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WHAT'S NEW IN NATIVE TITLE

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1. Case Summaries

Western Bundjalung People v Attorney General of New South Wales [2017] FCA 992

29 August 2017, Consent Determination, Federal Court of Australia, New South Wales, Jagot J

In this matter, Jagot J recognised the non-exclusive native title rights of the Western Bundjalung people in relation to an area located in northern New South Wales, extending from Tenterfield in the west to Casino in the east and Bonalbo in the north to Grafton in the south. The respondents to the application included the State of New South Wales, the Clarence Valley and Tenterfield Shire Council, Telstra, Transgrid and others. Other interests listed in schedule six of the determination included the New South Wales Aboriginal Land Council, Baryulgil, Casino Boolangle, Jana Ngalee, Moombahlene Jubullum and other Local Aboriginal Land Council.

In her reasons for judgment, Jagot J said at [8] that 'In the area regulated by the NTA, protection of the compact between the State and its citizens and thus the rule of law by ensuring justice according to law in a manner which is efficient, timely and at a cost which is proportionate to the importance and complexity of the matters in dispute, requires particular vigilance.'

Jagot J further observed at [20] that 'It is also apparent from the authorities that the Court recognises that the State party is effectively the guardian of all of the interests of its people in a native title claim. It should go without saying that the people to whom the State owes a duty include the Aboriginal people who are the claimants. Thus it would be wrong for the State to conceive of its role as merely a gatekeeper through which cogent claims may ultimately be permitted to pass if the claim is one that comes to be supported by so much material that, in all probability, the claim would succeed before the Court if litigated; in particular, ensuring *prima facie* cogent claims are resolved by agreement in a timely and fair manner, at a reasonable and proportionate cost to claimant groups, is an important part of the public interest the State is intended to protect and promote.'

Jagot J also expressed grave concerns about the progress of native title claims in New South Wales.'

At paragraphs [57] to [58] Jagot J reflected that: 'We know too that the agreement under s 87A of the NTA, and thus the proposed consent determination, does not take effect immediately. It takes effect only if the ILUA executed by the parties on 14 August 2017 is registered. The ILUA is confidential to the parties but the intersection of the processes, time and effort dedicated to the agreement of the ILUA and the agreement under s 87A cannot be ignored. Because the negotiation of ILUAs directly impacts on the capacity to resolve native title claims in a manner which is efficient, timely and at a cost which is proportionate to the importance and complexity of the matters in dispute, the Court cannot remain passive merely because it is an ILUA which is causing delay. As the ILUA is confidential I can say only these things. It is apparent from submissions on behalf of the first respondent in various matters that in New South Wales ILUAs are seen by the State as a means, at least in part, of confining the very rights which consent determinations acknowledge and recognise. Whatever else ILUAs might be intended to achieve, they are not intended to be the "price" for a negotiation in good faith of an agreement under ss 87 or 87A. Further, s 211 of the NTA which restricts the operation of State laws on native title rights and interests of certain kinds cannot be overlooked.'

At paragraph [65] Jagot then stated: 'It is convenient now to summarise what this matter appears to show about systemic issues in respect of native title claims in New South Wales. I say appears to show because I accept that I can only proceed on the basis of what emerges in the context of the Court, which is by no means the whole of the story. But this is what this matter at least appears to show:

1. As noted, the Department of Industry, which is responsible for administering the *Crown Lands Act 1989* (NSW) and thus is presumably responsible for ensuring that the effect of claims on rights and interests under that legislation are considered, is also responsible for co-ordinating the responses of all other government departments and agencies…Whatever the arrangements behind the scenes, the present system means that the resolution of native title claims in New South Wales is extraordinarily time consuming, resource intensive,

unwieldy and often ineffective. Given this, it should be no surprise that consent determinations in New South Wales, when we finally reach one after years of effort, are at risk of derailment. But this does not mean the current situation is acceptable.

2. The State has no published template ILUAs, nor any published guidelines about the kinds of ILUAs that might be appropriate.
3. The approach of the State to the operation of s 211 of the NTA and the relationship of that provision to ILUAs is not apparent from any published guideline or other document.
4. The State has no published guidelines explaining what it requires in respect of connection. Applicants and the Court remain in the dark as to what the State in fact requires to satisfy it to enable a consent determination to commence to be negotiated, let alone accepted. References to the 'State's credible basis' standard are descriptions with no known substance. The delays of the kind involved in this matter, two years before negotiations commenced due to apparent issues about connection in the face of the information provided with the claim, cannot readily be reconciled with the duties of the parties.
5. The State did not seem to have sufficient resources of the necessary kind for effective negotiation and drafting of this consent determination. As noted, the negotiations routinely bogged down and only an extraordinary effort over two days and more by Registrar Stride ultimately cut through the quagmire. As to drafting, to describe the process after the successful mediation in February 2017 as problematic is an understatement. Drafts seem to have been prepared, circulated and amended by lawyers without the fundamental substance of the agreement first being reached between the parties. Lawyers seemed to be expected to draft in attempts to resolve issues which could not be resolved without clarity of instructions. To compound the difficulties, no-one appeared to have version control of drafts. Unilateral amendments were proposed by the State to the Court, without prior discussion with the applicant's representative. The State also did not adhere to timing requirements relating to drafting, presumably because it could not do so given the resources available for the required tasks.
6. As the events in the three weeks leading up to today disclose, it is apparent that no matter what date is fixed for the filing of all of the necessary material, the material is simply not filed when required or even a reasonable amount of time before the scheduled hearing date. In the present case, the burdens this has placed on everyone for ensuring the matter could be resolved today have been substantial. **In no other kind of case where parties are legally represented would such conduct occur or be tolerated. That it routinely occurs in native title claims in New South Wales should be of the utmost concern to all of us**.' [Emphasis added]

