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AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

WHAT'S NEW IN NATIVE TITLE

DECEMBER 2017

1. Case Summaries

Tommy on behalf of the Yinhawangka Gobawarrah v State of Western Australia [2017] FCA 1568

22 December 2017, Strike Out Application, Federal Court of Australia, Western Australia, Barker J

This proceeding results from an interlocutory application brought by the Jurruru respondents (the applicants in WAD6007/2000 and WAD327/2012) to strike out an application for a determination of native title brought by the Yinhawangka Gobawarrah (YG) applicant, filed on 18 October 2016.

Barker J ordered that: (1) the application of the Jurruru respondents dated 7 June 2017 be dismissed and (2) the matter be referred to the Registrar for further case management with a view to holding a trial to determine who holds native title in the relevant area (3) any further orders sought by either the applicant or respondent were to be sought within 28 days of judgment.

The area covered by the YG application overlaps the area subject to the native title determination application of the Jurruru applicant in WAD6007/2000 (*Jurruru #1*) and WAD327/2012 (*Jurruru #2*). On 21 June 2016, Barker J dismissed an earlier application

filed by the YG group, for want of authorisation on the basis that the applicant had brought an application on behalf of a group of claimants larger than the group which had authorised the application: *Giggles on behalf of the Gobawarrah Minduarra Yinhawangka People v State of Western Australia* [2016] FCA 792. The YG application addressed in these reasons was filed on 18 October 2016. The Jurruru respondents then sought to strike out the YG application and the matter first came before the Court on 5 July 2017.

On that day the Jurruru respondents' filed written submissions in support of their interlocutory application for summary dismissal of the YG application on the following bases:

1. The YG claim was a subgroup claim and did not comply with s 61 of the *Native Title Act 1993* (Cth) (NTA)
2. The YG claim filed to comply with s 61 (4) of the NTA
3. There was insufficient evidence of authorisation
4. The YG claim was an abuse of process and
5. The TG claim had no reasonable prospects for success

The hearing of the application was adjourned following the hearing of submissions by the YG applicant to allow the opportunity for the YG applicant to file a minute of a proposed amended Form 1 and any supporting affidavits it sought to rely upon in response to the Jurruru respondent submissions. At an adjourned hearing on 13 December 2017, the YG applicant chose not to amend its Form 1 and sought to rely on two further affidavits.

The sub-group issue

The YG applicant rejected the Jurruru respondents' submissions to strike out their application on the following bases:

1. The Jurruru submissions incorrectly asserted that the YG applicant and claim group had previously acknowledged the claim area was communally held by the Yinhawangka People. The YG applicants stated that they had never acknowledged this.

2. As for the Yinhawangka claim group members who were previously part of the Gobawarrah Minduarra Yinhawangka (GMY) claim group, the Jurruru respondents mischaracterised the proposal to amend the GMY native title claim as this was subject to further consultations with the relevant Yinhawangka families and the obtaining of further anthropological research and legal advice. Further, the evidence of former GMY claimants referred to in the Jurruru submissions needed to be considered in context, and in light of the totality of the Aboriginal and expert anthropological evidence given. The evidence of the persons referred to emphasises that it is the descendants of the YG claim apical ancestors, who alone, have the authority and right to speak for the claim area.

3. It was not contested that the YG claim group comprises only some of the members of the wider Yinhawangka community however it is not a 'subgroup' in the sense alleged by the Jurruru respondent submissions.

4. The Jurruru respondent characterised the YG claim group as a sub-group. While the claim group did only comprise some members of the wider Yinhawangka community, the YG applicant asserted that a subset is not a sub-group as per Jurruru submissions. The YG applicant asserted that the Delegate of the National Native Title Tribunal found that the YG application for a determination of native title determination satisfied the registration test under the Act.

5. The factual situation contrasts with that in the two cases referred to in the Jurruru submissions. In *Velickovic v State of Western Australia* [2012] FCA 782 the claim group comprised only part of a family descent group in circumstances where other members of that family asserted native title rights and interests in the same are, as did other families. In *Giggles on behalf of the Gobawarrah Minduarra Yinhawangka People v State of Western Australia [2016] FCA 792* the claim group description comprised only a list of 23 people and it was conceded by the claim applicant that the claim was not properly authorised pursuant to s 61 of the Act, because the list of 23 names was not a complete list of all the persons who held native title claimed.

[16] The Jurruru respondents maintained their submission that the YG application constituted a claim by a sub-group. They argued that on the basis of traditional laws and customs asserted by the YG applicant that the rights and interests in the YG claim area may be held by Yinhawangka people more generally, who are not the descendants of the apical ancestors listed in the YG application.

[17] Barker J held that it was not in the interests of the administration of justice before the Court to progress the YG application or to rule on the subgroup question. If the Court 'were to uphold the view that the current YG application is, properly understood, an impermissible subgroup claim, because it has not been authorised [as Barker J found in the *Giggles* decision] then, subject to a successful appeal, the YG applicant would be prevented from proceeding further.'

[18] The argument put on behalf of the YG claimant was that they are not a 'subgroup' but a 'subset' of the Yinhawangka people and they do not admit that other Yinhawangka people hold native title rights and interests in the relevant overlap claim area. Whilst Barker J conceded that it was an arguable point, he did not consider that he should rule on it before evidence including expert anthropological opinion was tested at a possible trial. Barker J determined that it is not for the Court to rule on the significance of the evidence led and objected to in the context, and that this is a matter properly for the trial judge to consider.

Section 61 (4) issue

The YG applicant rejected the proposition that there was any relevant failure to satisfy the requirements arising under s 61(4) of the NTA and made forceful submissions set out at paragraph [22] of the written reasons for judgment. The YG applicant also relied on the finding by the NNTT Delegate for the purposes of the registration test that this provision was adequately met.

The issue raised by the Jurruru respondents was based upon the alternative interpretation of the YG application Form 1, that the claim is no longer that native title in the claim area is a communal Yinhawangka title, but that it is a group title held by only some of the Yinhawangka people. Barker J did not feel in light of his observations on the subgroup issue that The Court should conclude that the YG application failed to define with 'sufficient clarity', as asserted by the respondent, the relevant claim group.

Barker J found that the respondent had not sufficiently met the evidentiary burden warranting a strike out of the YG application at this pre-trial stage.

The insufficient evidence of authorisation issue

[27] The YG applicant rejected the submission that it had failed to provide proper evidence of meetings to facilitate authorisation.

It made the following submissions:

1. To seek summary dismissal of their application on this basis was not supported by any legal foundation in legislation or case law. The YG applicant also alleged defects in the Jurruru #1 and #2 applications with respect to authorisation.
2. Section 84 (D)(2) of the NTA provides an avenue to seek an order for the production of evidence of claim authorisation, however the respondent party did not pursue this avenue, and therefore summary is unwarranted.

[28] The YG applicant also relied on the registration test decision of the delegate referring specifically to paragraph [170] of the Registration Test decision.

The Jurruru respondents maintained that the YG applicant had had reasonable opportunity to provide evidence in support of adequate authorisation, but had failed to do so and that summary dismissal was warranted on that basis.

Barker J found that these were matters appropriate for the trial Judge pursuant to section 84D of the NTA if the matter eventuated to trial.

The abuse of process issue

The YG applicant submitted that a finding of an abuse of process was unreasonable and unsustainable for the following reason: In

range of abuse of process arguments. It was submitted that the case for summary dismissal of the YG claim is considerably weaker than it was in the Yilka and Edwards claims considered in *Murray*. In *Murray* the Court rejected the State's multipronged abuse of process application.

[34] By way of background to the *Yilka* decision the YG applicant asserted that:

1. The *Yilka* claim was preceded by a full trial and judgement in relation to the former Cosmo Newberry claim, which was brought by exactly the same applicant over the same claim area.
2. The Cosmo Newberry claim was dismissed on a jurisdictional basis on the grounds that it had not been properly authorised, nevertheless Lindgren J after hearing all of the evidence, went on to make substantive findings in relation to the merits of the Cosmo Newberry claim.
3. The Yilka claim group description included the members of the Cosmo Newberry claim, plus some additional claimants on the former Wongatha claim which overlapped the Cosmo Newberry Claim, which was also dismissed by Lindgren J for lack of authorisation.
4. The pleadings in the Cosmo Newberry claim were changed on numerous occasions by the Cosmo Newberry applicant.
5. All members of the Sullivan Edwards claim group had been included in the former Wongatha claim group and the members of the Sullivan Edwards claim group had made another claim prior to the Wongatha claim.
6. The Cosmo Newberry and Wongatha claims were pleaded and argued on the basis that native title rights were held on a group basis - or an aggregation of ngurra country rights. Lindgren J held that this was not consistent with traditional Western Desert Cultural Bloc laws and customs, but exercised his discretion to dismiss the claims only, rather than make a negative determination of native title.
7. The *Yilka* claim was pleaded on a different basis to the Cosmo Newberry claim – on the basis that native title rights were held on an individual not group basis.
8. Likewise the Sullivan Edwards claim was pleaded on a different basis to the Wongatha claim.

[36] The YG applicant asserted factual inaccuracies in the Jurruru respondent submissions to the following effect:

1. The first suggested inference (subgroup argument) and invalidity pursuant to s 61(4) is not open as addressed earlier.
2. Secondly there are no grounds open that the application is brought for an improper purpose.
3. The Jurruru submissions fail to take into account the legitimate arguments made by the YG applicant.

4. The Jurruru respondents have been unable to point to any other Yinhawangka people asserting native title rights in the same claim area.
5. Jurruru respondent submissions failed to take into account the nature of GMY proceedings
6. The YG applicant affidavits and expert anthropological evidence of consultant anthropologist Dr Vachon demonstrate that *prima facie* the claim group description may be sustainable under Yinhawangka law.

[40]–[42] The YG Applicant further submitted:

1. There was no intention to relitigate a native title claim which was previously struck out.
2. The YG claim is based on a new claim prepared with reference to new instructions and authorisation.
3. The YG claim is based on the application of traditional Yinhawangka laws and customs.

The YG applicant did not breach the criterion established in *State Bank of New South Wales Ltd v Stenhouse Ltd* (1997) Aust Torts Reports 81–423 in relation to the abuse of process issue as set out in paragraph [42].

[43] The Jurruru respondents maintained an abuse of process allegation, asserting that the affidavits submitted by the YG applicant, were an attempt to override the legal implications of previous evidence and findings in *Giggles*, while essentially seeking prosecution of the same claim.

Barker J ruled that a ruling as to whether the new claim had been brought by a 'subset' as distinct from a 'subgroup' of the Yinhawangka People is for consideration by the trial judge and no abuse of process could be made out in this proceeding.

The no reasonable prospects of success argument

[45] The YG applicants submitted that the affidavits filed contained cogent evidence which weighed in favour of the applicant's submission.

The YG applicant criticised the Jurruru respondent submissions as flawed further observing that: [46](5) 'Questions regarding the level at which native title rights are held in particular Aboriginal societies are often complex and contentious, anthropologically and legally. Claim groups, applicants, Native Title Representative Bodies and of course the Courts have grappled with this issue in a number of native title cases over the years. It is not uncommon for claims to have been pleaded one way, then another, or for claims to have been superseded by later claims pleaded on a different basis. Many claims have ultimately been successfully determined despite having a history of prior claim incarnations, pleaded on a different basis, and/or prior evidence that on its face may have been criticised as being inconsistent, but which ultimately was understood and accepted in a broader context in light of the totality of evidence in the case.'

The Jurruru respondents submitted that the YG application had unreasonable prospects of success and therefore should be dismissed under s 31A(2) *Federal Court of Australia Act 1976*.

[51] Barker J dismissed the strike out application dated 7 June 2017 brought by the Jurruru respondents, referring the matter to case management by the Registrar with a view to setting the proceedings down for trial, noting that any further orders sought by the parties were to be brought within 28 days of judgment.

Charles, on behalf of Mount Jowlaenga Polygon # 2 v Sheffield Resources Limited [2017] FCAFC 218

20 December 2017, Appeal – Future Act Negotiations, Full Federal Court of Australia, Western Australia, North, Griffiths and White JJ

In this matter, The Federal Court of Australia, Court of appeal: North, Griffiths and White JJ ordered that:

1. The appeal be allowed
2. Order 1 of the Court's orders dated 21 September 2017 be set aside
3. The decision dated 22 May 2017 of the National Native Title Tribunal be set aside
4. The matter be remitted to the National Native Title Tribunal (NNTT) for re-hearing according to the law: confined to the issue of whether or not s 36(2) *Native Title Act 1993* (Cth) (NTA) applies
5. The implementation and operation of the decision dated 14 June 2017 of the NNTT be stayed until further order
6. The first respondents notify the Court in writing in terms of the decision of the NNTT in terms of order 4 within 72 hours of the order being published
7. The Court is to determine on the papers the validity of the decision of the NNTT arising from order 4 above
8. The parties were provided with liberty to apply on the giving of 48 hour's notice
9. The first and second respondents to pay the appellants' costs of the appeal as agreed or assessed

North and Griffiths JJ

In this matter the Full federal Court heard an urgent appeal from *Charles, on behalf of Mount Jowlaenga Polygon # 2 v Sheffield Resources Limited* [2017] FCA 1126.

The central issue in the appeal was whether the primary judge erred in concluding that, on the proper construction of the relevant provisions of the NTA, the obligation to negotiate in

good faith pursuant to s 31(1)(b) did not continue to apply to negotiations which took place after a negotiation party made an application under s 35, for the arbitral body to make a determination under s 38 of the NTA. The hearing was expedited after an application from Sheffield Resources Limited (**Sheffield**).

