued on its merits. The agreement reached stipulates the variations to the determination that may be sought by the registered native title body corporate in these circumstances. The agreement does not prevent any party from opposing a variation to the determination on the basis of the merits of such an application, except with respect to the agreement of the parties as to 'occupation' for the purposes of paragraph 47B(1)(c) NTA.

Gunaikurnai People Native Title Claim Group People v State of Victoria (No 2) [2018] FCA 573

26 April 2018, Application for Joinder, Federal Court of Australia – Victoria, Mortimer J

In this matter the Court ordered that:

1. Daniel James Turnbull be joined as a respondent party to the proceedings pursuant to s 84(5) of the *Native Title Act 1993* (Cth) (NTA).
2. Mr Turnbull and Ms Briggs and their legal representatives were directed to participate in a confidential case management conference before Registrar Stride at a date to be fixed by the Registrar to address the structure, content and timing of Dr Pilbrow's report.
3. Orders 2 to 5 of the Orders dated 30 January 2018 were vacated.
4. On or before 1 June 2018, Ms Carolyn Briggs and Mr Daniel James Turnbull are to file and serve a response to the applicant's statement of issues, facts and contentions.
5. On or before 29 June 2018, the State is to file and serve a response to the statement of issues, facts and contentions filed by the applicant and the responses of Ms Briggs and Mr Turnbull.

[1] See What's New in Native Title March 2018.

6. On or before 13 July 2018, the applicant and Telstra and the Commonwealth are to file and serve any further response to the documents filed by the State, Ms Briggs and Mr Turnbull.

7. On or before 20 July 2018, the parties are to file a joint progress report and any proposed orders.

8. The proceeding was adjourned to a case management hearing on 1 August.

[2] Mr Turnbull as the Chief Executive Officer of the Bunorong Land Council Aboriginal Corporation made an application for joinder in February 2018. His application was supported by his affidavit and the affidavit of Dr Tim Pilbrow, an anthropologist employed by First Nations Legal and Research Services (FNLRS), formally Native Title Services Victoria. [4] Mr Turnbull was represented by Mr Sexton, a legal practitioner employed by FNLRS. FNLRS is also the organisation providing legal services to the Gunaikurnai people in this proceeding. However, the Court was satisfied that currently there appeared to be appropriate arrangements in place within the organisation to maintain a separation between Mr Turnbull's legal representation and the Gunaikurnai representation.

[5] Mr Turnbull deposed that he was aware of the notification of the Gunaikurnai claim and decided not to give notice under s 84(3)(b) and therefore did not become a respondent to the proceeding pursuant to s 84(3) of the NTA. During the hearing of the interlocutory application, Mr Sexton, appearing on behalf of Mr Turnbull, accepted it was a mistake on Mr Turnbull's part not to give notice. Mortimer J observed that it was regrettable that Mr Turnbull did not take advantage of the rights given to him under the NTA to join the proceeding to avoid the need for the present application. [6] The Gunaikurnai people did not oppose the joinder of Mr Turnbull, nor did the State. The two other respondents who gave notice under s 84(3) – the Commonwealth and Telstra – had not expressed any opposition to his joinder.

[7] The only party who opposed Mr Turnbull's joinder was Ms Briggs. Ms Briggs was joined as an Indigenous respondent to this proceeding. In an affidavit, Ms Briggs stated that she represents the Boon Wurrung People. Ms Briggs stated that she was acknowledged and recognised throughout Victoria as an elder of the Boon Wurrung People and her ancestral connections can be traced back to an apical ancestor in the Boon Wurrung clan, Louisa Briggs, who died in 1925. [8] A core question emerging from the affidavits of Ms Briggs and Dr Pilbrow was the identification of appropriate apical ancestors for the group (or groups). In short, Ms Briggs contended for a narrower group of apical ancestors than the Bunurong Land Council (with Mr Turnbull as its Chief Executive Officer) is prepared to recognise. [10] At paragraph [9] of his affidavit, Dr Pilbrow deposed to the Bunurong Land Councils' membership rules, one of which is that a person must be an Aboriginal person who is a descendent of one of the five known Bunurong Apical Ancestors (Elizabeth Maynard, Eliza Nowan, Jane Foster, Marjorie Munro and Louisa Briggs). [10] Ms Briggs

disputes the status of Eliza Nowan (who she identifies as Eliza Nohen) and Jane Foster as Boon Wurrung (or Bunurong) People.