Her Honour continued at [67]: 'It is also of fundamental importance for all parties to appreciate that the observations of Emmett J in *Munn v Queensland* [2001] FCA 1229 at [29] which appeared in the joint submissions about the State appearing "in the capacity of *parens patriae* to look after the interests of the community generally" were made on the basis of the indisputable assumption that the claimants are also part of the community for which the State is responsible. Nor should it be assumed that the 'interests of the community' are somehow in opposition to the recognition of native title rights and interests.'

Jagot stated bluntly at [70] that 'I am not satisfied that the overarching purpose of the civil procedure rules in the [*Federal Court of Australia Act 1976* (Cth)] has been met in this case, indeed I believe it has not, and I currently have no confidence that we can continue down our present path and comply with the duties to which are all subject for the many matters which remain to be resolved unless there is a change of approach within the State of New South Wales to dealing with native title claims, particularly claims which are *prima facie* cogent and thus call for a timely, fair and sensible resolution by agreement.'

Jagot J concluded by stating that: 'From today all Western Bundjalung People can say now *Ngullingah Jugun* (our country) and know that this is true not only under their traditional customs and laws, but also under the law of Australia as a whole' (at [74]).

On the determination taking effect the Ngullingah Jugun Aboriginal Corporation will hold the native title on trust for the common law holders.

Forster Local Aboriginal Land Council v Attorney-General of New South Wales [2017] FCA 997

28 August 2017, Non-Claimant Application, Federal Court of Australia, New South Wales, Griffiths J

In this matter, Griffiths J made an unopposed determination that native title does not exist within the Lot 7055 DP 1186158, situated in the Parish of Forster, County of Gloucester within the State of New South Wales. The respondent parties were New South Wales and NTSCORP.

The applicant, Forster Local Aboriginal Land Council, is the holder of freehold title over land situated on Lakeside Crescent, Elizabeth Beach, which is in the Great Lakes Local Government Area of New South Wales, pursuant to a grant made to it in 2013 under the *Aboriginal Land Rights Act 1983* (NSW) (ALRA). The applicant wishes to consent to development of an easement by the neighbouring land owner. The purpose of the neighbour's development application is to construct a road facilitating access to the neighbour's property through the easement. The neighbour has agreed to pay all costs of the development, including the costs of obtaining the applicant's consent as owner of the land. Pursuant to s 42 of the ALRA, Aboriginal

Land Councils must not deal with land subject to native title rights and interest unless the land is subject to an approved determination of native title.

By consent, the Court made orders in June 2017 that the proceeding would be determined unopposed in accordance with s 86G of the *Native Title Act 1993* (Cth) (NTA) and without holding a hearing. NTSCORP did not oppose orders consistent with the terms sought by the applicant. The Attorney-General was content for the matter to be determined under s 86G and, while not consenting to the application, acknowledged that it was within the power of the Court to make the determination sought by the applicant.

Three affidavits were deposed by members of the Land Council, establishing that the elders and the members of the applicant were satisfied that the land does not have cultural significance to their people, nor are they aware of any other persons who would have any cultural attachment to the land. In April 2017, the Land Council held an extraordinary meeting to consider proposed resolutions relating to land dealings affecting the land. Resolutions were passed at that meeting approving the development application.

Satisfied that the relevant requirements of the NTA had been met, Griffiths J ordered 'That Lot 7055 DP 1186158 is not subject to any native title rights or interests.'

Barkandji Traditional Owners #8 (Part B) v Attorney-General of New South Wales [2017] FCA 971

22 August 2017, Consent Determination, Federal Court of Australia, New South Wales, Griffiths J,

In this matter Griffiths J made a determination by consent recognising the native title rights and interests of Barkandji people to Part B of the claim area, located to the east of Broken Hill in far west New South Wales. The respondents to the application were the State of New South Wales, Menindee Local Aboriginal Land Council, New South Wales Aboriginal Land Council and Wilcannia Local Aboriginal Land Council.

In October 1997, the Applicant made a native title determination application. In June 2015, in *Barkandji Traditional Owners #8 v Attorney-General of New South Wales* [2015] FCA 604 the Court recognised that the Barkandji and Malyangapa People hold native title over Part A of the claim area.