Relevant provisions of the *Native Title Act*

[3] Subdivision P of Div 3 of Pt 2 of the *NTA* contains provisions relating to "the right to negotiate". 'The importance of these provisions for native title parties has long been recognised, as has the significance of the correlative obligation on other persons to negotiate in good faith.' (See *North Ganalanja Aboriginal Corporation and Anor for and on behalf of the Waanyi People v The State of Queensland and Ors* (1996) 185 CLR 595 at 616 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ).

Griffiths and North JJ noted the overview of Subdivision P, as set out in s 25 of the NTA: subdivision P applies to certain future acts as defined in s 233 NTA done by the Commonwealth, State or a Territory which includes certain conferrals of mining rights. Before the future act is done the parties must negotiate with a view to reaching agreement. If no agreement is reached either, an arbitral body or a Minister can make a determination about the act instead. If the Subdivision P procedures are not complied with, the future act will be invalid in so far as it affects native title. (s 25(4) NTA). Griffiths and North JJ then set out the details and legislative effect of sections 26, 27, 28 and 29 of the NTA.

Section 31 is the key provision of this urgent appeal and is set out in full at paragraph [11] of the written reasons for judgment. A non-exhaustive list of matters which may be subject to the negotiations is set out in section 33 NTA.

Application for arbitral body determination

Section 35 NTA permits the matter to be taken forward at the end of the six month period by way of an arbitral determination if the negotiations do not result in agreement.

Section 36 NTA requires an arbitral body to make a determination as soon as practicable subject to s 37 NTA. If any negotiation party satisfies the arbitral body that the other party did not negotiate in good faith, then the arbitral body must not make the determination on the application. Under s 36A NTA the relevant Minister may make a determination if there has been a delay in the arbitral body making the determination. Section 38 NTA specifies what kind of determinations the arbitral body may make. Section 39 NTA identifies various criteria an arbitral body must take into account when making a determination. Sections 75 and 76 NTA specify the type of applications that can be made and how a negotiation party may make an application for a determination to the arbitral body. The effect of section 139 NTA, is that the NNTT must hold an inquiry into the "right to negotiate application" as defined in s 75. Section 162 requires the NNTT to make a determination about the matters covered in the inquiry. The task of statutory construction must also take into account relevant parts of the Preamble and some of the explicit objects set out in s 3 of the NTA.

[27] The broad features of this legislative scheme, focussing upon the obligation to engage in good faith negotiations and the process for obtaining an arbitral determination, were described by in *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 (***Cox***) at [19], [21] and [22] by Spender, Sundberg and McKerracher JJ:

[19] 'The expression "negotiate in good faith" is to be construed in its natural and ordinary meaning and in the context of the Act as a whole (*Strickland v Minister for Lands for Western Australia*) Accordingly, the act of lodging an application under s 35, taken alone, cannot be relied upon in order to establish bad faith in the negotiating process (Strickland 85 FCR at 322). If negotiations reach a standoff, notwithstanding attempts in good faith to negotiate within the relevant six month period, there are no further obligations after the completion of the six month period on a party which wishes to lodge a notice under s 35 of the Act. There is no need, for example, to give further warning of the intention to do so.'

North and Griffiths JJ further explained that: [21] **'**The scheme of the relevant provisions of the Act recognises Parliament's intention that there must be a good faith period of negotiation in relation to the future act before there is any arbitral determination in relation to the future act. The period of six months provided for in s 35 of the Act ensures that there is reasonable time to enable those negotiations to be conducted. At the same time it permits the matter to be taken forward at the end of the six month period by way of an arbitral determination if the negotiations do not result in agreement. The ongoing protection provided for "negotiation parties" as defined by s 30A of the Act is that if any such party satisfies the arbitral body, in this case the Tribunal, that another negotiation party (other than the native title party) did not negotiate in good faith, the arbitral body must not make the determination on the application.'

Background facts summarised

On 8 August 2014 the Executive Director of the Department of Mines and Petroleum at the Government of Western Australia gave notice in accordance with s 29 of the Act, that a lease application (M04/459) under the *Mining Act 1978 (WA)* may be granted to Sheffield Resources Limited.

Following notification the Mount Jowlaenga Polygon #2 claim group appointed KRED as its lawyer to engage in negotiations with the grantee party for s31 negotiation purposes.

The NNTT member considered that, following the making of the s 35 application, the grantee party did not have a continuing duty to negotiate in good faith: see *Sheffield Resources Ltd and Another v Charles and Others on behalf of Mount Jowlaenga Polygon #2* [2017] NNTTA 25. On review, the primary judge affirmed the NNTT's construction was supported by a textual analysis of the key statutory provisions and by consideration of the effect of adopting the alternative construction. A principal textual consideration was his Honour's view that s 36(2) was not framed with continuing negotiations in mind because it adopted past tense, i.e. 'did not negotiate in good faith'. See

paragraphs [28]–[39]. For the AIATSIS case note on this decision see What's New in Native Title – September 2017.

The appeal

[46] The appellant pressed three grounds of appeal:

Ground 1 – focussed on the central issue of construction. The appellant claimed that the primary judge erred in concluding that the good faith obligation imposed by s 31(1)(b) did not attach to voluntary negotiations conducted by a negotiation party after a future act determination application has been made under s 35, but prior to a s 38 arbitral determination.

[50] Their Honours referred to the 'settled' approach to statutory construction in Australia, as described by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [14]:

'The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense.' Their Honours also referred to the recent observations of Gageler J in *ESSO Australia Pty Ltd v The Australian Workers' Union* [2017] HCA 54 at [71].

[52] The preamble to the NTA, as well as the objects of the legislation, set out in s 3, provide important context particularly: 'In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.'

[53] As the primary judge noted the two main objects of the NTA are to (1) provide for the recognition and protection of native title and (2) to establish ways in which dealings affecting native title may proceed and to set standards for those dealings.

[56] Their Honours considered that ten matters supported a different construction from that preferred by the primary judge:

1. The obligation to negotiate in good faith which is imposed by s 31(1)(b) is defined by reference to a particular possible outcome (i.e. the agreement of each of the native title parties to the doing of the act), but is not explicitly subject to any particular point in time or cut-off date, such as when a s 35 application is made (or accepted).
2. Although the obligation to negotiate in good faith is imposed on all the negotiation parties, it is explicitly stated to be directed to obtaining the agreement of each of the native title parties to the specified matters. The object of the obligation is directed to protecting the native title parties.

3. The legislative regime (ss 34, 35(3), 36(4), 38(1A)) contemplates the possibility that the parties may voluntarily continue to negotiate notwithstanding that a s 35 application has been made.
4. The past tense used in s 36(2) (i.e. 'did not negotiate...') is not a determinative factor in favour of the construction preferred by the primary judge. The possibility of post-s 35 application negotiations being voluntarily conducted is contemplated in the legislation and, where that occurs, s 36(2) continues to apply. The issue whether any other negotiation party (other than a native title party) did not negotiate in good faith may involve consideration by the arbitral body of conduct which occurred in negotiations carried out both pre and post the making of the s 35 application.
5. Their Honours noted that an interpretation of the heading of s 31, 'Normal negotiation procedure' that confines the operation of that section to negotiations conducted prior to when a s 35 application, would prevent the NNTT from mediating any negotiations that take place after the making of an application; notwithstanding that the NTA contemplates that such negotiations may voluntarily occur. Their Honours questioned what purpose is served by freeing post-application negotiations from the standards which apply to negotiations conducted in the period before the making of the s 35 application: 'Why should the native parties in particular lose the protections which they enjoy in respect of negotiations carried out in that earlier period?' (at [64]). Their Honours considered that such a construction does not promote the purpose or object of the legislation.
6. Their Honours considered that in contrast to that of the primary judge, their preferred construction –one which promotes the purpose or object of the NTA (see s15AA *Acts Interpretation Act 1901* (Cth)) and gives full effect to ss 31, 34, 36(2), 41A, 39(4) and 40(b) NTA is to regard any post-s35 NTA voluntary negotiations, as negotiations which are carried out under Subdivision P, to which the standards imposed by that subdivision, apply. See paragraph [66] (1)–(5) of the written reasons for judgment.
7. Their Honours held that the distinction between 'process' and 'construction' in s 31(1)(b) is still preserved if the word 'agreement' in that section is construed as referring not only to the objective of obtaining an agreement before a s 35 application is made, but also an agreement reached after that event and finalised before the making of the s 35 determination.
8. Their Honours did not consider that Carr J's observations in *Walley v Western Australia* [1996] FCA 409 relevant, as the issue did not arise there and importantly provisions such as ss 31,34,35,36,37 and 38 have been significantly amended since Walley was decided as respectfully is the case with respect to Lee J's decision in *Brownley v Western Australia (No 1)* [1999] FCA 1139.
9. Their Honours found it 'difficult to see how the issue of construction is affected by consideration of the "muddying" ramifications as referred to by the primary judge (see [87]). Those ramifications also arise under the primary judge's preferred construction,

because of the relevance under that analysis of post-s 35 application conduct in informing an assessment of the pre-s 35 application conduct.'

10. Finally their Honours rejected Sheffield's submission that their construction of the relevant provisions of the NTA is inconsistent with the Full Court's decision in *Cox v Western Australia* [2008] NNTTA 90 on the basis that the issue of a continuing obligation to negotiate in good faith did not arise for determination in that matter. At [71]: 'The reference in [19] of *Cox* to there being "no further obligations after the completion of the six-month period on a party which wishes to lodge a notice under s 35 of the Act", is a reference to obligations relating to the arbitral process and not obligations which attach to any ongoing negotiations conducted by the negotiation parties voluntarily and in parallel with the arbitral process.'

[71] Their Honours considered that the obligation to negotiate in good faith applied as a matter of implication where the parties agree to negotiate after an application for determination is made. It was considered significant that s 35(3), which contemplates that the negotiation parties may voluntarily agree to continue to negotiate after the making of a s 35 application, describes the objective of those post-s 35 application negotiations as being to obtain an agreement of the kind mentioned in s 31(1)(b) before an arbitral determination is made.

At [59]: 'An agreement of that kind is an agreement which results from good faith negotiations as to the doing of the future act with or without conditions. The good faith obligation is an integral part of the process which is directed to the objective of making an agreement with the native title parties. That obligation subsists even though an agreement may not ultimately be reached.'

Ground 2

The second ground presented in the alternative, was that if the primary judge's construction is correct, it is essential to determine when the obligation of good faith ceased to apply to any continuing negotiations between the negotiating parties and in particular, whether the good faith obligation applied to negotiations between the appellant and Sheffield in relevant period [47]. Given the appellant's success in relation to ground 1 this ground did not arise for determination.

Ground 3

This ground, which was also expressed in the alternative, was that the primary judge erred if he accepted that a s 35 application is made when a Form 5 is 'lodged' with the Registrar, because this ignores the need for the NNTT to accept an application under s 77 of the NTA before it has jurisdiction to entertain a s 35 application. This ground did not arise for determination given the appellant's success in relation to ground 1.

[75] Griffiths and North JJ held that the appeal should be allowed, with costs.

[76] Their honours did not consider it appropriate for the Court to determine whether or not Sheffield was in breach of its obligation of good faith and remitted the matter to the NNTT, and stayed the NNTT's decision dated 14 June 2017 pending the decision of the NNTT on the question of good faith on the remitter.

White J

Reasons for judgment

White J considered the two issues raised by the appeal: (1) whether parties engaging in negotiations after a future act determination application (FADA) has been made pursuant to s 35(1) of the NTA are obliged to do so in good faith.

[80] North and Griffiths JJ answered the question in the affirmative but White J reached a contrary conclusion. [81] The second issue would only arise if the first question were to have been answered in the negative and concerns the precise time at which the obligation to negotiate in good faith concludes.

White J gratefully adopted (1) the factual circumstances giving rise to the appeal (2) the relevant provisions of the NTA and (3) the appellant's ground of appeal as set out by North and Griffiths JJ in their written reasons for judgment.

Negotiating in good faith

[94] Negotiating in good faith has been said to involve acting honestly, without ulterior motive or purpose, with an open mind, willingness to listen, willingness to compromise, an active and open participation of the other parties, and the making of every reasonable effort to reach an agreement: *Brownley v Western Australia* [1999] FCA 1139. Delay, obfuscation, intransigence and pettifoggery have been said to be indicia of a want of good faith: *Brownley* at [25].

White J considered at [98] that the making of a future act determination application (FADA) 'seems implicitly to end the obligation to negotiate in good faith imposed by s 31(1) (b). That is the effect of s 35(3) which permits, but does not oblige, the negotiating parties to continue to negotiate.'

Identifying the issue for construction

His Honour characterised the 'real' question raised by the appellants' first ground of appeal as whether a failure by a negotiation party to negotiate in good faith after a FADA has been made is a failure of the kind to which s 36(2) refers, so as to preclude the arbitral body, on satisfaction that there has been such a failure, from making a determination. In the alternative, that the issue bears on whether an 'agreement of the kind mentioned in s 31(1) (b)' has been made. The submission was that an essential element of the agreement to which s 31(1) (b) refers is that it be the product of good faith negotiation.