Mortimer J: [11] 'As I stated at the end of the hearing of the interlocutory application, the Court's decision on the joinder of Mr Turnbull does not reflect any view held by the Court in relation to the claims of Ms Briggs and Mr Turnbull, and who is right and who is wrong.' [12] 'There is, however, no doubt that it is appropriate for Mr Turnbull to be joined as an Indigenous respondent to this proceeding. He would have had, on the material before the Court, a right to be a party under s 84(3) had he given the appropriate notification.'

[14] In *Allen on behalf of the Nyamal People #1 v State of Western Australia* [2018] FCA 320 Barker J emphasised (at [33]) that on a joinder application it is not for the Court to decide whether the allegations made by the joinder applicant are finally made out, but rather whether they are arguable. [15] The purpose of Mr Turnbull being joined as an Indigenous respondent to this proceeding is the same purpose as the purpose for Ms Briggs being an Indigenous respondent. Both of them seek to defend the native title interests they say they have in the claim area that is the subject of the Gunaikurnai application.

[19] The State supported the joinder of Mr Turnbull and the Gunaikurnai applicants did not oppose the joinder and for those reasons [21] Mortimer was 'satisfied first, that Mr Turnbull's interests may be affected by a determination in the Gunaikurnai proceeding and second, that it was in the interests of justice for him to be joined as a party.'

Mortimer J noted that 'it is important that Dr Pilbrow's work is informed by material from, and perspectives of, each of them, together with the information and perspectives that can be provided by any other Bunurong or Boon Wurrung people. Without cooperative and comprehensive input from all Boon Wurrung and Bunurong people, Dr Pilbrow's report might be less effective than it could be. Her Honour referred the matter to case management before Registrar Stride to (1) ensure that both the Court's timetable for the next steps in the proceeding are complied with and (2) to further ensure that no one was left out of Dr Pilbrow's research process.

Hamlett on behalf of the Wajarri Yamatji People (Part B) v State of Western Australia [2018] FCA 545

23 April 2018, Consent Determination, Federal Court of Australia – Western Australia, Griffiths J

In this matter the Court ordered that:

1. No determination is made in respect of the excluded area. Proceedings WAD 6033 of 1998 and WAD 382 of 2017, to the extent that they cover that area, continue in case management before a Registrar of the Court.

2. Pursuant to sub-section 67(1) of the *Native Title Act 1993* (Cth), proceedings WAD 6033 of 1998 and WAD 382 of 2017, to the extent that they cover the Part B Determination Area, be determined together.
3. In relation to the Part B Determination Area, there be a determination of native title in terms of the Part B Determination as provided for in Attachment A. The Part B Determination is to take effect immediately upon the making of a determination under section 56(1) or section 57(2) of the NTA as the case may be.
4. By 18 July 2018, a representative of the common law holders of the native title rights and interests shall indicate whether they intend to have the native title rights and interests held in trust and, if so, by whom.
5. If a prescribed body corporate is nominated in accordance with order 4, it will hold the native title rights and interests referred to in order 3 in trust for the common law holders of the native title rights and interests.
6. There be no determination in relation to:
    a. the balance of the area covered by the Wajarri Yamatji #2 Application (which includes the area covered by the Wajarri Yamatji #4 Application); or
    b. the Wajarri Yamatji Application to the extent that it covers that area.
7. Both proceedings be adjourned to a directions hearing on a date to be fixed.
8. There be no order as to costs.

[1] The proceedings concern applications made under s 61 of the *Native Title Act 1993* (Cth) (NTA) for a determination of native title applications WAD6033/1998 (Wajarri Yamatji #1 Application) and WAD382/2017 (Wajarri Yamatji #2 Application). The applications are together known as the Wajarri Yamatji Applications. [2] The applicant in the Wajarri Yamatji Applications, the State of Western Australia and other respondents required under s 87A of the NTA to be parties to the proposed determination have reached an agreement as to the terms of a determination and form of orders that is appropriate to provide recognition of the native title rights and interests held by members of the Wajarri Yamatji in relation to part of the land and waters covered by the Wajarri Yamatji Applications (Determination Area).