In February 2017, the Court granted the applicant leave to file an amended native title determination application to reduce the area in relation to the land or waters identified in Schedule Six of the Part A determination. The Part B determination is in relation to part of the land or waters listed in Schedule Six of the Part A determination. The native title rights and interests in relation to the area in respect of which s 47A of the *Native Title Act 1993* (Cth) (NTA) applies, comprise the right of possession, occupation, use and enjoyment to the exclusion of all others. The non-exclusive rights and interests include an unlimited right to take and use the natural

resources. The group has the right to take and use the water of the non-exclusive area for personal, domestic and communal purposes.

The determination takes effect upon the LALC Lands ILUAs being registered on the Register of Indigenous Land Use Agreements. On the determination taking effect, the Barkandji Native Title Group Aboriginal Corporation RNTBC shall hold the determined native title in trust for the common law holders.

Helicopter Tjungarrayi on behalf of the Ngurra Kyanta People v State of Western Australia (No 3) [2017] FCA 938

15 August 2017, Overlap Determination, Federal Court of Australia, Western Australia, Barker J

In this matter, Barker J made a determination recognising the exclusive native title rights and interests of the Ngurra Kyanta people in relation to the Part B areas of the WAD410/2012 (Ngurra Kayanta) and WAD326/2015 (Ngurra Kayanta #2) applications. Both applications cover the same area of land and waters, with Ngurra Kayanta #2 filed to seek the benefit of s 47B of the *Native Title Act 1993* (Cth) (NTA).

Ngurra Kayanta was filed in December 2012 and amended in May 2015. Ngurra Kayanta #2 was filed in June 2015. The Part A area was determined by consent in August 2016. The Part B applications were determined together pursuant to s 67(1) of the NTA. The parties to the Part B area were the applicant, the State of Western Australia, the Shire of Halls Creek and Central Desert Native Title Services Ltd.

On 10 December 2015, the Commonwealth intervened due to an issue regarding the entitlement by the State to compensation from the Commonwealth arising under s 53 of the NTA with respect to the application of s 47B to parts of Ngurra Kayanta and Ngurra Kayanta #2.

The only issue remaining between the parties was whether s 47B applied to the area. In May 2017, the Court found that it applied to disregard any prior extinguishment in relation to the whole of the determination area: *Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia (No 2)* [2017] FCA 587.

The determination was proposed pursuant to s 94A and s 225 of the NTA to take effect once a prescribed body corporate is determined by the Court under s 56 or s 57 of the NTA. The applicant submitted that as all matters in controversy between the parties have been determined, either by way of admissions in pleadings or decision of the Court, the Court could proceed to make a determination of native title in accordance with ss 61, 81, 94A and 225 of the NTA. In the circumstances, the applicant submitted that it was unnecessary for the Court to consider whether s 87 or s 87A might also apply.

Barker J considered that *Brown (on behalf of the Ngarla People) v State of Western Australia (No 3)* [2010] FCA 859; *Aplin on behalf of the Waanyi Peoples v State of Queensland (No 3)* [2010] FCA 1515; *Willis on behalf of the Pilki People v State of Western Australia (No 2)* [2014] FCA 1293; and *Birriliburu People v State of Western Australia [2016]* FCA 671 confirm the Court's power to make a determination where all issues in the proceeding have been resolved by way of admissions in pleadings and the prior resolution of any outstanding issues. His Honour was satisfied that the determination sought by the applicant should be made. The issue of the applicability of s 87 or s 87A of the NTA was not agitated by the parties, and his Honour found it unnecessary to consider the question of the applicability of those provisions in the circumstances of the case.

The nature and extent of the native title rights and interests recognised are the right to possession, occupation, use and enjoyment of the determination area to the exclusion of all others. Non-exclusive rights were recognised in relation to water.

The determination requires that the nomination of a prescribed body corporate occur within six months of the determination being made and, in the event there is no nomination, either a further extension of time for this to occur or the matter be listed for further directions.

Kemppi v State of Queensland [2017] FCA 902

4 August 2017, Application for Leave to Appeal, Federal Court of Australia, Queensland, Jagot J

In this matter, Jagot J dismissed an amended application for leave to appeal filed in relation to the s 66B decision of the primary judge.

In April 2017, Reeves J dismissed an interlocutory application under s 66B of the *Native Title Act 1993* (Cth) (NTA) to replace the applicant: *Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373.

The principles for making a an application for leave to appeal were set out by Jagot J at [2]: 'The applicant needs to persuade the Court that the primary decision is attended by sufficient doubt to warrant reconsideration, the Court must also be satisfied that substantial injustice would result should leave be refused, supposing the primary decision to be wrong.

These criteria were applied in the present case, recognising that the power of the Court to make an order for replacement of an applicant under s 66B of the NTA is a discretionary one, so that, ultimately, the principles in *House v R* (1936) 55 CLR 499 regulate the exercise of any form of appellate scrutiny.