His Honour did not accept the appellant's position, asserting firstly that [102] that s 31(1)(b) 'is more naturally to be understood as referring to an agreement having the specified content, without the inclusion of a requirement as to the process by which the agreement is reached' and [104] secondly that the obligation is good faith with a view to an agreement of a specified kind and therefore the mandatory obligation relates to the conduct of the parties in the negotiation and not the product of the negotiation. [105] Thirdly, White J considered that Parliament could have included an express statement as such, but did not elect to do so. Fourthly, [106] his Honour also considered that 'considerable uncertainty' into the operation of the Subdivision P NTA scheme may follow such a construction of the provision. Such uncertainty could arise if one of the parties to an agreement later took the view that it was not a product of good faith negotiation and then sought arbitration. [107] Fifthly, His Honour found this to be in line with the Carr J's decision in *Walle*y.

[108] – [109] Finally, His Honour did not regard the submission concerning the effect of an agreement on a FADA, for which s 35(3) provides, as being a persuasive indication. 'All it means is that the secondary (arbitral) process by which a future act may be permitted comes to an end. It is not as though that denies the arbitral body some supervisory role with respect to the agreement, because it did not have such a role in any event. The position is no different from that which would have applied had the parties reached agreement during the mandatory period of good faith negotiation.

Accordingly, White J accepted the submission of the first respondent (Sheffield) that the primary issue : whether a failure to negotiate in good faith after a FADA has been made operates, by reason of s 36(2), to preclude an arbitral body from making a determination on the application. Unless the arbitral body is satisfied of that fact, it is bound to conduct an inquiry and to make a determination of the FADA – see ss 38(1), 139(b) and 162 of the NT Act.'

First issue – Ground 1 statutory construction

[112] Firstly White J considered it significant that any negotiations occurring after a FADA has been made are voluntary, and that the NTA regards voluntary negotiation differently to the mandatory negotiation in good faith under s 31. Section 35(3) is permissive in that it provides that the negotiation parties *may* continue to negotiate even after the FADA has been made. This is in contrast with s 31(1) (b) which provides that the negotiation parties *must* negotiate in good faith. Section 35 does not contain any ancillary provisions relating to the negotiation. In particular, there are no counterparts in s 35 to ss 31(2), (3) and (4). His Honour considered the inference may readily be drawn that the legislature did not consider provisions of that kind to be necessary in respect of the voluntary negotiations contemplated by s 35(3) as there is no obligatory element of good faith in such negotiations.

Secondly, his Honour found that [115] the expression 'did not' in s 36(2), was significant as it is expressed in the past tense – and as referring to the particular time in the past when good faith negotiation was required and not those that may occur pursuant to s 35(3).

[116] Thirdly, White J considered that the task of statutory construction requires a court to strive to give meaning to every word in the provision: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [71]. In the present case, this required effect to be given to the express reference to the negotiation in good faith 'mentioned in s 31(1)(b)' in 36(2), which indicated to his Honour that s 31(2) refers to the single composite obligation to negotiate in good faith imposed by s 31(1)(b). In addition, it is significant that, while referring expressly to the negotiation mentioned in s 31(1) (b), s 36(2), it does not refer at all to the negotiations mentioned in s 35(3).

[118] Fourthly, his Honour stated that the construction for which the appellants contend also involved the prospect of improbable consequences. As counsel for Sheffield pointed out, it could mean that an arbitral body may be precluded from making a determination in the case of a grantee party who had, before making a FADA, negotiated in good faith only because that party's subsequent conduct in negotiation had not been in good faith.

[120] Fifthly, his Honour agreed with the primary judge that a requirement that negotiations after the making of an FADA be in good faith, has the potential to complicate the arbitral process. It would mean that an issue about a party's good faith in negotiations could be raised at any time during the arbitral process (including after the arbitral body had reserved its decision) in respect of any negotiation conduct by a party, thereby giving rise to additional issues, and delay in the arbitral determination.

[122] Sixthly, White J stated that the Parliament could easily have stipulated that any negotiations occurring after the making of the FADA be in good faith, but did not do so.

[123] Finally White J held that 'the course of decision making in the Tribunal is consistent with the construction which I consider appropriate.' His honour held that earlier NNTT decisions supported his Honour's construction, citing *South Blackwater Coal Ltd v Queensland* [2001] NNTTA 23 at [11]; *Cameron v Hoolihan* [2005] NNTTA 84 at [38] and *Cox v Western Australia* [2008] NNTTA 90 at [19].

His Honour rejected the argument that the heading to s 31 suggests that good faith negotiation is the 'normal' procedure, stating that the counterpart to s 31 is the expedited procedure for which s 32 provides.

White J also rejected the appellants' submission that the provision in s 35(3) for the parties to 'continue to negotiate' connoted implicitly the continuation of the negotiations required by s 31(1) (b) and the same terms and conditions, including the obligation of good faith. His Honour held that had it been intended that the term 'continue to negotiate' should have the effect for which the appellants contend, the legislature would have added words like 'in accordance with paragraph 31(1)(b)' immediately after that term.

In his Honour's view, the Court should not read into s 35(3) words which the legislature has not itself chosen to use.

The Court agreed with the primary Judge [130] 'that evidence of the negotiations occurring after the making of a FADA may in some cases be probative of whether a party was negotiating in good faith before the FADA was made. 'I also agree that it should be an ordinary expectation that parties will in fact negotiate in good faith. However, a failure by a party to do so after the making of a FADA does not require the arbitral body to refuse to make the determination.'

Second issue – when a FADA is made

The second issue of the appeal concerned the time at which the obligation imposed by s 31(1) (b) concludes and at which continued negotiations become a matter of choice for the parties. It turns on when the application is 'made' within the meaning of s 35 (3).

The appellants contended that, when the arbitral body is the Tribunal, an application is 'made' when it is accepted by the Tribunal (which in this case occurred on 1 November 2016). Sheffield contended that, at least in relation to the Tribunal, an application which conforms with the statutory requirements is made when it is given to the Registrar (which in this case was 24 October 2016).

[133] The difference between the two dates was said to be significant because some of the conduct on which the appellants relied for their claim that Sheffield did not negotiate in good faith, occurred in the period between 24 October and 1 November 2016. His Honour found it unclear whether the issue was raised before the primary judge, however, Sheffield did not submit that it was not open to the appellants to agitate this ground on the appeal to this Court.

[136] Based upon a reading of ss 75–77 of the NTA, his Honour found that an application for the purposes of s 35(1) is made when an application complying with the requirements of s 76 is given to the Registrar and the Tribunal determines to accept it, as required by s 77.

[143]: White J made the following conclusion:

'Although the parties made submissions concerning the appropriate orders in the event that the appellants succeeded on the primary issue, they did not address the orders which would be appropriate in the circumstance that the appellants failed on the primary issue but succeeded on the second issue. In those circumstances, had my view about the appropriate disposition of the appeal prevailed, I would hear from the parties as to the orders which are appropriate to give effect to these reasons.'

Pearson on behalf of the Tjayuwara Unmuru Native Title Holders v State of South Australia (Tjayuwara Unmuru Native Title Compensation Claim) [2017] FCA 1561

20 December 2017, Consent Determination – Compensation, Federal Court of Australia, South Australia, White J

In this matter, White J made a compensation determination by consent in favour of those people who are Nguraritja (landowners) for the Tjayuwara Unmuru determination, in relation to areas of land over which were excluded from their native title determination due to the extinguishment of native title. The State of South Australia was the respondent party and the Attorney-General of the Commonwealth intervened, but did not appear in the proceeding. The area subject to the determination is surrounded by the land which was the subject of the Tjayuwara Unmuru determination and would probably have formed part of the Tjayuwara Unmuru determination.

[1] On 16 July 2013, the Court made a native title determination by consent (the Tjayuwara Unmuru determination) recognising the rights and interests of the relevant Nguraritja people in relation to a significant area in the central part of the far north of South Australia: see *De Rose v State of South Australia* [2013] FCA 687.

[2] On 27 February 2015, the Nguraritja filed an application pursuant to s 61 of the *Native Title Act 1993* (Cth) (NTA) seeking compensation in respect of those areas excluded from the consent determination because native title had been extinguished. The extinguishment occurred by reason of acts of the State of South Australia. The compensation determination concerns relatively small portions of the Stuart Highway corridor, which traverses the Tjayuwara Unmuru determination area (together, the Stuart Highway Corridor Land); and land dedicated for the purpose of a Digital Radio Concentrator Tower which is under the care, control and management of Telstra Corporation Ltd (the DRC Land). The Stuart Highway Corridor land is an area of approximately 4.153 km2 and the DRC land comprises an area of approximately 0.0225 km2. The entitlement of the Applicants to compensation arises from the provisions in Pt 2, Div 2 of the *Native Title Act 1993* (Cth) (NTA) and the counterparts to those provisions in the NTSA Act.

[3] The parties agreed that s 19 of the NTA and s 32 of the *Native Title (South Australia) Act 1994* (SA) (NTSAA) have the effect of validating the acts involved in the surrender and excision of the Stuart Highway Corridor land and the subsequent establishment of that land as part of the Stuart Highway Corridor. It was also agreed that s 19 of the NTA and s 32A of the NTSAA have the effect of validating the act of the State in excising the area of the DRC land. The entitlement of the Nguraritja to compensation pursuant to s 20(1) in respect of that land was enlivened as a result.

The applicant and the respondent reached agreement as to the compensation payable by the State under the NTA. Pursuant to s 87(2) NTA, the Court may make an order on the agreement of the parties without conducting a hearing. White J referred to the statement of Mansfield J in *Lander v South Australia* [2012] FCA 427 at [11]–[12] and noted that 'those

observations are as apposite in the case of compensation determinations as they are in relation to consent determinations of native title.'

[25] The parties agreed that the payment by the respondent to the Tjayuwara Unmuru Aboriginal Corporation RNTBC on behalf of the native title holders of the confidential sum referred to in the agreement, comprises full and just (in the sense required by s 51 and 53 of the NTA) compensation for any acts attributable to the respondent (or for which the respondent is liable to pay compensation) in the agreement area, in accordance with the terms of the agreement. The persons entitled to the compensation, the amount or kind of compensation to be given to each person and any dispute regarding the entitlement of a person to an amount of the compensation, shall be determined in accordance with the decision making processes of the RNTBC as set out in its constitution.

[27] The parties engaged in extensive negotiations on a confidential and without prejudice basis. During the course of the negotiations, the Nguraritja provided the State with videoed interviews of the claimants and an expert report concerning the effect of the loss. The videoed interviews included material containing culturally sensitive information provided by the native title holders in support of their claim. That material is, in accordance with the traditional laws and customs of the Nguraritja, to be viewed only by certain senior males.

[30] The Nguraritja have creation stories and laws, known as *tjukurpa*, which cross the determination area. They claim that the establishment of the Stuart Highway and of the Digital Radio Concentrator tower have interfered with the pathway of a particular highly restricted men's *tjukurpa*. There is a ceremony associated with this *tjukurpa* which is of the highest importance and in which only men of required ritual seniority can participate. The details of the *tjukurpa* and its association with the determination area have never been recorded in an open or public manner.

[31] The Nguraritja claimed that the Stuart Highway has cut the *tjukurpa* in three different places, causing irreversible damage to the cultural landscape and to the laws and customs associated with the *tjukurpa*. The Nguraritja also claimed that the Digital Radio Concentrator tower has been built in a sacred area and now constitutes an impediment to the *tjukurpa* track, as it travels from one site in the determination area to another. The Nguraritja also claim that Stuart Highway has changed the manner in which water flows across the land which, in turn, has spiritual consequences. In part, this is because the Stuart Highway has been built up and in part, because of the excavation of borrow pits at various places along its length.

The Nguraritja further claimed that the Stuart Highway has affected the exercise of their native title rights to hunt and gather from the land. This is because animals such as kangaroos and emus have been frightened away from the road. In addition, the Highway and its frequent use have restricted the activities which can be carried on in close proximity to it.

[42] The parties filed joint submissions that the Court should make an order preserving the confidentiality of the amount of compensation. They sought the making of that order pursuant to s 37AG (1) (a) of the *Federal Court of Australia Act 1976* (Cth) on the ground that it is necessary to prevent prejudice to the proper administration of justice. SANTS provided an affidavit from Mr Pearson, the first of the named claimants. Mr Pearson's affidavit disclosed the following:

1. the negotiations which the applicant conducted with the State were on a confidential basis and the applicant had understood, at the time of the negotiations, that the amount agreed upon would be kept confidential;

2. the amount of compensation is a compromise figure taking into account both legal and factual uncertainties and, further, the applicant's desire to avoid further disclosure of the highly secret men's law to which reference was made earlier; and

3. the potential for there to be a critique in the wider Aboriginal community, and in particular amongst the Western Desert People, of the compensation amount. Such a critique may be positive or negative, informed or uniformed, merited or unwarranted.

[44] Both the applicant and the State further submitted that the prospect of the compensation sum being kept confidential was a significant factor in the obtaining of agreement. Both parties pointed out that the principles concerning the assessment of compensation under s 51 of the NTA are still not finally settled, even taking account of the first instance decision in *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 and the Full Court decision in *Northern Territory of Australia v Griffiths* [2017] FCAFC 106 and that the compromise was reached in this particular context. The parties referred to the suppression order made by Mansfield J in *De Rose v State of South Australia* [2013] FCA 988 and the reasons for that order given at [82].

His Honour considered there to be some countervailing factors: 'These include the importance of the open justice principle, the fact that the compensation involves expenditure of public money and the interests of transparency and accountability with respect to the compensation sum. Further, things have moved on since the decision in *De Rose*. There are now the two decisions in *Griffiths* to which reference was made earlier. It is also reasonable to think that, in some respects, the disclosure of the compensation figure in this case may facilitate negotiations in other matters' (at [46]).