[3] On 19 October 2017, the Wajarri Yamatji #1 Application was the subject of a determination of native title made under s 87A NTA: see *I.S. (Deceased) on behalf of the Wajarri Yamatji People (Part A) v State of Western Australia* [2017] FCA 1215. The Wajarri Yamatji Part A Determination covered an area of approximately 68,743 square kilometres of land and waters in the Murchison and Gascoyne regions of Western Australia.[2]

[2] See What's New in Native Title - November 2017.

The Wajarri Yamatji Part B Determination Area covers approximately 12,252 square kilometres of land and waters. The Wajarri Yamatji #2 Application covers approximately 14,234 square kilometres of land and waters. The whole of the Wajarri Yamatji #2 Application overlaps with the larger Wajarri Yamatji #1 Application. The Wajarri Yamatji Part B Determination Area covers areas of unallocated Crown land, Aboriginal-held pastoral leases and reserves for the benefit of Aboriginal People. It encompasses three Aboriginal communities (Pia Wadjari, Burringurrah and Buttah Windee) and two reserves located in the Weld Range (Wilgie Mia and Little Wilgie).

Griffiths J: [22] Indigenous people of the Mid-West, roughly, those of the Murchison and Gascoyne districts, use the term 'Yamatji', which means 'person', to describe themselves and recognise that they share some aspects of culture and law in common. Thus, Wajarri Yamatji translates to Wajarri person/people. [23] The Wajarri Yamatji form part of an overarching Wajarri society, which also encompasses those Nharnuwangga Wajarri persons whose native title rights and interests were recognised in *Clarrie Smith v State of Western Australia* [2000] FCA 1249. Griffiths J sets out the Wajarri Yamatji evidence in support of their claim in paragraphs [23] – [50] of his Honour's reasons for judgment. [57] – [60] His Honour found that s 87A of the NTA was satisfied and that it was appropriate that the order be made [75].

[51] The Court was informed that the Wajarri Yamatji Applicant would not be in a position to seek a determination that their native title be held in trust by a prescribed body corporate at the time the Wajarri Yamatji Part B Determination is made. Accordingly, the determination of native title will not take effect until a prescribed body corporate is nominated under s 56 NTA.

Griffiths J concluded stating: [84] 'I am satisfied that the Minute sets out a description of the nature and extent of the native title rights and interests and the 'other interests' in relation to the Wajarri Yamatji Part B Determination Area which complies with s 225 of the *Native Title Act*.' [85] His Honour was satisfied that it was appropriate to make the proposed order by consent under s 87A of the NTA.

Lightning on behalf of the Nywaigi People v State of Queensland [2018] FCA 493

20 April 2018, Consent Determination, Federal Court of Australia – Queensland, Robertson J

[1] – [2] In this matter the Court recognised by consent the native title rights and interests of the Nywaigi people in relation to land and waters in and around Victoria Creek to the north and Rollingstone Creek to the south, west to the Paluma Ranges and east to the waters of Halifax Bay. Halifax Bay is to the north and west of the City of Townsville in the State of Queensland. The main respondents to the application were the State of Queensland; Ergon Energy Limited, Telstra Corporation Limited; Catherine Maree Bornis, Crystal creek Hut Owners Association; Halifax Bay

Recreation & Lifestyle Association Inc. and others. The Nywaigi People application was originally filed on 10 April 2015.

The agreement, made under s 87(2) of the *Native Title Act 1993* (Cth) (NTA), was filed on 6 April 2018. [21] The applicant submitted that it was appropriate for the Court to exercise its discretion under section 87 to make an order in the terms of the proposed determination without holding a hearing having regard to the principles in *Munn for and on behalf of the Gunggari People v State of Queensland* [2001] FCA 1229. [23] Robertson J found that the requirements of section 87(2) had been established. The determination recognises the exclusive right to possession, occupation, use and enjoyment of the area to the exclusion of all others in relation to land and non-exclusive rights in relation to waters.