Whilst there were six proposed grounds which were said to give doubt to the decision of the primary judge, Jagot J was not persuaded that any of those grounds raised sufficient doubt. Jagot J dealt with the six grounds as follows:

1. That the primary Judge erred with respect to comments made about the form of the meeting notice. Jagot J determined at [5] that 'read as a whole, the notice did not give the Wangan and Jagalingou people as a whole a reasonable opportunity to decide whether or not to attend the meeting and participate in the deliberations which were to occur at that meeting. Jagot J agreed with the Reeves J that 'the notice for the March 2016 meeting was defective on numerous grounds, only some of which were relied upon by his Honour in his reasons for judgment'(at [7]).
2. That the primary judge erred in an asserted conclusion at [33] of his reasons, which are said to exclude conduct of an applicant in negotiating an indigenous land use agreement (ILUA) as a valid reason for convening an authorisation meeting. Jagot J dismissed this ground stating at [8]: 'I read his Honour's judgment in these paragraphs as focused only on the question whether the notice of the March 2016 meeting satisfied the criteria of reasonable notice of the matters to be conducted at the meeting, and a reasonable opportunity to decide whether to attend the meeting and to participate in its deliberations.'
3. In accepting the Commonwealth's submissions in relation to ss 251A and 251B, her Honour stated at [11] that 'These conclusions effectively dispose of not only proposed grounds 1 and 2 of the proposed appeal, but also grounds 3 and 4.
4. See 3 above.
5. That the primary judge erred in the reasons given for indicating that, in any event, he would not have made orders under s 66B for discretionary reasons. Her Honour found at [13]: 'Insofar as the primary judge's reasons are concerned, I am unable to accept that his Honour's conclusions about the validity and integrity of the 16 April 2016 meeting were glaringly improbable or contrary to compelling inferences. In this regard, I agree with the submissions by the State of Queensland that this contention overlooks the unchallenged affidavit evidence from the second respondent about the steps which had been taken to ensure the integrity of the April 2016 meeting.'
6. That the primary judge took into account irrelevant considerations in respect of the exercise of discretion that his Honour indicated he would have undertaken, had he reached a different conclusion about the validity of the notice for the March 2016 meeting. Her Honour considered that the applicant's submissions on this point did not give sufficient weight to the fundamental principle that an irrelevant consideration is one that, according to the relevant statute, a decision-maker must not take into account. Jagot J accepted the State's submission that there is nothing in the scope, purpose or objects or provisions of the NTA which would support the contention that the matters identified by the applicant are matters which the primary judge was prohibited from taking into account in the exercise of his discretion (at [14]).

Jagot J concluded at paragraphs [17]-[18]: ‘I am convinced that this application for leave is incapable of satisfying the first limb of the requirement for leave. Considering the fact that it was more than open to his Honour to find that the April 2016 meeting was the result of a process unaffected by any deficiency, it necessarily also follows that the application for leave is incapable of establishing substantial injustice should the decision of the primary judge be assumed to be wrong. For those reasons, Jagot J made orders dismissing the amended application for leave to appeal.

Freddie v Northern Territory [2017] FCA 867

3 August 2017, Consent Determination, Federal Court of Australia, Northern Territory, Mortimer J

In this matter, Mortimer J recognised the native title rights and interests of the claim group made up of people from nine estate areas associated with the Kankawarla, Kanturrpa, Jajjinyarra, Linga, Patta, Pirrtangu, Purrurtu, Wapurru and Yurtuminyi landholding groups. The determination area covers the Phillip Creek Pastoral Lease, and is located approximately five kilometres north of Tennant Creek, in the central region of the Northern Territory. The respondent parties were the Northern Territory, pastoralists Alexander John and Katherine Louise Warby, and Gowan Russell Carter and Jennifer Erica Cook.

The application for determination of native title was filed on 1 December 2014 and subject to two interlocutory applications for amendment, primarily seeking to remove the original named applicant who passed away in August 2015, and to update the list of mining interests in the application area. The application was amended in November 2016.

The applicant and the Northern Territory agreed (without opposition from the other three respondents) to resolve the claim by a ‘short-form’ approach involving anthropological evidence and material relating to the construction or establishment of public works in the claim area. The anthropological evidence filed was briefer than in a contested claim. The parties reached agreement on the terms of the determination pursuant to ss 87 and 94A of the *Native Title Act 1993* (Cth) (NTA).

The non-exclusive native title rights and interests recognised include the right to access and live on the land, the right to hunt, gather and fish and take and use the natural resources of the land and waters.