[42] – [48] White J concluded that the order for suppression was appropriate, in particular having regard to the matters to which Mr Pearson deposed and the considerations to which Mansfield J referred in *De Rose*. In addition, his Honour took account of the policy of the NTA to encourage the resolution of matters by agreement, and the circumstance that, this being an early compensation case, the parties conducted their negotiations on the basis of an expectation of confidentiality. White J did note at [48] however, 'that in the future when the principles concerning the assessment of compensation become more settled, parties

may not be able to proceed on that assessed basis, especially having regard to the countervailing considerations to which I have referred.'

[49] His Honour was satisfied that it is appropriate to make the orders to give effect to the parties' agreement.

Akiba on behalf of the Torres Strait Regional Seas Claim v State of Queensland **[2017] FCA 1560**

19 December 2017, Authorisation of Applicant, Federal Court of Australia, Queensland, Mortimer J

In this matter, Mortimer J made programming orders for the re-authorisation of the applicant for Part B of the Torres Strait Regional Seas Claim. These orders are set out at the end of this case note.

[1] The hearing and reasons for judgment cover two topics: (1) the process in the lead up to a section 66B *Native Title Act 1993 (Cth)* application and (2) why the Court foreshadows future consideration of costs orders against persons who are not a party to the proceedings, and as an alternative, against the Torres Strait Regional Authority (TSRA). This is the fourth ruling or set of interlocutory reasons the Court had had to give within three months.

Her Honour observed that [4] the responsibility for this state of affairs rests squarely with the Torres Strait Regional Authority (TSRA).

[6] A case management hearing was held on Thursday Island, 20–22 November 2017. Mortimer J set out the events on Thursday Island in *Akiba on behalf of the Torres Strait Regional Seas Claim v State of Queensland* [2017] FCA 1438 (Transcript Reasons; see summary below). The background to this proceeding is set out in *Akiba on behalf of the Torres Strait Regional Sea Claim v State of Queensland* [2017] FCA 1336 (Venue Reasons, see What's New in Native Title – November 2017). The necessity for a case management hearing (CMH) on 18 December 2017 arose from the series of events since the orders made by the Court following the Thursday Island CMH in November 2017.

[4] Following the CMH on Thursday Island, and after several confidential case management sessions conducted by Registrar Fewings as part of the three-day hearing, the urgency of the need to reconstitute the applicant became apparent to the Court. The Court stated that that situation emerged through the evidence of Mr Akiba about how he did not speak for the Part B area of the Regional Seas claim, and the breakdown (through the actions of the TSRA) in the working arrangements with the relevant PBC Chairs which had been in place for several years when Gilkerson Legal were acting for the applicant.

The directions made on 22 November 2017 required a process for authorisation of a new applicant for the Part B Sea Claim to be completed by 29 March 2018, and for any

application to replace the applicant under s 66B of the *Native Title Act 1993* (Cth) (NTA) to be filed by 12 April 2018. Despite the orders and the consent of the parties reached at the November CMH, at the time of the CMH on 18 December 2017 the orders had not been progressed.

The Court observed that the responsibility for that state of affairs lies solely with the TSRA, and the enormous amounts of public funds which have been expended by the Court and the parties (and, indeed, by the TSRA itself) since early 2017 are also the responsibility of the TSRA. Her Honour considered that if the TSRA had kept to the (appropriate) role it played in this proceeding until approximately April 2017, the claim would be close to a consent determination at least in relation to the Western Overlap area.

[11] The Court then temporarily joined the chairs of the relevant PBCs to the proceedings, so that there were some people who were party to the proceedings with a representative role in relation to the claim group members. Mr Maluwap Nona, Ms Garagu Kanai and Mr Ned David (the claim group member respondents) are people who may hold native title in the claim area and can speak to some extent for claim group members, unlike the current applicant Mr Akiba, who speaks for country subject to the Part A claim.

The need for a stipulated process

The Court stated at [14] that 'this ruling is necessary to ensure that the directions made on 22 November 2017 are complied with and achieve the necessary purpose of the applicant being properly authorised and constituted. Without that, this proceeding is in danger of being dismissed, or stayed, and all the hard work to date will be frustrated. It is also important to ensure that the positive direction achieved at the Thursday Island CMH is not lost.'

[17] At the close of the November CMH, the Court stated that the three individual claim group respondents together with Mr Akiba, would have the primary carriage of any s 66B application and would require funding for legal representation. Counsel for the TSRA informed the Court that the funding application was being considered by the TSRA Native Title Unit.

Due to the lack of progress following the November CMH, the Registrar listed the matter for a case management conference on 11 December 2017. Senior Counsel for the TSRA informed the Registrar at the conference that a funding decision would be made within 48 hours. That did not occur, and was part of the reason the 18 December CMH was listed.

[10] The Court considered that the lack of progress stemmed from the TSRA's attitude to funding the chosen legal representative for the three claim group member respondents. Their chosen legal representative is Mr Oliver Gilkerson of Gilkerson Legal, the firm which was until around October 2017 acting for the applicant and working with the relevant PBC Chairs, including Mr Nona, Ms Kanai and Mr David.

[31]–[32] Gilkerson Legal made a request for s 203BB NTA assistance (funding) on behalf of the claim group respondents on 22 November 2017, noting that the approval of the funding was both imperative and urgent in terms of the timeframes set out in the Court's orders of 22 November 2017. The Court found the initial response from the CEO of the TSRA to be disingenuous in the context of the agreed position established at the November CMH and found the organisation to be 'again playing an unproductive, unco-operative and negative role, quite counter to its representative body functions, and quite inappropriate for its (objectively) very minor role as a respondent in this proceeding' (at [31]). The Court observed from the ongoing correspondence Gilkerson Legal received in response to its request that the TSRA was flooding Mr Gilkerson with documents, and attempting to make the process as formal, document intensive and complicated as it could.

[46] The Court noted that in contrast to the ongoing funding delays and complications experienced by Mr David, Mr Nona and Ms Kanai and their legal representative, Mr Akiba's legal representative was able to obtain funding 28 minutes after the application was made (at [80]).

The 'obstructionist behaviour' of the TSRA towards the claim group respondents continued, with an offer to provide Gilkerson Lawyers and Dillon Bowers Lawyers, jointly, $81,000 (inclusive of GST) to complete the authorisation process, and that such funding be split between the law firms depending on the tasks to be completed by each firm. The Court accepted Mr Gilkerson's contention about the inadequacy of the amount offered, on the basis that Dillon Bowers had been granted by the TSRA $35,000 to 'read in' to the matter and attend a case management conference and a CMH.

[55]–[56] The Court was informed of a 'Torres Strait Regional Seas Claim consultation meeting' unilaterally convened by the TSRA in Cairns with a week's notice. The Court found it 'difficult to see this as anything other than a usurpation of the role envisaged by the Court's orders for the applicant and the three claim group member respondents' (at [57]). Her Honour further found it 'remarkable that the TSRA held cultural concerns over the Court conducting the CMH on Thursday Island, in circumstances where the parties were given more than two months' notice of the CMH, and on an island which is relevant to this proceeding (see [118] of the Venue Reasons), and yet appears to have had no concern itself about holding a consultation on the Part B Sea Claim in Cairns, on Aboriginal country that has nothing to do with this proceeding, with just over one week's notice' (at [62]).

A resolution was unanimously passed at that meeting on 8 December, directing the TSRA and their consultant to cease carrying out any further consultation sessions about the claim and endorsing the applicant and PBC Chair respondents to take over that role and action the Federal Court orders, on behalf of the claim group members supported by the legal representatives of their choice, and Gur a Baradharaw Kod (GBK).

At the time of the case management hearing on 18 December, the funding situation remained unresolved, and the attitude of the TSRA towards funding Mr Gilkerson and his clients remained 'obstructionist to say the least' (at [98]).

[100] The Court examined its file in relation to the TSRA's funding of barristers and solicitors and found that in 2017, the TSRA funded at least 14 different barristers, many of whom are Senior Counsel, and law firms, on behalf of itself and Mr Akiba, and in one instance, on behalf of one of its lawyers. The Court was told during the 18 December CMH that the TSRA had sought its own legal advice from Senior Counsel about steps required for the authorisation process. The Court considered this to demonstrate 'the preparedness of some individuals within the TSRA to continue to spend significant amounts of public funds to further its own agenda and purposes (whatever those might be), while denying funding to claim group members' (at [102]).

The Court further stated: [117]–[118]: 'As is apparent from these reasons, I have a level of misgiving about what is going on behind the scenes of this proceeding. The evidence to which I have referred indicates it is those "behind the scenes" matters which have provoked conduct that seems directed at neutering this Court's ability to deal with this proceeding as its judicial functions require. It is also what is neutering the interests of the claim group members in having their native title claim, finally, progressed to a satisfactory resolution. That a native title representative body should be at the centre of, and the prime mover in, such a negative process is appalling.'

Mr Akiba submitted that he is not capable of being a member of the applicant as he does not speak for the claim area and does not wish to continue in that role. The Court noted that the orders made at the November CMH regarding authorisation and the s 66B application were not directed at a specific party, as Mr Akiba was not legally represented at the time. Mortimer J noted at [124] that 'it is an unusual turn of events. That is because, in such situations of a breakdown within an applicant, the Court can usually rely on the legal representatives of the applicant, and/or alternatively the native title representative body, to act professionally and in the interests of the claim group members as a whole to take steps to rectify the situation.'

The Court continued at [126], stating that it' has no confidence in the TSRA. Since I have been involved in this matter it has failed on every occasion this matter has been before the Court to act constructively and positively towards advancing the obviously necessary reconstitution of the applicant. It has also failed in the steps it has taken in between Court hearings.'

Mortimer J attributed the change in the cooperative approach taken by the TSRA and Gilkerson Legal to a change of personnel at the TSRA in early 2017, with Ms Cecilia O'Brien coming into the PLO role at the TSRA. Mortimer J noted at [127] that 'the TSRA has, as far as I can see, abused its funding powers to a significant extent to attempt to control this proceeding for its own purposes, whatever those might be, in a way which is wholly inappropriate.'

In light of that situation, the Court was required to take a 'much more interventionist and prescriptive role than would usually be the case' (at [128]).

[129] The Court made prescriptive programming orders for steps to be taken towards the s66B application. In *Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373 Reeves J considered the relevance of authorisation meetings at [29]–[32]. See What's New in Native Title – April 2017. In the recent decision of *Gomeroi People v Attorney General of NSW* Rangiah J also set out some of the problems with respect to authorisation meetings at [48]–[53]. A case note follows in this edition of What's New in Native Title.

The Court's programming orders are set out at paragraph [137].

[143] Costs were not sought against the TSRA at the CMH on 18 December 2017, however the Court considered, on its own motion, whether costs should be awarded in respect of 'a hearing that should not have needed to take place.' The Court found at [154] that 'the circumstances in this case are such that I consider the TSRA's conduct to have been unreasonable even though, as the authorities make clear, that is not a threshold, or a jurisdictional fact which must be made out before the Court's discretion on costs can be exercised.' The Court considered that the conduct of the TSRA might justify a costs order against it, but did not consider there was a sufficient basis for a costs order presently, 'without knowing what the motivations of those within the TSRA are for the instructions that have apparently been given' (at [153]).

[155]–[156] The Court in conclusion noted that the conduct outlined in the reasons is conduct of officers within the TSRA who purport to discharge the TSRA's functions as a native title representative body, not as a respondent to the proceeding.

[175] The Court reserved the costs of the CMH for all parties except the TSRA and concluded by stating that 'the Court expects its Orders to be met. If the cause of non-compliance with the Orders is inadequate finding from the TSRA, then the Court will deal with that situation as and when it arises. If the TSRA, whether through its funding decisions or otherwise, continues to derail and disrupt this proceeding, and continues to take unilateral action without working cooperatively with the applicant and the three claim group member respondents, apparently for its own purposes whatever they might be, then the Court will, prior to the 1 February 2018 deadline for compliance with the first of these Orders, entertain whatever applications the applicant and the three claim group member respondents seek to make to the Court.'

The Court made the following orders:

1. Each of the steps and conduct set out be undertaken by the applicant and Mr Ned David, Mr Maluwap Nona and Ms Garagu Kanai in consultation with and working with each other.

2. Paragraph 1 does not prevent the applicant and Mr David, Mr Nona and Ms Kanai whether by themselves, legal representatives or third parties, speaking with and or working with the TSRA.

3. All factual investigations including anthropological input for identifying the relevant claim group members be completed by 1 February 2018.

4. The method of attendance, notification and assistance to attend the authorisation meeting be agreed between the applicant and Mr David, Mr Nona and Ms Kanai by 15 February 2018.

5. The authorisation process as a whole be permitted to include the use of social media as agreed between the applicant and Mr David, Mr Nona and Ms Kanai.

6. All other active parties be notified of the agreed process by 15 February 2018.

7. Any concerns by any active party in relation to the agreed process be raised with the legal representatives for the applicant and Mr David, Mr Nona and Ms Kanai by 22 February 2018.

8. Any revisions required to the agreed process be decided by 1 March 2018.

9. All pre-authorisation steps be completed by 16 March 2018.

10. All preparations for the authorisation meeting be completed by 23 March 2018.

11. The authorisation meeting be held on 29 March 2018.

12. Each step in the process be the subject of a joint report to the Court.

13. Costs are reserved and incidental to the CMH of 18 December 2017.

Sumner v State of South Australia (Ngarrindjeri Native Title Claim Part A) **[2017] FCA 1514**

14 December 2017, Consent Determination, Federal Court of Australia, South Australia, White J

In this case White J recognised the non-exclusive native title rights and interests of the Ngarrindjeri people over approximately 7173 km2 of land and waters south of Adelaide, and in the upper South East of South Australia. The respondent parties included the State of South Australia, fishing licence holders, and local government interests.