Robertson J: [40] 'I accept the submissions on behalf of the applicant that the material establishes the following. Aboriginal people who spoke a dialect of the Nywaigi language, known as the Nywaigi dialect, used and occupied Nywaigi country prior to 1788. There has been ongoing use of the Nywaigi dialect and acquisition and transfer of Nywaigi cultural knowledge throughout the twentieth century, from which I infer that the Nywaigi People today are descended from a community of people who spoke the Nywaigi dialect of the wider Nywaigi language and who used and occupied Nywaigi country prior to 1788. The material provides a basis for Nywaigi identity and links the Nywaigi People today to land and language through the application of normative rules associated with "dreaming stories". It identifies Nywaigi ancestors and locates them as a community of Nywaigi People in the early days of sustained European contact in Nywaigi country (from the 1870s). It links the Nywaigi People and establishes a basis for inferring that they are descended from a pre-sovereignty community of Nywaigi ancestors. It establishes the Nywaigi People today, and in 1900, as an organised society that possesses native title rights and interests in accordance with observed and acknowledged traditional laws and customs. The material also supports the intergenerational transfer of those laws and customs and I infer that they, as well as the rights possessed in accordance with them, have their origins in a pre-sovereignty Nywaigi society.'

[49] Robertson J ordered that the Warga Badda Nywaigi Aboriginal Corporation be the prescribed body corporate to hold the native title as an agent. [57] The Court made orders by consent which recognised that the native title claimants have, and always have had, native title rights and interests in land and waters within the area the subject of the Application.

Croft on behalf of the Barngarla Native Title Claim Group People v State of South Australia (No 3) [2018] FCA 552

6 April 2018, Revised Determination, Federal Court of Australia – South Australia, White J

This matter concerned an amendment to the determination of native title made in *Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia (No 2)* [2016] FCA 724. Earlier, Mansfield J had made findings concerning matters bearing on the existence of native title in the area, other than the issues of tenure and extinguishment: *Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia* [2015] FCA 9. Following that decision, the parties reached agreement as to the terms a determination, and the determination made on 23 June 2016 in favour of the Barngarla People in relation to a large area on the Eyre Peninsula in South Australia gave effect to that agreement.

Whilst the issues of extinguishment had for the most part been resolved by the parties consensually, the remaining issues were to be resolved via the Barngarla Settlement ILUA. Order 2 of the orders made on 23 June 2016 provided for the determination to take effect upon the Barngarla Settlement ILUA being registered on the Register of Indigenous Land Use Agreements within 12 months. [6] However the finalisation of the Barngarla Settlement ILUA was delayed while the parties considered the implications for compensation as a result of *Griffiths v Northern Territory (No 3)* [2016] FCA 900, the appeal from that decision to the Full Court of the Federal Court *Northern Territory v Griffiths* [2017] FCAFC 106, and the subsequent applications for special leave to appeal to the High Court of Australia (which were granted on 16 February 2018).

As the Barngarla Settlement ILUA was not finalised within the 12 month period contemplated by Mansfield J in his orders, the Court listed the matter for further directions as contemplated by Order 3. However, by the consent of the Applicant and the State, the Court vacated that hearing so as to give the parties further time in which to finalise and execute the Barngarla Settlement ILUA. The ILUA has now been finalised on the basis that issues of compensation will be deferred until after the determination has come into effect.

The Applicant and the State of South Australia have, since 23 June 2016, entered into the Barngarla Determination ILUA, which:

1. contains the agreement of the Applicant and the State that the vesting of Adjacent land and Subjacent land in the Minister under s 15(1)(a) of the *Harbors and Navigation Act 1993* (SA) is a valid act to which the non-extinguishment principle applies. The effect of registration of the Barngarla Determination ILUA is that, pursuant to s 24EBA of the *Native Title Act 1993* (Cth) and s 32B of the *Native Title (South Australia) Act 1994* (SA), the validity of the vesting will be confirmed, and any extinguishing effect of the vesting will be changed so that the

non-extinguishment principle will apply to the vesting of Adjacent land and Subjacent land which is within the Determination Area; and

2. addresses parcels which, in the course of negotiating the tenure schedules, were agreed by the parties to be included into an Indigenous Land Use Agreement.