Other interests in the area include those of the Phillip Creek Station pastoral lease holder, various pipeline licences and easements and rights of way connected to those licences, the interests, by way of fee simple estate, of two Aboriginal Corporations (Yurtuminyi Aboriginal Corporation in relation to NT Portion 5005 and Jurntu Jungu Aboriginal Corporation in relation to NT Portion 5006); a substantial number of mining and petroleum tenements (mostly held by two corporations, Giants Reef Exploration Pty Ltd and Santexco Pty Ltd); telecommunications interests held

by Telstra and several other leasehold interests in NT Portion 5476. A variety of other interests, including interests held by Aboriginal people who may or may not be included as native title holders in the claim area are also recognised, such as rights and interests arising under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).

Mortimer J discusses s 87of the NTA and the Court's function at [12]-[24] of her Honour's reasons. At [21]: 'Since the determination made by the Court must include the matters set out in s 225 of the *Native Title Act*, there must be some probative material against which the Court can assess whether those matters can be stated in a determination. The principal source will be the parties' agreed position put to the Court in the proposed orders and determination setting out the matters required by s 225, together with an agreed statement of facts filed pursuant to s 87(8), joint submissions and any supporting documents such as an expert report…However there is no need to provide the Court with all of the evidence of the primary facts substantiating native title. Again, that is because the premise of s 87, and the *Native Title Act*'s emphasis on conciliation, is that the parties have freely and on an informed basis come to an agreement.'

'A s 87 agreement may be reached on behalf of the State (or Territory), and other parties, without the level of proof required in a contested application. Inherent in parties' agreement to resolve claims by settlement rather than litigation, as in other areas of the law, is a willingness to abide by an outcome without the exhaustive and detailed investigation that accompanies a trial of contested issues of fact and law. The public interest in an outcome of this kind is considerable: see *Prior on behalf of the Juru (Cape Upstart) People v State of Queensland* (No 2) [2011] FCA 819 at [26], Rares J' (at [23]).

Her Honour was satisfied that there was ample evidence in support of a close and ongoing connection to country through traditional law and custom, and to provide the foundation for acceptance by the Territory of the claim, and a foundation for the determination in the form sought.

Mortimer J allowed the applicant 12 months to make a proposal regarding the nomination of the prescribed body corporate.

Her Honour congratulated the parties on reaching agreement within three years of the s 61 application being filed: 'That is an admirable achievement' (at [45]).

Clancy on behalf of the Wulli Wulli People #2 v State of Queensland [2017] FCA 869

1 August 2017, Joinder Application, Federal Court of Australia, Queensland, Collier J

In this matter, Collier J heard an interlocutory application filed by Queensland South Native Title Services (QSNTS) seeking to be joined as a party to the native title proceedings brought on behalf of the Wulli Wulli #2 claim group. The Wuilli Wulli #2 applicant opposed the application.

The Wulli Wulli #2 native title proceedings commenced in September 2011 by the claim group's legal representatives, Just Us Lawyers. In December 2011, an application was filed in Wakka Wakka #3. QSNTS provided the Wakka Wakka #3 claim group with assistance in relation to the filing of that claim. The two claims wholly overlap geographically and share common apical ancestors. In July 2012, Collier J ordered that the proceedings in Wulli Wulli #2 and Wakka Wakka #3 be heard together.

The applicants in both Wulli Wulli #2 and Wakka Wakka #3 attended mediation in June 2014. Following the mediation, the Form 1 applications in both claims were amended in accordance with an agreement of 17 June 2014 signed on behalf of both claim groups. The Form 1 was amended to include descendants of Maggie Hart and Mi Mi as members of the Wulli Wulli #2 claim group. The name of the applicant changed to Robert Clancy & Ors on behalf of the Wulli Wulli and Wakka Wakka Peoples.

In April 2017, Just Us Lawyers sent a letter to QSNTS advising that the applicant had received the State's response in relation to connection in the Wulli Wulli #2 and Wakka Wakka #3 matters, and proposed a number of meetings in the context of urgent case management. On or about 13 April 2017, a notice was published in the South Burnett Times newspaper inviting Wulli Wulli and Wakka Wakka People to attend an information meeting on 5 May 2017 and an authorisation meeting on 7 May 2017. After QSNTS became aware of the notice, the application for joinder was prepared and filed.

Following the authorisation meeting of the Wulli Wulli #2 claim group, the applicant filed an interlocutory application for leave to amend the Form 1 native title determination. In June 2017, Collier J made orders granting leave and the application amended to:

1. Remove Maggie Hart and Mi Mi from the list of apical ancestors;
2. Add Bessie Rawbelle to the current list of apical ancestors;
3. Amend the description of existing ancestors consistent with the Wulli Wulli determination; and
4. Revert to the former name of the proceeding, that being Wulli Wulli People #2.

In order to warrant joinder as a party to proceedings, the applicant for joinder must demonstrate the follow elements:

1. The person has an interest in the proceedings;
2. The interest may be affected by a determination in the proceedings; and
3. In the interests of justice, the Court should exercise of its discretion to join the person as a party.