The native title application was filed in 1998 and amended in 2016, to reduce the claim area and in particular to exclude seaward waters. In July 2017, the Court made orders by consent to split the native title determination proceedings into two parts – Ngarrindjeri Part A and Ngarrindjeri Part B. The Ngarrindjeri Part B is overlapped by the First Nations of the South East. Ngarrindjeri Part A comprises the remaining area of the Ngarrindjeri Claim.

All parties reached an agreement as to the determination of native title in relation to Part A and sought a consent determination as per s 87A NTA. The applicant and State of South Australia filed joint submissions, which included reports by anthropologists Professor Dianna Bell and Dr David Martin.

In accordance with s 223 NTA, the Court held that a determination of native title requires there to exist a recognisable group of society that observes traditional laws and customs. The evidence submitted identified a system of totems called Ngatji, which regulated kinship, a central institution to Ngarrindjeri society. Semi-permanent seasonal camps, a shared Creation story called Ngurunderi, a standard governance structure called Tendi and mutually intelligible dialects were evidenced as distinctive features of the Ngarrindjeri. Furthermore, it was identified that the only means of inclusion into society was by descent, and therefore the sub-groups within the Ngarrindjeri people did not compromise the finding that they constitute a single community or group.

[23]–[24] Professor Bell's report indicated that the distinctive features of the Ngarrindjeri continued to operate through transmission of beliefs. White J held that the evidence of such in the determination area satisfied the requirements of s 223 NTA.

[27] The evidence submitted determined that the way in which a Ngarrindjeri person connects to their land is their Ngatji, whereby the physical and cultural geography of the determination area is believed to have been laid by the Creation hero, Ngurunderi. The principles were identified as essentially religious or spiritual in character.

Furthermore the parties agreed that the key elements of Ngarrindjeri existed at the time of sovereignty in 1788.

The Court noted the inclination of both it and the NTA to encourage parties to reach an agreement on applications for a determination of native title, and found it appropriate to give effect to the agreement.

[29] The Court was satisfied that the requirements of s 225 NTA had been met. The non-exclusive native title rights and interests recognised include the right to access, camp, hunt, fish and gather resources, and conduct ceremonies and maintain places of importance and areas of significance within the determination area.

[39] The Ngarrindjeri Aboriginal Corporation is the nominated prescribed body corporate for the determination area for the purposes of s 57(2) of the NTA.

Congoo on behalf of the Bar Barrum People #9 v State of Queensland [2017] FCA 1510; *Congoo #10 v Queensland* FCA 1511

12 December 2017, Consent Determinations, Federal Court of Australia, Queensland, Reeves J

In these matters, Reeves J made determinations by consent recognising the native title rights and interests of the Bar Barrum People over land and waters on the Atherton Tablelands in North Queensland. Determination of the Bar Barrum People's application #9 related to approximately 1.5 square kilometres of pastoral land in the Walsh River district. Determination of application #10 related to all watercourses and lakes within a bounded area on the Tablelands that were not part of the five Bar Barrum determinations made in 2016. Respondents to application #9 were the State of Queensland, Mareeba Shire Council and the Osborne Property Company Pty Ltd. Respondents to application #10 included the State of Queensland, Mareeba Shire Council, and Ergon Energy Corporation Limited.

Applications #9 and #10 were lodged in November 2015 and in August 2016 respectively. Amendment was made to #9 to change the description of the claim group, and some technical amendments were made to #10. The parties agreed to the terms of both determinations with the parties to #9 having failed to reach agreement on any upgrade of the pastoral lease to freehold.

The non-exclusive rights recognised include rights to: access and move freely over the determination areas; camp and erect shelters; hunt, fish, gather, take and use natural resources for non-commercial purposes; conduct ceremonies; maintain areas of significance; teach; hold meetings; and light fires for domestic, but not hunting or clearing purposes. In relation to the #9 pastoral land, his Honour recognised the right of the Bar Barrum people to conduct burials.

Reeves J made note (at [18]) that these applications were the last made on behalf of the Bar Barrum People over a period of twenty-six years, and that consequently, these determinations culminate in the successful recognition of native title over the whole of Bar Barrum traditional lands.

The Mbabaram Aboriginal Corporation is the nominated prescribed corporate body for the purposes of s 57(2) of the NTA.

Sumner v State of South Australia (Ngarrindjeri Native Title Claim Part A) [2017] FCA 1550

11 December 2017, Application for Removal of the Applicant, Federal Court of Australia, South Australia, White J

In this matter White J ordered that Ms Laura Agius and Mr Peter Rigney be removed from persons who constitute the applicant and dismissed the request to give the proceedings a new designation.

Since the native title determination application was commenced in 1998, two members of the applicant passed away. On 14 September 2016 the Court made orders pursuant to s 66(B)(2) of the *Native Title Act 1993* (Cth) (NTA) that the twenty people who now comprise the applicant, replace the then current parties.

[3] The application for determination of the native title in the area referred to as Ngarrindjeri Part A was listed for a consent determination on 14 December 2017. On 6 December 2017, the Applicants filed an interlocutory application seeking two orders: that Mr Peter Rigney and Ms Laura Agius be removed from the persons constituting the applicant and that the proceedings be given the designation 'Mathew Rigney and Others v State of South Australia and Others'.

Removal of the applicant

S 66(1) (a) NTA permits that one or more members of a native title claim group may apply for an order that certain group members replace the current applicant where such persons are deceased or incapacitated. The applicant sought that Mr Peter Rigney and Ms Laura Agius be removed as persons constituting the applicant pursuant to that provision. A resolution passed by the Ngarrindjeri native title claim group on 9 November 2017, stipulated that all persons acting as applicants who are deceased, namely Laura Agius, or who are in seriously poor health, namely Mr Peter Rigney, are no longer to be applicants for the application. His Honour was satisfied that it was appropriate to make the order removing Ms Laura Agius and Mr Peter Rigney as persons who constitute the applicant. Basil Sumner became the lead applicant.

Designation issue

The Court has discretion to alter proceeding designations in accordance with rr 2.13 and 34.120 of the *Federal Court Rules 2011* (Cth). The applicant sought to have the designation changed from 'Ngarrindjeri Native Title Claim' to 'Mathew Rigney and Others v State of South Australia and Others' in honour of the late Mr Mathew Rigney, who died in 2011. Mr Matthew Rigney had been a party to the proceedings as applicant, until he was removed on 14 September 2016. While his Honour appreciated the wish to honour the late Mathew Rigney, due to his contribution the Ngarrindjeri Native Title Management Committee and the Ngarrindjeri people, his Honour held the change in designation not appropriate. The refusal was based on the confusion a change in designation would cause:

1. The proceedings have been known for a very long time as Ngarrindjeri Native Title Claim

2. The change would imply that the late Mr Mathew Rigney was a member of the current Applicant group

3. The change would imply that the matter is a special case where a deceased is applicant to the proceedings as in *Lennon v South Australia* [2010] FCA 743 and *I.S. (Deceased) on behalf of the Wajarri Yamatji People (Part A) v State of Western Australia* [2017] FCA 1215. His Honour deemed that it was not.

4. The proposed designation is different from those used in relation to other native title applications.

The Court ordered (1) that Ms Laura Agius and Mr Peter Rigney be removed from the persons who constitute the applicant and (2) dismissed the orders sought by paragraph two of the interlocutory application lodged on 6 December 2017.

Kelly on behalf of the Gumbaynggirr People v Attorney General of New South Wales **[2017] FCA 1459**

8 December 2017, Consent Determination, Federal Court of Australia, New South Wales, Collier J

In this matter, Collier J recognised the rights and interests of the Gumbaynggirr people in relation to Crown land and waters east of the north coast railway line, west of the mean high water mark of the Pacific Ocean, with the northern boundary at the southern border of Lot 102 in the Parish of Newry, County of Raleigh and the southern boundary at Nambucca Shire. Wenonah Head is a landmark within the area. The respondent parties included the Attorney-General of New South Wales, Bellingen Shire Council and Urunga Amateur Anglers Club Inc., the New South Wales Aboriginal Land Council (NSWALC) and Coffs Harbour and District Local Aboriginal Land Council (LALCs) were joined as respondents in November 2015 with the consent of the parties.

[1] In 2014 Jagot J delivered judgment in *Phyball on behalf of the Gumbaynggirr People v Attorney-General of New South Wales* [2014] FCA 851 (*Phyball*). This consent determination concerns a separate claim by the same native title claim group, to an area of land outside that recognised in *Phyball*. The application was filed in June 1998, and has been amended several times, including in 1999, 2001, 2016 and 2017.

Following a conference of experts in June 2016, the applicant and LALCs provided the first respondent with a joint in-principle settlement proposal. Subsequently in September 2016, the State filed a notice stating that it accepted the applicant's evidence as sufficient to establish connection for the purposes of negotiating a consent determination recognising

non-exclusive native title subject to tenure. However, it provided a counter-proposal in early November 2016.

The parties reached an agreement in accordance with s 87 of the *Native Title Act 1993* (Cth) (NTA) and joint submissions in support of that agreement were filed by the applicant and the State. [7] The application area is also subject to 10 Aboriginal land claims made under s 36 of the *Aboriginal Land Rights Act 1983* (NSW) (ALRA), one of which (LALC 5044) was made in 1993 prior to the applicant commencing this proceeding. In addition to the s 87 agreement, two Indigenous Land Use Agreements (ILUAs) and an agreement under the ALRA have also been executed between the relevant parties. The s 87 agreement has been facilitated by the execution of the ILUAs and the ALRA agreement.

The parties also submitted that, in order to address uncertainties expected to arise for all parties and the public in relation to the exercise of native title and the co-existence of other non-native title rights and interests, the State, the applicant and other parties agreed to negotiate the two ILUAs and an agreement pursuant to s 36AA of the ALRA, to accompany the consent determination. The parties submitted that the agreements contain 'matters consequential upon or related to the recognition of native title rights and interests' as contemplated by Mansfield J in *Brown v The State of South Australia* [2010] FCA 875 at [29].

The parties entered into the following agreements:

1. An ILUA between the Applicant, the Gumbaynggirr Wenonah Head Aboriginal Corporation 7376, the Attorney General of New South Wales, the Minister administering the *Crown Lands Act 1989* (NSW), the Minister administering the *National Parks and Wildlife Act 1974* (NSW) and the chief executive of the Office of Environment and Heritage (the State ILUA);
2. An ILUA between the Applicant, the Gumbaynggirr Wenonah Head Aboriginal Corporation 7376 and Coffs Harbour and District Local Aboriginal Land Council (the CHDLALC ILUA); and
3. An Aboriginal Land Agreement pursuant to s 36AA of the ALRA between the Minister administering the *Crown Lands Act 1989* (NSW) and Coffs Harbour and District Local Aboriginal Land Council and New South Wales Aboriginal Land.

Ms Moss for the State deposed that the basis of these agreements was to enable the recognition of the Gumbaynggirr people's native title rights and interests by the Court so that the transfer of lands to the Coffs Harbour and District Local Aboriginal Land Council under the Aboriginal Land Agreement would be subject to native title. The orders sought by the parties were in terms that they are to take effect 21 days after the later in time of registration of the State ILUA and the CHDLALC ILUA.

Collier J accepted the submission of the parties that the s 87 agreement and orders sought by the parties endeavour to balance the interests of the applicant together with the

Aboriginal Land Councils (being Coffs Harbour and District Local Aboriginal Land Council and NSW Aboriginal Land Council), the State and the other respondent parties.

The orders sought by the parties expressed the native title rights to be subject to the laws of the State of New South Wales and the Commonwealth. The parties submitted that the order is intended to reflect the understanding of the parties that where the *Fisheries Management Act 1994* (NSW) operates to require native title holders to obtain any licence or permit for commercial fishing activities, such a licence or permit to fish for commercial purposes will be obtained.

The Court found that it has power to make an order that the determination of native title takes effect upon the registration of the State ILUA or CHDLALC ILUA, referring to: *Doyle on behalf of the Kalkadoon People #4 v State of Queensland (No 3)* [2011] FCA 1466; *Doctor on behalf of the Bigambul People v State of Queensland* [2016] FCA 1447; *Bullen on behalf of the Esperance Nyungar People v State of Western Australia* [2014] FCA 197; *Cashmere on behalf of the Jirrbal People #1 v State of Queensland* [2010] FCA 1090.

The non-exclusive native title rights and interests recognised include rights to access the area; hunt, gather and fish; to take, use, share and exchange natural resources for any purpose; conduct and to participate in cultural and religious activities, practices and ceremonies, including the conduct of burials; and maintain and to protect from physical harm, places and areas of importance or significance under traditional laws and customs.

At paragraph [61] Collier J concluded: 'the settlement of this proceeding also resolves the last pre-2000 native title determination application in New South Wales, which is a milestone in native title determinations in this country. In my view it is clear that the Court has the power to make the orders sought granting native title. I also consider it appropriate that the orders be made.'

[18] The applicant nominated Gumbaynggirr Wenonah Head Aboriginal Corporation ICN 7376 pursuant to s 56(2) of the NTA to hold the determined native title in trust for the common law holders.

Atkins on behalf of the Gingirana People v State of Western Australia [2017] FCA 1465

7 December 2017, Consent Determination, Federal Court of Australia, Western Australia, Barker J

In this matter, Barker J recognised, by consent, the native title rights and interests of the Gingirana people to approximately 12,153 square kilometres of land located in the western perimeter of the Little Sandy Desert, south of Newman and northwest of Wiluna in Western Australia. The application was filed in 2003 and amended three times. The respondent

parties included the State of Western Australia, Yamatji Marlpa Aboriginal Corporation and Telstra Corporation Limited. The Commonwealth Attorney General was an intervenor.