[9] The executed Barngarla Settlement ILUA has been provided to the Native Title Registrar. The only matter remaining was the interlocutory application by the applicant to amend the determination made on 23 June 2016. [11] The Court's power to vary the determination by amendment is found in s 13(1)(b) of the NTA. [20] White J found that it was appropriate to make the orders for amendment of the determination and the particulars are set out in paragraph [25] of his Honour's reasons for judgment.

Lewis on behalf of the Warrabinga-Wiradjuri #6 v Attorney General of State of New South Wales [2018] FCA 481

12 April 2018, Application for Joinder, Federal Court of Australia – New South Wales, Griffiths J

In this matter the Court ordered that the interlocutory application filed by Mr Keith Kemp on 12 December 2017 be dismissed. Mr Kemp's joinder application was opposed by the applicant in the substantive proceeding. The Attorney-General of NSW and NTSCORP neither consented to nor opposed the application. A summary of the background matters in NSD1786/2016 is set out in paragraphs [5] – [7].

The main country claim by the Warrabinga-Wiradjuri People was filed in May 2017. [9] Mr Kemp's interlocutory application was filed in December 2017, after the relevant three-month notification period for NSD1786/2016 had expired (i.e. on 8 May 2017). Accordingly, the application fell to be determined by reference to s 84(5) and not s 84(3) of the NTA.

There was substantial agreement between the parties as to the relevant legal principles concerning joinder. The parties were agreed that the relevant provision in the NTA concerning Mr Kemp's application to be joined as a party in the circumstances here is s 84(5). Some of those principles were summarised by Branson J in earlier proceedings involving Mr Kemp, being *Davis-Hurst on behalf of the Traditional Owners of Saltwater v New South Wales Minister for Land and Water Conservation* [2003] FCA 541. Drawing also on cases such as *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1 and *Jacob v State of Western Australia* [2014] FCA 1106 per McKerracher J, the relevant principles which guide the exercise of the Court's discretion are set out at [17] – [18].

[26] Griffiths J summarised Mr Kemp's case as follows:

1. there is a Dreaming Track which starts near Canberra and proceeds to and beyond Ulan, which Dreaming Track is linked with the K Group (a reference to a language group more commonly known as the Gundungurra);
2. the traditional land and waters of the Wiradjuri People are to the south of the Dreaming Track;
3. Wiradjuri Country is to the west and north of the Macquarie River; and
4. all the apical ancestors listed in the various Warrabinga-Wiradjuri claims are apical ancestors of the K Group.

[29] In his reply submissions, Mr Kemp stated that he had not approached any Gundugurra people about making a rival claim to the current proceeding. He said that there would be significant practical difficulties in him obtaining authorisation to make such a claim and that there would also be serious resource implications. He submitted that NTSCORP would only fund one native title claim for a particular area.

[30] In brief, the applicant opposed the joinder on the basis that:

1. although Mr Kemp had elected not to claim a native title interest in the application area, his interest could not be defined with reasonable certainty and is not readily ascertainable as a matter of fact;
2. although Mr Kemp claims to have knowledge of familiarity with what he describes as 'Group K', he has not sought to rely on any independent material which suggests that the boundaries of traditional Gundungurra country is proximate to the application area and the available material suggests to the contrary;
3. although Mr Kemp does not claim membership of the Gundungurra in his evidence, he appears to suggest in his 2 March 2018 submission that he is seeking to establish his authority to act as a representative of that group. Applying Reeves J's decision in *Isaacs on behalf of the Turrbal People v State of Queensland (No 2)* [2011] FCA 942 at [19], a person cannot be joined as a respondent party in a proceeding if his or her purpose is to act as a representative to assert native title rights on behalf of other people;
4. on the issue of the interests of justice, the applicant submitted that if the Court considered that Mr Kemp had a sufficient interest for the purposes of s 84(5), his joinder was not in the interests of justice because:
    a. the application is inconsistent with the overarching purpose of civil practice as defined in ss 37M(1) and (2) of the *Federal Court of Australia Act 1976* (Cth) and, in particular, the just resolution of disputes as quickly, inexpensively and efficiently as possible; and
    b. the other orders sought in Mr Kemp's interlocutory application relate to proceedings in which Mr Kemp currently is not a party and the terms of

order 4 of his interlocutory application suggest that Mr Kemp may have a personal interest in being made a consultant in the proceedings pursuant to s 131A of the NTA.