QSNTS submitted that it has an interest in the proceedings which could be affected because of its status as a recognised native title representative body under s 203AD of the *Native Title Act 1993* (Cth) (NTA), with a statutory responsibility for representing the interests of native title holders in the southern region of Queensland. QSNTS further submitted that it was in the interests of justice that it be joined to the current proceedings because, in summary:

1. The interests held by QSNTS in this case are materially indistinguishable from those held by QSNTS in *Edwards on behalf of the Wongkumara People v State of Queensland* [2014] FCA 282, in which the Court found QSNTS specifically to have an interest supporting joinder to native title proceedings;
2. QSNTS promptly sought to be joined once it became aware of the notice of the planned authorisation meeting seeking to remove the descendants of Maggie Hart and Mi Mi from the Wulli Wulli #2 claim group description, in breach of the processes set out in the mediation agreement;
3. There is a public interest in QSNTS properly performing its statutory functions, particularly in light of the fact that it has already committed substantial financial resources to ascertaining the person who holds or may hold native title in relation to the claim area; and
4. Joining QSNTS to the proceeding may obviate the need for the Court to entertain at this stage a multitude of joinder applications from the descendants of Maggie Hart and Mi Mi.

The Wulli Wulli #2 applicant submitted that it opposed joinder by QSNTS because, in summary:

1. QSNTS had demonstrated no interest of any kind necessary to support joinder. The status of QSNTS as a recipient of funding under s 203FE and such obligations as it may hold as a consequence of receipt of that funding do not constitute interest of a kind sufficient to permit joinder;
2. At best, the interests of QSNTS are indirect, undefined and lacking in substance;
3. QSNTS had not shown that it was in the interests of justice that the Court exercise its discretion to allow joinder. In particular:
    a. The delay of QSNTS in seeking joinder was substantial;

b. Joinder of QSNTS could result in delay in the resolution of the substantive proceedings. QSNTS had not defined or disclosed the role it proposed to take in the proceedings if joined;

c. No benefit had been demonstrated by the joinder of QSNTS; and

d. The applicant held concerns that, if QSNTS were permitted to join the proceedings, it would seek to re-agitate, review and re-open issues which had been the subject of prolonged and costly management, negotiation, mediation, investigation and consideration. This would result in delays and possible frustration of the prompt and efficient resolution of the proceedings.

Collier J rejected the applicant's arguments as being of little substance. To the contrary, her Honour held at [27] that there is extensive authority that representative bodies have both an interest in native title proceedings in respect of claims in their statutorily mandated regions of Australia, and that that interest could be affected by a determination of native title in the proceedings. In particular, her Honour considered the issues arising in *Edwards* [2014] FCA 282 to be almost identical to those arising in this case.

At [36], her Honour stated: 'I am not satisfied that QSNTS was or is required to articulate a detailed plan explaining its likely participation in the proceedings. Section 84(5) of the *Native Title Act* certainly does not include any such requirement, over or above the existence of an interest in the proceedings. In his affidavit sworn 4 May 2017, Mr Kevin Smith of QSNTS deposed that it was not possible at this stage of the proceedings for QSNTS to identify each respect in which the performance of its statutory functions could be enhanced or adversely affected if QSNTS were joined as a party to the proceedings. However, he claimed that if joined, QSNTS would be better equipped to determine, if requested, how to allocate resources to provide assistance. In my view this is a practical and sensible approach to the likely involvement of QSNTS in the proceedings.'

Her Honour considered that while the native title application was filed in 2011, the application for joinder cannot be considered late in the context of the proceedings, given that no agreement had been reached on the terms of the determination and that the claim group composition remained a live issue. That issue also counted against the applicant's delay of resolution argument.

In relation to QSNTS' interest in the proceedings, Collier J stated at [39] that 'QSNTS, as the relevant statutory representative body, has a role in facilitating and assisting participants in the native title process, to ensure proper composition of the claim group seeking native title. This role is perfectly compatible with QSNTS taking a neutral stance so far as concerns the outcome of these proceedings. The fact that QSNTS seeks joinder to the proceedings is not indicative of partisanship. Rather, the material before the Court points to QSNTS fulfilling its statutory role.'

Collier J held that the inclusion or not of the descendants of Maggie Hart and Mi Mi in the claim group description is 'clearly contentious'. Her Honour ordered that the parties engage in further confidential case management to seek to resolve the issue.

2. Legislation

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

3. Native Title Determinations

In August 2017, the NNTT website listed 6 native title determinations.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC/ PBC
Yaegl People #2	Yaegl People #2 v Attorney General of New South Wales	31/08/2017	NSW	Native title exists in the entire determination area	Consent	Claimant	Yaegl Traditional Owners Aboriginal Corporation RNTBC
Western Bundjalung People	Western Bundjalung People v Attorney General of New South Wales	29/08/2017	NSW	Native title exists in parts of the determination area	Consent	Claimant	N/A
Forster Local Aboriginal Land Council	Forster Local Aboriginal Land Council v Attorney-General of New South Wales	28/08/2017	NSW	Native title does not exist	Unopposed	Non-claimant	N/A
Barkandji Traditional Owners #8 Part B	Barkandji Traditional Owners #8 (Part B) v Attorney-General of New South Wales	22/08/2017	NSW	Native title exists in parts of the determination area	Consent	Consent	N/A
Ngurra Kyanta and Ngurra Kyanta 2 Part B	Helicopter Tjungarrayi on behalf of the Ngurra Kyanta People v State of Western Australia (No 3)	15/08/2017	WA	Native title exists in the entire determination area	Claimant	Litigated	N/A
Phillip Creek Pastoral Lease	Freddie v Northern Territory	3/08/2017	NT	Native title exists in parts of the determination area	Claimant	Consent	N/A