[4] On 14 August 2017, the Attorney General of the Commonwealth of Australia intervened in the application pursuant to s 84A(1) of the *Native Title Act 1993* (Cth) (NTA). The intervention arose over the issue of whether the State may have an entitlement to compensation from the Commonwealth arising under s 53 of the NTA, with respect to the operation of s 47A and s 47B NTA to parts of the application.

The Court recognised exclusive native title rights and interests to possession, occupation and enjoyment of Unallocated Crown Land 1, 3 and 4. The non-exclusive native title rights and interests recognised include: the right to access, take and use the resources for any purpose, and the right to maintain and protect places of significance.

[11]–[24] The Court accepted that the Gingirana claimants belong to a system of laws and customs referred to as the Western Desert Cultural Bloc. The pathways to connection recognised were: by descent of people with traditional association with the land; by birth or birth of an ancestor on the determination area; or by possession of traditional cultural knowledge of the determination area. The Court found there to be a significant amount of material in support of the claimants' connection to the determination area. This was partly due to the evidence given by five Gingirana claimants during the preservation evidence hearing in March 2015.

During the preservation evidence hearing, all the witnesses explained the significance of the law to Gingirana claimants. In particular, Mr Patterson explained in his witness statement [20]:

'The Tjukurpa is the story – the Law – about Putijarra country. It has been passed down from the old people. It started in the beginning – in the dreamtime. Tjukurpa makes special places. From the dreamtime, we pass it on from generation to generation. It is still alive today. Men have their tjukurpa, and ladies have their own tjukurpa – men can't talk about ladies stuff and ladies can't talk about the men's side. For some tjukurpa, both men and women share the knowledge. Some parts of law business are for men, some parts of law business are for women and some parts are for everyone together. This is our Putijarra Law, and we are still following that.'

The State was satisfied that the evidence was sufficient to establish the maintenance of connection according to traditional laws and customs in the determination area. The State was also satisfied that the connection material is sufficient to establish that the claimants occupied UCL 1, UCL 3 and UCL 4 in the eastern portion of the determination area at the requisite time for s 47B(1)(c) of the NTA to apply.

The parties and the Commonwealth agreed that the description of the native title holders in Schedule 2 of the determination, rather than that in the Form 1, accurately reflects those

persons who hold native title rights and interests in the determination area according to traditional laws and customs.

The Court made the determination as sought in Schedule 2, holding at [26]–[27] that 'the Court is not limited to making a determination in the form sought in the Form 1 and may proceed to make a determination in such form as it sees fit based on the evidence, provided the application is valid: see *BP (deceased) on behalf of the Birriliburu People v Western Australia* [2008] FCA 944 at [18], Watson on behalf of the Nyikina Mangala People v State of Western Australia (No 6) [2014] FCA 545 at [33] and *Street on behalf of the Yarrangi Riwi Yoowarni Gooniyandi People v State of Western Australia* [2016] FCA 1250 at [18].

The Court was satisfied that it is appropriate and within the power of the Court under ss 87 and 94A of the NTA, to make the determination. The determination includes an agreement that within six months of the date of the determination, a prescribed body corporate will be nominated in accordance with the requirements of ss 55, 56 and 57 of the NTA.

Gomeroi People v Attorney General of New South Wales [2017] FCA 1464

7 December 2017, Application to Replace Applicant, Federal Court of Australia, New South Wales, Rangiah J

In this matter, Rangiah J heard an interlocutory application pursuant to s 66B of the *Native Title Act 1993* (Cth) (NTA) seeking an order that 19 persons (the replacement applicant) replace the current applicant of the native title determination application filed on behalf of the Gomeroi people.

The application relied upon resolutions carried at a meeting of the native title claim group on 19 and 20 July 2016 (the 2016 authorisation meeting). The application was opposed by the current applicant, who alleged that the resolutions did not reflect decisions by the whole of the claim group to remove the current applicant and authorise the replacement applicant.

The current applicant was authorised by the claim group at a meeting held on 10 and 11 May 2013 (the 2013 authorisation meeting). The claim group passed a resolution at that meeting that it wished to have 19 individuals as the applicant, each drawn from one of the 19 regions which were said to comprise the traditional Gomeroi country. Resolution #10 also passed at that meeting and outlined the expectations of the claim group for the applicant. It stated that the applicant may not attempt to terminate the services of NTSCORP Limited or the legal practice funded by NTSCORP as solicitor acting on behalf of the Gomeroi people native title claim group, and must not execute any agreement conferring benefits or obligation on Gomeroi People, without first obtaining a resolution of the Gomeroi People native title claim group specifically authorising it to do so. The resolution stated that the applicant or any person comprising the applicant may be replaced

for acting contrary to those expectations and therefore exceeding the authority conferred on them by the Gomeroi people native title claim group.

The current applicant did not adhere to Resolution #10 in two respects: (1) the current applicant appointed Sam Hegney Solicitors to prosecute the native title claim and associated legal matters in place of Robert Powrie, a solicitor funded by NTSCORP; (2) the current applicant, by majority, agreed to the grant of a mining lease in favour of three mining companies. The authority of the claim group for these actions was not obtained.

On 8 June 2016, NTSCORP decided to convene the 2016 authorisation meeting. The meeting was to be held to, among other things, enable the Gomeroi claim group to consider whether to replace the current applicant. Alexander Chalmers, a solicitor employed by NTSCORP, deposed that the decision was based on requests received by NTSCORP from various Gomeroi claim group members.

Eleven resolutions were put to that meeting, the most significant of which were:

1. Resolution #6 – the Gomeroi People native title claim group resolve to remove the following 19 people jointly comprising the Applicant and confirm that they are no longer authorised by the Gomeroi People native title claim group: Maureen Sulter, Susan Smith, Michael Anderson, Raymond Welsh (Snr), Richard Green, Greg Griffiths, , Elaine Binge, Alfred Priestly, Leslie 'Jacko' Woodbridge, Ray Tighe, Alfred Boney, Anthony Munro, Madeline McGrady, Bob Weatherall, Jason Wilson, Lyall Munro Jnr, Clifford Toomey, Burrul Galigabali (dec), Norman McGrady (dec).

2. Resolution #11 – the Gomeroi People native title claim group confirm that the 19 people they have elected and authorised as their Applicant in native title determination application NSD2308/2011 are Jason Wilson, Leslie Duncan, Marcus Waters, Malcolm Talbot, Barry French, Garry Binge, Raymond Weatherall, Steven Talbott, Donald Craigie, Dennis Griffen, Jennifer Bennett, Sheryl Barnes, Roslyn Nean, Sharon Porter, Emily Roberts, Fay Twidale, Tania Matthews, Natasha Talbott and Maria Cutmore.

At paragraph [35] the Court set out the five conditions that must be satisfied for a successful s 66B application set out by French J in *Daniel v State of Western Australia* [2002] FCA 1147 at [17].

The replacement applicant relied on the first and third conditions:

1. The person to be replaced is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it.

2. The persons making the application under s 66B are authorised by the claim group to make the application and to deal with matters arising under it.

A further issue was whether, if the five conditions were satisfied, the Court should refuse to make the order in the exercise of its discretion under s 66B(2) NTA.

The current applicant submitted that the interlocutory application should be dismissed because:

1. The notice of the 2016 authorisation meeting drafted by NTSCORP was inadequate.
2. The 2016 authorisation meeting was not adequately advertised.
3. The composition of the persons attending the 2016 authorisation meeting was not appropriately representative of the Gomeroi Claim Group.
4. The conduct of the 2016 authorisation meeting was irregular and/or unfair.
5. The replacement applicant was not validly elected and authorised by those in attendance at the 2016 authorisation meeting.
6. The replacement applicant is not representative of the Gomeroi Claim Group.
7. The 2016 authorisation meeting was not convened by NTSCORP for a purpose permitted under the Act.
8. The Court's discretion should be exercised against making an order for the replacement of the current applicant.

The current applicant asserted that there were misrepresentations in the meeting notice and procedural defects in the conduct of and voting at the meeting. The current applicants relied on cases referring to the necessity for a 'valid' or 'properly conducted' meeting of the claim group. His Honour considered 'prescriptive expressions such as these are unhelpful in a context where, as Reeves J pointed out in *Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373 at [21] at [29], the Act does not require an authorisation meeting to be held.' The NTA does not prescribe rules for the conduct of authorisation meetings, or conditions for their validity.

[47] The questions that must be answered under s 66B NTA are whether the current applicant is no longer authorised, and whether the proposed replacement applicant is authorised, by the claim group to make the application and deal with matters arising in relation to it. Rangiah J noted that defects, whether substantive or procedural, do not necessarily require refusal of an order for replacement of the applicant: see, for example, *Dodd on behalf of the Wulli Wulli People v State of Queensland (No 2)* [2009] FCA 1180 at [14], *Doctor on behalf of the Bigambul People v State of Queensland* [2010] FCA 1406 at [71].

[54] Rangiah J acknowledged the practical difficulties involved in organising and conducting a claim group meeting, referring to *Lawson v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 at [28], where Stone J said: 'I do not think, however, that the Act requires decisions of native title groups to be scrutinised in an overly technical or pedantic way. Unless a practical approach is adopted to such questions the

ability of indigenous groups to pursue their entitlements under the Act will be severely compromised.' His Honour preferred to adopt 'a robust approach…to determining whether or not the claim group as a whole has made any decision about authorisation'.

Whether notice was only directed to claim group members with similar concerns

The current applicant submitted that the meeting notice was a notice for a meeting of the members of the Gomeroi claim group who held the same concerns as those calling the meeting. The meeting notice was expressly addressed to 'all' members of the Gomeroi claim group and invited all such members to attend the meeting. It indicated that a purpose of the meeting was for the claim group to make a decision as to whether to continue to authorise the current applicant, or to replace the current applicant. It also set out the two particular concerns of those who wished the meeting to be called.

Rangiah J stated at [65] that 'it is difficult to see why the articulation of these concerns should mean that the meeting was called only for those who shared the same concerns…The meeting notice made it adequately clear that any member of the claim group who did not share the concerns expressed, or who did not want the current applicant to be replaced, could attend the meeting and have their say upon the proposed resolutions.' At [63], his Honour rejected the current applicant's reliance on *Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373 and held that the meeting notice cannot be described as calling a meeting only for those members of the claim group who held the same concerns.

Whether the meeting notice was misleading

[66] The Court stated that the notice must be sufficient to enable the persons to whom it is addressed, namely members or potential members of the native title claim group, to judge for themselves whether to attend the meeting and vote for or against a proposal, or whether to leave the matter to be determined by the majority who do attend and vote at the meeting. The current applicant submitted that the notice was misleading because it stated that the current applicant decided to change lawyers and execute the agreement with the mining companies without the authority of the claim group, whereas the current applicant was so authorised. Rangiah J noted that the current applicant's argument 'seemed to be that by virtue of its authorisation as the applicant, it was empowered under s 62A of the NTA to 'deal with all matters arising under this Act in relation to the application', including deciding which lawyers should represent the claim group and to entering into agreements under s 31 of the NTA' (at [69]).

Whether the meeting notice was misleading by stating the current applicant acted without authority of claim group

In *Gomeroi People v Attorney-General of New South Wales* [2016] FCAFC 75, Barker J (Reeves J concurring), held at [80]–[82] that the claim group may place limits on the authority that the applicant would otherwise have. At [87]–[91] it was accepted that a claim

group may place limits upon the power of the applicant to change lawyers. Barker J also accepted that the claim group may restrict the power of the applicant to enter into an agreement under s 31(1)(b) of the NTA. Rangiah J held that the statement in the notice is supported by those findings and therefore not misleading. Even if it was misleading, his Honour found that the statement was unlikely to have made any material difference to the outcome of the meeting [73].

Whether the meeting notice was misleading as to when registration would take place

The Current Applicant submitted that the meeting notice clearly indicated that registration would *only* be permitted from 8:00 am to 12:00 pm on Day 1. The Court rejected that submission, on the basis that there was no evidence of anyone not attending the meeting due to that understanding of the notice.

Whether meeting notice was misleading by stating that a large number of requests to call the meeting had been received

The current applicant submitted that the only request that had been received by NTSCORP was in the form of the petition. They further submitted that the petition may have been fabricated. The Court accepted the evidence of Leslie (Phil) Duncan, who prepared the petition. There was no evidence from any of the signatories that they had not signed the petition and The Court was not prepared to find that Mr Duncan or someone else took the signature pages from another petition and attached them to the petition.

The Court held that the petition can be considered to be a request to call a meeting made by each of the individuals who signed it, and found that the meeting notice was accurate, and not misleading, when it said that NTSCORP had received a large number of requests from members of the claim group to call the meeting.

Whether the meeting notice was misleading by failing to disclose NTSCORP's motives for calling the meeting

The current applicant submitted that the meeting notice was misleading because it failed to disclose that the motivating purposes of NTSCORP were to have itself reinstated as the lawyers for the claim group and to provide a reason to refuse to hand over the file relating to the native title determination application to Mr Hegney. Further, they submitted that the meeting notice failed to disclose the substantial interest NTSCORP had in the outcome of the 2016 authorisation meeting. The current applicant contended that the 2016 authorisation meeting was not convened for a purpose permitted by the NTA.