Griffiths J: [32] 'The first issue for determination is whether Mr Kemp has demonstrated, at least on a *prima facie* basis that he has relevant interests which may be affected by a determination of native title in respect of the current proceeding. [37] Given Mr Kemp's failure to demonstrate even on a *prima facie* basis that the Dreaming Track affects the areas the subject of the claim in the current proceeding, it necessarily follows that his interests will not be affected "in a demonstrable way" by a determination of the current proceeding. [38] It is unclear whether Mr Kemp is acting in a personal or a representative capacity. I am not prepared, however, to accept the applicant's invitation to make a firm finding that Mr Kemp is acting in a representative capacity and that his application should be characterised as a representative claim on behalf of the K Group.'

[39] His Honour did not accept the applicant's submission that Mr Kemp had a personal interest in being appointed a consultant under s 131A of the NTA, and that this is what has motivated his interlocutory application: 'I have noted Mr Kemp's reply submission in which he acknowledged that he may have a conflict of interest in consulting on a professional basis in the proceeding.'

[40] His Honour found that that Mr Kemp's interests were insufficient to qualify as 'interests' for the purposes of s 84(5), and that it was unnecessary to address and determine the second limb of s 84(5), namely whether or not it is in the interests of justice to join him as a party in the proceedings. The two limbs are conjunctive and the second limb only arises if the first limb has been established. Griffiths J found at [42] that the interlocutory application should be dismissed. There was no order made as to costs.

2. Legislation

Commonwealth

Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018

Status: The bill was introduced and read a first time on 28 March 2018 and the second reading was moved on 28 March 2018.

Stated purpose: Part of a package of three bills[3] in relation to the establishment of the Aboriginal and Torres Strait Islander Land and Sea Future Fund, the bill amends the *Aboriginal and Torres Strait Islander Act 2005* to give the Indigenous Land Corporation (ILC) functions in relation to water-related rights; require the ILC to prepare a National Indigenous Land and Sea Strategy and regional indigenous land

[3] Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018; Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018.

and sea strategies; align rules for dealings in water-related rights granted by the ILC, or acquired with ILC assistance, with rules for dealings in land granted by, or acquired with, ILC assistance; and include experience in water management as a qualifying criteria for membership of the ILC Board; and ***Aboriginal and Torres Strait Islander Act 2005*** and ***Remuneration Tribunal Act 1973*** to rename the ILC as the Indigenous Land and Sea Corporation

Native title implications: Recognising that many dispossessed Indigenous people would be unable to regain control of land under the *Native Title Act 1993* (Cth) (either because of historical extinguishment or disconnection to traditional lands), the Government established the ILC to complement native title laws and assist dispossessed Aboriginal and Torres Strait Islander people to acquire and manage land. Developments in native title case law following the passage of the *Native Title Act* and the establishment of the ILC clarified the common law was capable of recognising native title rights with respect to the use of water, and the taking of resources from waters, for any purpose (see, eg, *Akiba v Commonwealth* (2013) 250 CLR 209 and *Rrumburriya Borroloola Claim Group v Northern Territory (No 2)* [2016] FCA 908). These developments in the law acknowledged that the relationships of Aboriginal and Torres Strait Islander peoples to waterscapes and between land and water are inseparable. From July to September 2017, the ILC consulted Aboriginal and Torres Strait Islander people across Australia about including freshwater and sea country in the ILC's remit. A clear majority of participants supported expanding the ILC's functions to water.

For further information please see the Second Reading Speech or Explanatory Memorandum.

States and Territories

There were no current bills before the state or territory parliaments, or relevant previous Bills that received Royal Assent or were passed or presented during the period 1-30 April 2018.