4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate

The Native Title Research Unit within AIATSIS maintains a RNTBC summary document which provides details about RNTBCs and PBCs in each state/territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information. The statistics for RNTBCs as of 15 September 2017 can be found in the table below.

Information on RNTBCs and PBCs including training and support, news and events, research and publications and external links can be found at nativetitle.org.au. For a detailed summary of individual RNTBCs and PBCs see PBC Profiles.

Additional information about RNTBCs and PBCs can be accessed through hyperlinks to corporation information on the Office of the Registrar of Indigenous Corporations (ORIC) website; case law on the Austlii website; and native title determination information on the NNTT and ATNS websites.

State/Territory	RNTBCs	No. of successful (& conditional) claimant determinations for which RNTBC to be advised
Australian Capital Territory	0	0
New South Wales	6	0
Northern Territory	26	3
Queensland	82	0
South Australia	15	0
Tasmania	0	0
Victoria	4	0
Western Australia	42	0
NATIONAL TOTAL	**175**	**3**

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 15 September 2017.

5. Indigenous Land Use Agreements

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

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
4/08/2017	Juru People Land Exchange ILUA	WI2015/010	Body Corporate	Qld	Access, Extinguishment

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

6. Future Acts Determinations

In August 2017, 7 Future Acts Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
30/08/2017	Gooniyandi Aboriginal Corporation RNTBC and Sandrib Pty Ltd and Western Australia	WO2016/0421	WA	Objection - Expedited Procedure Applies	Due to the age of Mr Cox and Mr Street's affidavit (affirmed in 2015) filed in support of the Gooniyandi's objection, and as it was not supported by further contemporary evidence, Member Shurven held that the affidavit has limited probative value. The affidavit was afforded greater weight in determining the existence of sites or areas of particular significance; however the general nature of the evidence generally was insufficient to displace the expedited procedure. Member Shurven noted that 'where a native title party provides only general evidence about community and social activities, the Tribunal is more likely to conclude these activities can coexist with a grantee party's exploration activities without direct or substantial interference.' Sandrib stated that it will undertake to establish dialogue with the Gooniyandi people and negotiate a Heritage Protection Agreement prior to the commencement of any ground disturbing activities. The State proposes to impose a condition allowing the Gooniyandi RNTBC to request Sandrib enter into a Regional Standard Heritage Agreement (RSHA) within the first 90 days of grant. If the Gooniyandi RNTBC chooses to enter into a RSHA with Sandrib, the company would be required to notify and consult with the Gooniyandi RNTBC. Member Shurven was satisfied the group's activities can coexist with the activities proposed by Sandrib, particularly given the size of the licence is over 200 square kilometres.
29/08/2017	IS (name withheld for cultural reason) & Others on behalf of Wajarri Yamatji and Cundeelee Pty Ltd and Western Australia	WO2016/0441	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the group in response to the springing order applied to the directions. The objection application was dismissed as a result, pursuant to s 148(b) of the *Native Title Act 199*3 (Cth).