The notice stated that NTSCORP was assisting in the notification and organisation of the meeting in accordance with their statutory facilitation and assistance in dispute resolution functions under s 203BB and s 203BF of the NTA.

[98] The Court stated that a discretionary statutory power must exercised for a purpose for which the power was granted, and not for an ulterior purpose: *Thompson v The Council of*

the Municipality of Randwick [1950] HCA 33 at 105–106; *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* [1935] ArgusLawRp 105 at 468. It is enough to invalidate a decision if an improper purpose was a substantial purpose of the power: *Thompson* at 106, *Samrein* at 468.

[104] Rangiah J accepted that it must have been a part of NTSCORP's motivation for calling the meeting that it (or, at least, the legal practice it funded) had been removed as lawyers for the claim group and it wished to regain its position. That motivation seemed to stem from the current applicant acting contrary to the stated expectations of the claim group as a whole and in circumstances where Resolution #10 indicated that the persons comprising the applicant may be replaced for acting contrary to those expectations. His Honour also accepted that part of NTSCORP's motivation was to avoid handing over its file to Mr Hegney. However, his Honour did not accept that those matters were a substantial purpose and held that the dominant purpose, of NTSCORP in calling and facilitating the 2016 authorisation meeting, was to assist the claim group following receipt of a number of requests by exercising its facilitation, assistance and dispute resolution of functions under ss 203BB and 203BF of the NTA.

Whether the meeting notice was misleading by failing to identify that the replacement applicant would not consist of representatives of the 19 regions

The current applicant submitted that if the meeting notice had said it was proposed that the applicant would no longer consist of representatives of each of the 19 regions, it is likely that more members of the claim group would have attended the meeting to oppose the motion.

The meeting notice stated that there would be discussion and the making of decisions on whether the claim group wished to continue to authorise the current applicant or replace the current applicant, and if the latter, the claim group would consider resolutions to authorise a new applicant. The 2013 authorisation meeting had resolved to elect the applicant so as to represent each of the 19 regions. However, Rangiah J held that the 2013 Resolution was not binding upon those who attended the 2016 authorisation meeting. It was always possible that if the claim group decided to authorise a new applicant, the new applicant would not be chosen on the same basis as in 2013.

Further, the Court considered that the proposal that the new applicant would not represent the regions, seems to have arisen from the floor of the 2016 authorisation meeting. It does not appear that there was some pre-conceived plan for this to occur.

The Court was satisfied that one of the allegations made by the current applicant, that the meeting notice was misleading, was made out. The notice was misleading because it was ambiguous as to whether registration would be permitted after 12:00pm on Day 1. However, Rangiah J found that none of the allegations if made out were likely to have made a difference to the outcome of the 2016 authorisation meeting.

Whether the 2016 authorisation meeting was adequately advertised

[115] The adequacy of advertising is relevant to the issue of whether members of the claim group were given every reasonable opportunity to make an informed decision as to whether to attend the meeting and to participate in the decision-making process. What is required is that reasonable attempts be made to notify all the members of the claim group who have the capacity to participate in decision-making: cf. *Frank on behalf of the Mayala People v State of Western Australia (No 3)* [2016] FCA 1255 at [10].

There was no evidence presented that indicated any member of the claim group was unaware of the fact that the meeting had been called and of the business to be dealt with at that meeting. Rangiah J was satisfied that the advertising of the meeting was adequate and was not prepared to infer that other persons did not attend the meeting because they did not receive the meeting notice and did not find out about the meeting and the business to be discussed from some other source.

Whether the composition of the persons attending the 2016 authorisation meeting was appropriately representative of the Gomeroi Claim Group

[137] On the evidence available, the Court did not accept that there was a mandatory traditional process of decision-making that had to be followed at the meeting involving decision-making by persons who together could speak for all of the Gomeroi country. It was therefore open to the claim group to agree upon the process of decision-making.

[139] The Court did not accept that it was necessary for there to be representatives of each of the 19 regions in attendance at the meeting. All that was required was that the members of the claim group be given every reasonable opportunity to participate in the decision-making process.

Whether the meeting degenerated into chaos and whether Mr Bergmann was not independent

[142]–[168] The current applicant submitted that the meeting facilitator, Mr Bergmann failed to conduct the meeting in a fair and proper manner and that Mr Bergmann permitted people to engage in shouting, yelling, swearing and abusive behaviour.

It was submitted that on most occasions Mr Bergmann would decide who the microphone would be passed to by pointing to the person or nodding at them and that, more often than not, a person who was opposed to the current applicant was permitted to speak.

Mr Bergmann of KRED Enterprises was engaged by NTSCORP to facilitate the meeting. Mr Bergmann resides in Broome, Western Australia, and is admitted as a solicitor and barrister. His role involved chairing the meeting, reading to the group's proposed resolutions and coordinating the counting of votes. In response to the allegation that Mr Bergmann favoured those opposed to the current applicant when distributing microphones during the meeting, Mr Bergmann said that he had not met any of the members of the claim

group previously, and was not a position to assess whether an individual was sympathetic to the current applicant or not. He said that he instructed the staff of NTSCORP to distribute the microphones based on the order in which meeting attendees raise their hands to indicate that they wanted to speak. He expressed the opinion that all those attendees who wanted to say something at the meeting were given an opportunity to speak.

Mr Bergmann maintained that he had acted independently and conducted the meeting an impartial way. Rangiah J considered Mr Bergmann to be an honest and reliable witness and that he acted independently and impartially in the way that he conducted the meeting.

The Court did not accept the current applicant's submission that their treatment at the meeting was such as to cause them to walk out of the meeting, so that the outcome of the meeting did not reflect the decision of the claim group as a whole. The Court found that it was only necessary that the current applicant and their supporters had every reasonable opportunity to attend and participate in the meeting. They were given such an opportunity but elected to remove themselves from the meeting.

Alleged defects in the system of registration and record keeping

[169] The Current Applicant alleged that the system of registration and record keeping at the 2016 authorisation meeting was defective.

Whether there was an error in allowing people to register outside the times stated in the meeting notice

As noted above, Rangiah J rejected the submission that the meeting notice indicated that registration would only be open between 8:00am and 12:00pm on the first day of the meeting. The Court did not find there to be any error in permitting registration outside of those times.

The current applicant further submitted that there was no evidence before the Court that accurately recorded which attendees were verified as members of the claim group, and that there was no evidence as to how the attendance list relied on by the replacement applicant was created, but ample evidence that it was defective.

The procedure adopted by NTSCORP was that those who were verified as members of the claim group from the claim group list were given green wristbands. Only those with green wristbands were entitled to vote at the meeting.

[184] Rangiah J considered the process to have been generally reliable and was not prepared to infer that green wrist bands were erroneously issued in such numbers as to affect the outcomes off the voting at the meeting. Further, like Kiefel J in *Butchulla* at [29], his Honour found it difficult to believe that members of the claim group would not have immediately spoken out if they observed persons not within the claim group who were voting. The Court was not satisfied that the defects in record keeping pointed to by the current applicant concerning the attendance records reflected broader problems with voting

by claim group members, or had any material impact on the voting outcomes of the meeting.

Whether people were able to remove green wristbands or vote without green wristbands

The Court noted that it is possible that there were some mistakes made in the process of registration, but was not satisfied that any such mistakes were likely to be of such magnitude that the voting outcome is likely to have been affected. Rangiah J considered it to be unlikely that members of the group gave their green wristbands to non-members who then fraudulently used the wristbands to vote, while those members procured a second wristband which they used to vote.

Other alleged defects in the conduct of the 2016 authorisation meeting

[200] The current applicant alleged that there were nine further defects in the conduct of the 2016 Authorisation Meeting.1. Whether Resolution #1 was ambiguous

Resolution # 1 stated:

The Gomeroi People native title claim group have agreed to and adopted the following process of decision-making for the purposes of the native title claim:

1. the decision to be made will be put in the form of a clearly worded written motion;
2. the motion will be read out to the meeting;
3. the motion must be moved and seconded by members of the group before it is decided on;
4. the decision will then be made by the group by a show of hands;
5. a decision of the majority in relation to the motion shall be a decision of the meeting.

The current applicant submitted that Resolution #1 was ambiguous because it was not clear whether the decision was to be made by a majority of those who registered to vote at the meeting or all those who were present at the time the vote was taken. Rangiah J accepted that the resolution was ambiguous, however the manner in which the decision would be made, was clarified shortly after the resolution was passed by Mr Bergmann, who stated that only those in the room would be counted during voting.

The Court held that the claim group as a whole must be understood to have agreed that the decision of the majority present in the room would be taken to be a decision of the meeting, referring to *Noble v Mundraby, Murgha, Harris and Garling* [2005] FCAFC 212 at [18]: '…Nor does s 251B require a formal agreement to the process adopted for the making of a particular decision. Agreement within the contemplation of s 251B may be proved by the conduct of the parties. The claim group as a whole must be understood to have agreed that the decision of the majority present in the room would be taken to be a decision of the meeting.'

Resolution #1 required that a motion must be moved and seconded by members of the group before it is decided on. The current applicant submitted that six members of the replacement applicant were not validly nominated. Rangiah J considered that Resolution # 1 only required a 'motion' to be moved and seconded by members of the claim group. The nominations and seconding of the nominations of candidates were not motions, and were not required to be carried out in accordance with Resolution # 1. In any event, his Honour found that while the nominations of Ms Cutmore, Mr Griffen, Ms Talbott and Ms Roberts were inconsistent with Resolution # 1, the claim group by electing those people had decided to depart from the procedure set out in Resolution # 1 in respect of those four persons. That course was open to the claim group and did not require a formal resolution. The Court was satisfied that the irregularities identified did not materially affect the decision of the meeting to authorise the members of the replacement applicant.

The current applicant submitted that the replacement applicant is not appropriately representative of the Gomeroi claim group in accordance with Gomeroi laws and customs. They submitted that decisions concerning all of the claim area must be made by persons who can collectively speak for all of the claim area, which requires representatives of each of the 19 areas. Rangiah J was not satisfied on the evidence that there is a traditional Gomeroi law or custom that requires decision-making of the kind required in respect of a native title application to be made by persons who collectively represent the 19 regions.

Consideration of cumulative effect of defects

[245] The Court held that each of the identified defects in the meeting notice, the registration process, record keeping and the conduct of the meeting, individually or cumulatively, made no material difference to the outcome of the meeting.

Exercise of the discretion

[248] Section 66B(2) of the NTA gives the Court a discretion to refuse to make an order for replacement of the current applicant even if it is satisfied that the grounds set out in s 66B(1) are established. The current applicant submitted that an important discretionary consideration is that there is no indication from the meeting notice or the resolutions passed at the 2016 authorisation meeting of any member of the claim group having any concerns about the manner in which the current applicant had carried out its primary role, in connection with the native title determination application.

They relied on *Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373, where Reeves J held that the discretion under s 66B(2) would have been exercised against making an order for replacement of the applicant because there was no indication of any members of the claim group having any concerns about the manner in which the existing applicant was carrying out its primary role of conducting the native title application.

The Court considered this to be important as the application had been on foot for about 13 years and it was imperative that it be brought to finalisation as soon as it was reasonably possible, and that the existing applicant be permitted to continue to pursue the application without the hindrance or disruption that would undoubtedly be associated with the replacement of the applicant.

[250] Rangiah J held that there was a clear indication in the petition, in the meeting notice and in Resolutions #5 and #6 that there was substantial concern among the claim group about the current applicant's conduct of the native title application. That concern was that the current applicant had replaced NTSCORP (or the legal practice funded by NTSCORP) as their legal representatives in relation to the native title application. This was a concern about the current applicant's conduct of the application. The Court stated that even if members of the claim group were only dissatisfied with the current applicant's entry into the s 31 agreement, the Court did not find that there was a sufficient basis to decline to make an order under s 66B.

While the primary function of an applicant is in connection with a native title application, the applicant also has important secondary functions such as entry into agreements under s 31(1)(b) of the NTA. The dissatisfaction of the claim group as a whole expressed in the form of Resolution #6 and #11 with such secondary aspects of the current applicant's conduct, provided a powerful reason for making the order. The Court distinguished this matter from *Burragubba* on the basis that the application was commenced six years ago and there is no indication that it would be unduly delayed by the replacement of the applicant.

[255] Rangiah J ordered that the members of the current applicant are no longer authorised by the claim group to make the native title determination application and to deal with the matters arising in relation to it. [265] The Court further ordered that the members of the replacement applicant are authorised by the claim group.

Gebadi v Woosup (No 2) **[2017] FCA 1467**

7 December 2017, Fiduciary Duty of Applicant, Federal Court of Australia, Queensland, Greenwood J

In this matter, Greenwood J heard an application brought against Mr Larry Woosup and Ms Beverley Tamwoy for alleged breach of fiduciary duties owed by them to the Ankamuthi people native title holding group as members of the applicant.

[1] The application was brought by the remaining members of the applicant, Mr Mark Gebadi, Ms Tracey Ludwick, Ms Catherine Salee, Mr Benjamin Tamwoy, Mr Asai Pablo, Mr Charles Woosup and Mr Nelson Stephen, in a representative capacity on behalf of the

Ankamuthi people. The Court's declaration and orders made by the Court are set out paragraphs [1] and provided at the conclusion of this case note.

[4] The Court made a determination of native title in favour of the Ankamuthi people in July 2017: *Woosup on behalf of the Ankamuthi People #1 v State of Queensland* [2017] FCA 831. [6] The prescribed statutory corporate trustee pursuant to s 56(2)(a) NTA was the nominated and ordered by the Court to be the *Seven Rivers Aboriginal Corporation (ICN 8522).* The proceedings against Mr Woosup and Ms Tamwoy were commenced in April 2016. As originally filed, Gulf Alumina Limited (Gulf) and the State of Queensland were joined as the third and fourth respondents. An order for the dismissal of the proceeding as against the third and fourth respondents was obtained in December 2016.