3. Native Title Determinations

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

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC/ PBC
Kuruma Marthudenera Part B	Finlay on behalf of the Kuruma Marthudenera Peoples v State of Western Australia	26/04/2018	WA	Native title exists in parts of the determination area	Consent	Claimant	Kuruma Marthudunera Aboriginal Corporation RNTBC
Wajarri Yamatji Part B	Hamlett on behalf of the Wajarri Yamatji People (Part B) v State of Western Australia	23/04/2018	WA	Native title exists in parts of the determination area	Consent	Claimant	N/A
Nywaigi People	Lightning on behalf of the Nywaigi People v State of Queensland	20/04/2018	Qld	Native title exists in the entire determination area	Consent	Claimant	Warga Badda Nywaigi Aboriginal Corporation

4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate

The Native Title Research Unit within AIATSIS maintains details about RNTBCs and PBCs in each state/territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information. The statistics for RNTBCs as of 17 May 2018 can be found in the table below.

Information on RNTBCs and PBCs including training and support, news and events, research and publications and external links can be found at beta.nativetitle.org.au. For a detailed summary of individual RNTBCs and PBCs see the PBC Profiles. Additional information about RNTBCs and PBCs can be accessed through hyperlinks to corporation information on the Office of the Registrar of Indigenous Corporations (ORIC) website; case law on the Austlii website; and native title determination information on the NNTT and ATNS websites.

State/Territory	RNTBCs	No. of successful (& conditional) claimant determinations for which RNTBC to be advised
Australian Capital Territory	0	0
New South Wales	6	0
Northern Territory	27	2
Queensland	84	5
South Australia	17	0
Tasmania	0	0
Victoria	4	0
Western Australia	45	4
NATIONAL TOTAL	**183**	**6**

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 17 May 2018.

5. Indigenous Land Use Agreements

In April 2018, 3 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
26/04/2018	Barngarla and Lucky Bay ILUA	SI2017/002	Area Agreement	SA	Development, Infrastructure, Extinguishment
24/04/2018	Doojum CLA NT Portion 4984 ILUA	DI2018/001	Body Corporate	NT	Community Living Area, Community, Residential
18/04/2018	Yi-Martuwarra Ngurrara and Christmas Creek ILUA	WI2017/017	Area Agreement	WA	Pastoral, Access

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

6. Future Act Determinations

In April 2018, 4 Future Act Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
24/04/2018	Raymond William Ashwin (dec.) and Others on behalf of Wutha and Empire Resources Limited and Western Australia	WF2017/0019	WA	Future Act - NIGF Satisfied - Tribunal has jurisdiction	This decision considered whether the Tribunal had power to conduct an inquiry into a future act determination application lodged by Empire Resources Limited (Empire) for the grant of mining lease M57/636. Empire lodged the application under s 35 of the *Native Title Act 1993* (Cth) (NTA). The proposed lease is over land and waters the subject of the Wutha native title claim. Wutha contend Empire and the State did not negotiate in good faith as required by s 31(1)(b) NTA. After considering the evidence Member McNamara determined that the State acted reasonably and determined that Empire and the State negotiated in good faith. It was held that the Tribunal has the power to make a determination on the application (s 38).