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
25/08/2017	Raymond William Ashwin (dec) and Others on behalf of Wutha and Evolution Mining (Mungari) Pty Ltd and Western Australia	WO2017/0112	WA	Objection - Expedited Procedure Applies	Due to a lack of evidence provided by Wutha in relation to the s 237 criteria, Member Shurven was not satisfied that the proposed grant was likely to directly interfere with their community or social activities; interfere with areas or sites or particular significance to Wutha; or involve, or create rights whose exercise is likely to involve, major disturbance to the land and waters concerned.
15/08/2017	Derrick Smith & Ors on behalf of Gnaala Karla Booja and Carbone Bros. Pty Ltd and Western Australia	WF2017/0002	WA	Future Act - Dismissed	An application for future act determination was made on behalf of Gnaala Karla Booja in April 2017 on the basis that the applicant had reached agreement with Carbone concerning the grant of the proposed lease but were unable to finalise an agreement of the kind mentioned in s 31(1)(b) of the NTA because a member of the applicant was deceased. In July 2017, the State of Western Australia informed the Tribunal that a reserve had been created over land wholly overlapping the proposed lease to accommodate a 'State Explosive Facility'. As a result of the notice of intention to take (registered in November 2016), all interests including native title rights and interests in the land, other than those of the Crown and those granted by two existing mining leases, are taken. At the relevant date there were no 'interests granted by Mining Lease 70/1339' and the purported exclusion from the taking order can have no effect in respect of interests that did not exist at the time of taking of the land and creation of the reserve. For the purposes of the Tribunal and its consideration of the application, registration is conclusive. It follows that there is no future act within the meaning of s 233 of the *Native Title Act 1993* (Cth) for the Tribunal to consider as there are no native title rights and interests to be affected.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
8/08/2017	Raymond William Ashwin (dec) and Others on behalf of Wutha and Melville Raymond Dalla-Costa and Western Australia	WO2016/0453	WA	Objection - Expedited Procedure Applies	The Wutha native title claim overlaps the licence by approximately 1.71 square kilometres. Wutha provided no evidence, statements or documents in support of their contentions and as such, Member Shurven was not satisfied that the proposed grant was likely to directly interfere with their community or social activities; interfere with areas or sites or particular significance to Wutha; or involve, or create rights whose exercise is likely to involve, major disturbance to the land and waters concerned.
4/08/2017	Raymond William Ashwin (dec) & Others on behalf of Wutha and Youanmi Metals Pty Ltd and Western Australia	WO2016/0518	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Ms Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays. The objection application was dismissed pursuant to s 148(b) of the *Native Title Act 1993* (Cth).
4/08/2017	Kevin Allen & Others on behalf of Njamal and Warren Ayres and Western Australia	WO2017/0211	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Ms Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays. The objection application was dismissed pursuant to s 148(b) of the *Native Title Act 1993* (Cth).

7. Publications

AIATSIS

Fluid mechanics: the practical use of native title for freshwater outcomes

This research report by Nick Duff explores how native title holders can exercise their water rights to promote or protect the things they value. It examines the interaction between native title and other areas of law that may impact on freshwater, including water legislation; approvals for mining, petroleum and infrastructure projects; and common law torts that govern land use.

To download, please visit the AIATSIS website.

8. Training and Professional Development Opportunities

AIATSIS

Australian Aboriginal Studies

Australian Aboriginal Studies (AAS) is inviting papers for coming issues. AAS is a quality multidisciplinary journal that exemplifies the vision where the world's Indigenous knowledge and cultures are recognised, respected and valued. Send your manuscript to the Editor by emailing aasjournal@aiatsis.gov.au.

For more information, visit the journal page of the AIATSIS website.

ORIC

ORIC provides a range of training for Aboriginal and Torres Strait Islander corporations about the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (CATSI Act), the corporation's rule book and other aspects of good corporate governance. More information on upcoming training is outlined below.

Upcoming training courses

Course	Location	Dates	Applications Close
Introduction to Corporate Governance workshops	Darwin, NT Hobart, Tas	26-28 Sept 17-18 Oct	3 Sept 22 Sept
Two-day governance workshop	Albury, NSW Mt Isa, Qld Port Augusta, SA Batemans Bay, NSW	19-20 Sept 10-11 Oct 8-9 Nov 5-6 Dec	15 Sept 6 Oct 3 Nov 24 Nov
Building Strong Stores workshop	Katherine, NT	27 Oct	14-15 Nov

For more information or to apply, visit the ORIC website.

9. Events

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

AAS / ASA / ASAANZ Conference 2017 - Shifting Shapes

Three anthropology associations (AAS, ASA and ASAANZ) are collaborating to put on an international conference in December 2017, bringing together anthropologists and members from across Australia, New Zealand, the UK and Commonwealth and beyond.

Date: 11 - 15 December 2017

Location: University of Adelaide

For more information, please visit the conference website.

Australian Archaeological Association

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

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

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

Date: 6-8 December 2017

Location: La Trobe University, Melbourne

For more information, please visit the conference website.

Australian Indigenous Governance Institute

Indigenous Women in Governance Masterclass

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

The masterclass will include presentations from keynote Speakers June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Jackie Huggins AM, Co-Chair of National Congress of Australia's First Peoples, and

Michelle Deshong, CEO of the Australian Indigenous Governance Institute. Panel discussions will be held with a range of Indigenous female CEO's of community organisations as well as a practical workshop on gender strategies in governance.

Date: 30 November 2017

Location: Lendlease, International Towers, Sydney

To register, visit the event page.

ORIC

Technical review of the CATSI Act

On 5 July 2017, the Minister for Indigenous Affairs, Nigel Scullion, announced that ORIC will lead a technical review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

The purpose of the review is to consider technical amendments to strengthen and improve the CATSI Act and align it with recent changes in corporate law and regulation, particularly in the Corporations Act 2001.

To view the terms of reference or discussion paper, please visit the ORIC website.

Written submissions are open until Tuesday, 3 October 2017. To submit, email CATSIreview@oric.gov.au or post to CATSI review, PO Box 29, WODEN ACT 2606.

ORIC is hosting public roundtable discussions in Alice Springs on 26 September 2017 and in Cairns on 27 September 2017. To register, visit the ORIC website.

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.