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
20/04/2018	IS (name withheld for cultural reasons) & Others on behalf of Wajarri Yamatji and Paul John Sargentson and Western Australia	WO2017/0513 WO2017/0514 WO2017/0515	WA	Objection - Expedited Procedure Applies	This was a decision about whether the expedited procedure applies to the proposed grants of prospecting licences P20/2295-S, P20/2296-S and P2-/2297-S to John Paul Sargentson. The State considered the grants as acts attracting the expedited procedure. All PLs are located on Madoonga pastoral lease N049446 and entirely overlap with the Wajarri Yamatji registered native title claim. Wajarri Yamatji lodged objections stating that the expedited procedure should not apply because interference or disturbance with one or more of the criteria in s 237 NTA is likely. The licences in this matter were overlapped entirely by a pastoral lease, and by a live exploration licence (held by another explorer since it was granted in 2013). Wajarri Yamatji provided general evidence arguing that low impact activities will be likely to cause interference in general and how these prospectors' activities will affect the area within these licences specifically. The question the Tribunal had to address was whether there was a real risk or chance that activities done lawfully by the grantee on the licences will interfere with areas or sites of particular significance to the native title party in accordance with their traditions. Member Shurven concluded that the grant of these licences was unlikely to have any greater effect than the existing use of the licence areas, particularly given the generality of the information and evidence provided about the effect of low-impact activity on the licences.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
19/04/2018	Raymond William Ashwin (dec.) and Others on behalf of Wutha and John Reginald Prince and Western Australia	WO2017/0854	WA	Objection - Dismissed	The State of Western Australia gave notice under s 29 of the *Native Title Act 1993* (Cth) of its intention to grant prospecting licence P38/4429-S to John Reginald Prince, without requiring Mr Prince or the State to negotiate with the Wutha native title claim group. The area of the proposed licence is wholly overlapped by the Wutha claim group's native title claim (WC1999/010). The Wutha claim group lodged an objection with the National Native Title Tribunal against the application. Neither contentions nor evidence were received from the Wutha claim group. The State wrote to the Tribunal requesting the objection be dismissed on the basis that the Wutha claim group had failed, within a reasonable time, to proceed with the objection or comply with the Tribunal's directions. Member Shurven considered that in the circumstances, the Wutha claim 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. Member Shurven did not need to answer the question of whether the licence could be granted in an expedited way because she concluded t objection should be dismissed.
05/04/2018	Boonthamarra Native Title Aboriginal Corporation RNTBC and Edwin James Wherrit and Queensland	QF2017/0013	Qld	Future Act - May be done subject to conditions	Tthe State of Queensland gave notice under s 29 of the *Native Title Act 1993* (Cth) of its intention to grant mining claim MC300067 to Edwin James Wherritt. The tenement sits entirely within the area of the Boonthamurra People's determination of native title (QCD2015/008). In 2016, the State requested that the National Native Title Tribunal mediate the matter per s 31(3) NTA. No agreement was reached and mediation was terminated. In December 2017, the State lodged a future act determination application in relation to the tenement. The Boonthamurra RNTBC did not challenge the power of the Tribunal to determine this matter due to any lack of good faith in negotiations with the State or Mr Wherritt. Member Shurven considered the evidence and information before her and concluded that the future act may be done subject to conditions.

7. Publications

ANU Press

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

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

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

Nyamba Buru Yawuru

Yawuru Mirlimirli

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Lawbook Company of Australia

Australian Native Title Law

Australian Native Title Law Second Edition by Stephen Lloyd and Melissa Perry annotates the *Native Title Act 1993* (Cth) and analyses the common law principles applicable to native title. It explains the essential concepts and principles which underpin it, including relevant principles of constitutional, property and discrimination law, referencing a range of relevant authority and materials. The First Edition was published in 2004 and the Second Edition builds upon these foundations by bringing the Act up-to-date and providing detailed commentary on the more important of these amendments, in particular the *Native Title Amendment Act 2007*, the *Native Title Amendment (Technical Amendments) Act 2007* and the *Native Title Amendment Act 2009*. The book now draws upon over 1,000 cases, including leading recent High Court decisions such as *Queensland v Congoo* (2015), *Western Australia v Brown* (2014), *Karpany v Dietman* (2013), and *Akiba v Commonwealth* (2013).

8. Training and Professional Development Opportunities

AIATSIS

Australian Aboriginal Studies

Australian Aboriginal Studies (AAS) is inviting papers for coming issues. AAS is a quality multidisciplinary journal that exemplifies the vision where the world's

Indigenous knowledge and cultures are recognised, respected and valued. Send your manuscript to the Editor by emailing aasjournal@aiatsis.gov.au. For more information, visit the journal page of the AIATSIS website.

9. Events

AIATSIS

National Native Title Conference 2018

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

Date: 5–7 June 2018

Location: Cable Beach Resort, Broome WA

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

Arts Libraries Society of Australia and New Zealand

Biennial Conference 2018

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

Date: 4–5 October 2018

Location: Canberra, ACT

For more information visit the website.

Australian Archaeological Association

2018 Conference

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

The AAA 2018 conference is being jointly run by the New Zealand Archaeological Association (NZAA).

Date: 28 November – 1 December 2018

Location: Auckland, New Zealand

The call for papers closes on 20 July. For more information visit the AAA website.

Relationships Australia

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

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

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

Date: 9.30 to 12:00, 5 June 2018

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

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.