Greenwood J emphasised at paragraph [20]: 'Those individuals who become or who are constituted as *the applicant* prosecute each application for and on behalf of all members holding the common or group rights and interests comprising the particular native title or, where relevant, those persons comprising the compensation claim group (apart from revocation or variation applications). In doing so, the Act contemplates that those individuals constituting the applicant act in the *interests* of the group members and also in their own interests but, in respect of their own interests, they do so only in their capacity as *members* of the group, and not in furtherance of their private interests which in any way conflict with the interests of the relevant group. These arrangements under the Act reflected in ss 13 and 61, and all of the provisions of the Act relating to those sections, have been enacted by the Parliament of Australia in order to give effect to the *Preamble* to the Act and the *main objects* of the Act.'

Background

[46] Firstly, on 4 December 2013, Mr Larry Woosup and Ms Beverley Tamwoy entered into an agreement (the ancillary agreement) with Gulf for the purposes of s 31 of the *Native Title Act 1993* (Cth) (NTA), permitting Gulf to conduct the Skardon River Bauxite Mining Project (SRBM Project). Mr Woosup and Ms Tamwoy made the agreement on their own behalf and on behalf of the Ankamuthi people, defined as the native title claim group in the Ankamuthi native title determination application. The payments to be made to the Ankamuthi people under the agreement were as follows:

1. $20,000 upon execution of the agreement;
2. $350,000 upon execution of the deeds;
3. $30,000 upon commencement of production of the [SRBM Project].

At the time the agreement was entered into, Mr Woosup and Ms Tamwoy were the only living members of the applicant for the Ankamuthi claim. In December 2014, meetings of the Ankamuthi people were held to authorise the seven applicants together with Mr George Mamoose, Mr Michael Toby and Ms Ella Hart (Deemal) to become individuals constituting the Ankamuthi applicant. Mr Larry Woosup and Ms Beverley Tamwoy were authorised to

continue to be individuals constituting the Ankamuthi applicant along with the new appointees.

Contentions

[47] Secondly, the applicants in this proceeding submitted that Mr Woosup and Ms Tamwoy failed to submit a proposal to a meeting of the Ankamuthi people enabling the Ankamuthi people to decide whether to enter into the ancillary agreement with Gulf or not, and failed to disclose the agreement to the other members of the applicant consequent upon the reconstitution of the applicant in December 2014, or the claim group.

[48] Thirdly, it was further submitted that Mr Woosup and Ms Tamwoy owed fiduciary obligations to the Ankamuthi people as members of the native title claim group, which they breached by entering into the agreement with Gulf.

[49]–[50] The applicants argued that by receiving financial benefits under the Gulf agreement; by not advising the members of the native title claim group of the payments; by retaining and using the monies paid under that agreement for his own benefit; and by not paying the financial benefits to the native title claim group, Mr Woosup breached particular fiduciary obligations he owed to the Ankamuthi native title claim group and [51] Mr Woosup was required to account to the *Ankamuthi* native title claim group for the financial benefits he received.

[52] The Court observed: 'It can be seen therefore that the central contention in these proceedings is that Mr Woosup and Ms Tamwoy owed fiduciary obligations to the *Ankamuthi* native title claim group when acting as applicant and that they failed to discharge those obligations. In the case of Mr Woosup, it is said that he has taken for his *own* benefit, benefits payable under the Gulf agreement for and on behalf of the *Ankamuthi* native title claim group.'

The essential questions for the Court were:

1. Whether Mr Woosup and/or Ms Tamwoy owe fiduciary obligations to the *Ankamuthi* native title claim group, that is to say, are they in a fiduciary relationship with that group?
2. If fiduciary obligations are owed by either of them to the claim group, what are the obligations so owed?
3. Have either of them failed to discharge those obligations?

The relevant procedural matters to this proceeding are set out by the Court in paragraphs [56] to [78]. The relevant factual matters are set out at paragraphs [74] to [95].

The Court considered that it would be inconsistent with the statutory scheme for some persons, amongst a group of persons constituting an applicant for the purposes of a s 61 native title determination application, to 1) enter into a s 31(1)(b) agreement with a person or entity, 2) not disclose the fact of it to the claim group or the other persons constituting the

applicant, and 3) cause payments made under the agreement to be applied and used for the personal benefit of those persons within the applicant who had struck the agreement. The payments under such an agreement do not become the 'applicant's money' personally. The payments retain their character as payments made to and for the benefit of those persons who hold the common or group rights and interests comprising the particular native title as claimed. An applicant, when exercising any aspect of the right to negotiate and bring into existence a s 31(1)(b) agreement, does so as applicant for those persons who hold the common law group rights and interests comprising the native title as claimed.

Fiduciary obligations

The Court noted that: [96] 'In accepting a role (as a member of the *Ankamuthi People*), of acting as persons constituting the *Ankamuthi applicant* so as to make the native title claim for the native title claim group, Mr Woosup and Ms Tamwoy accepted and undertook to act for and on behalf of the members of the claim group in the exercise of any right, power or discretion affecting the interests of the *Ankamuthi* native title claim group in either a legal sense or a practical sense. The principles which lead to that result in the context of the role of persons who constitute *the applicant* in a native title determination application are the essential principles which determine whether a person has accepted or assumed fiduciary obligations to another. The *context* in the case of Mr Woosup and Ms Tamwoy, in accepting and undertaking to act as persons constituting *the applicant*, is the *relevant context* but the *principles* to be applied in determining whether they owed fiduciary obligations to the native title claim group *are the same principles determined in our jurisprudence for deciding whether a person has, in all the circumstances, assumed particular fiduciary obligations to another*.'

[97] In *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141, the Full Court (Dowsett, Greenwood and White JJ) considered the question of whether particular parties owed fiduciary obligations to another. In determining that question, the Court analysed the principles to be applied, within the relevant factual matrix, in answering that question. Greenwood J (with White J in agreement) identified the principles to be applied. Dowsett J differed as to the application of the principles to the facts in issue but did not depart from the expressions of principle of Greenwood J (and White J in agreement), although his Honour set out the relevant principles in his own terms.

[98] The following principles identified by Greenwood J (White J concurring) of relevance to the present proceedings are these.

It is worth setting out Greenwood J's observations in *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141 in this case note in detail:

236. In developing his seminal analysis of the coherent body of law developed by Equity in identifying "certain and distinct" obligations which define their own "fiduciary" for their own respective purposes, Dr Finn expressed this observation in *Fiduciary Obligations* 1977

(described by Millett L.J. in the Court of Appeal in *Bristol v Mothew* at p 18 as "his classic work"), at p 2:

> [Equity] has evolved a series of self-contained obligations – obligations which are themselves certain and distinct, and which individually define their own "fiduciary" for their own respective purposes. These obligations attribute no large significance to the term used to describe the persons to whom each individually applies. In some instances he is referred to as a fiduciary: in others as a confidant. The term used is unimportant. It is not because a person is a "fiduciary" or a "confidant" that a rule applies to him. It is because a particular rule applies to him that he is a fiduciary or confidant *for its purposes*. [original emphasis of the author]

237. The point of emphasis adopted by Dr Finn in the above passage is that a person to whom the relevant rule applies is a fiduciary *for the purposes* of the applied rule and not necessarily for all rules, as all rules might not apply although, plainly enough, more than one rule might apply to a person. The relevant rules, however, do not apply to a person by simply attaching a taxonomic label "fiduciary" to the person. In *Bristol v Mothew*, Millett L.J. at p 18 recognised the force of the point of principle identified by Dr Finn but detached it from the *specific relativity* of the relationship between the application of the particular rule to a person and the fiduciary relationship of trust and confidence thus arising simply *for the purposes of the particular rule* applied in all the relevant circumstances

238. The matrix of fact and contextual circumstances will determine whether a relevant rule applies and if it does, the person will be a fiduciary for the purposes of the rule. Once a person is a fiduciary for the purposes of a relevant rule, remedies peculiar to the equitable jurisdiction apply which are primarily restitutionary or restorative rather than compensatory. The nature of the obligation will also determine the nature of the breach.

239. In *Fiduciary Obligations* 1977, Dr Finn took the approach at p 2 that particular obligations will be "imposed" upon particular persons in Equity because those persons might be carrying on particular activities which "require the law's regulation". In *Bristol v Mothew*, Millett L.J. observed, at p 18AB, that the application of the relevant rule rendering a person a fiduciary of another for the purposes of the rule is a function of someone having "undertaken" to act "for or on behalf of another" in a particular matter in circumstances which give rise to a relationship of trust and confidence. These duties are "special to fiduciaries": Millett L.J. at p 18AB.

240. In Edelman J's *2010 LQR Article*, Edelman J expounds a thesis that the essential unifying theme emerging from the corpus of cases involving fiduciary duties is that the "scope of those obligations" depends upon the "scope of an express or implied undertaking", that is, a "voluntary undertaking" of one to another. However, in that article, Edelman J expressly "does not enter the debate about which duties must be owed in a voluntary undertaking before a person can be said to be a 'fiduciary'": the *2010 LQR Article* at p 316.

241. In the *McPherson Articles*, McPherson J describes the nature of the "undertaking" as either express, implied or inferred and cautions against the analytical sloppiness inherent in finding "constructive undertakings": 72 ALJ 289; *CLC Papers*, Vol 5.4, Paper No. 2, p 2. McPherson J contends that the underlying explanation of "most of the decisions" is that the transaction in question is shown to be one in which "a person is expected to act in the interests of the other party": an expectation we would now describe as reflecting an obligation derived from an undertaking, express or implied, by one to the other to so act, arising out of the forensic circumstances of the transaction between the relevant participants.

242. McPherson J put his view of the principle this way (72 ALJ 290; *CLC Papers*, Vol 5.4, Paper No. 2 at p 4):

> Approaching the matter in this way is capable of explaining most of the decisions which have been vexing the minds of so many for so long. Solicitors, agents, company directors and employees are precluded from acting in their own interests from the moment they assume the conduct of another's affairs, or a segment of those affairs. So also with an investment counsellor who advises me where to put my money. The question is one of degree. How far have I surrendered my affairs to the control of someone else?

243. In *Hospital Products*, Mason J at p 96 sought to "distil the essence or the characteristics" of a relationship which might be described as a "fiduciary relationship".

244. That became necessary, "[b]ecause [a] distributor – manufacturer is not an established fiduciary relationship": Mason J at p 96. His Honour observed at pp 96 and 97 that the "critical feature" of "accepted fiduciary relationships" is that a person (the fiduciary) "undertakes or agrees to act for or on behalf of or *in the interests of* another person in the exercise of a *power* or *discretion* which will *affect* the interests of that other person in a *legal* or *practical* sense" [emphasis added]. If that be so, the "relationship" between the parties is "therefore" one which gives the first person a "special opportunity" to exercise the power or discretion "to the detriment of that other person who is accordingly vulnerable to abuse by [the first person] of his position": Mason J at p 97. Thus, the first person is understood to be a fiduciary of the second and the two stand in a "fiduciary relationship". Although referred to as a relationship of "trust and confidence", this "essence" or characterising "feature" so described by Mason J is "critical" to *each* such relationship: Mason J at pp 96 and 97.

245. A person agreeing or undertaking to act "for" or "on behalf of" or "in the interests of" another signifies that the fiduciary acts in a "representative" character in the exercise of "his responsibility": Mason J at p 97. Mason J also observes at p 97 that it is "partly" because the first person's exercise of the power or discretion "can adversely affect the interests" of the second person and also because the second person is "at the mercy of" the first person that the first person "comes under a duty" to exercise the power or discretion "in the interests of the person to whom the duty is owed".

246. See also the observations of Gibbs CJ at pp 6869 and 72; Dawson J at p 142 in *Hospital Products*.

248. In *Hospital Products*, Mason J made two further observations of importance.

249. The first concerns the coexistence of contractual and fiduciary relationships. Often, the existence of a basic contractual relationship provides "a foundation for the erection of a fiduciary relationship": Mason J at p 97. In *Hospital Products*, Mason J was, of course, considering a bilateral contract between a manufacturer and a distributor. Where there is a contract, "it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties": Mason J at p 97. Mason J also said this at p 97:

> ... The fiduciary relationship, if it is to exist at all, must *accommodate itself* to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be *superimposed upon the contract* in such a way as to alter the operation which the contract was intended to have according to its true construction. [emphasis added]

251. The second is that although Hospital Products International Pty Ltd's ("HPI") capacity to make decisions and take action in some matters by reference to its *own interests* was inconsistent with the existence of a "general fiduciary relationship", that circumstance did not "exclude the existence of a more limited fiduciary relationship for it is well settled that a person may be a fiduciary in some activities but not in others": Mason J at p 98.

252. In *Hospital Products*, Mason J concluded that a limited fiduciary obligation sprang from the United States Surgical Corporation ("USSC") having "entrusted" the Australian distributor, HPI, with the "protection, promotion and custodianship of its product goodwill in Australia". This gave rise to USSC's "vulnerability" to the distributor's abuse of its position which enabled HPI (and its controller, Mr Blackman) to "take every opportunity to enrich themselves at USSC's expense": as explained by the High Court in *John Alexander's Clubs* at [93].

258. In *John Alexander's Club*, French CJ, Gummow, Hayne, Heydon and Kiefel JJ observed at [88] that phrases such as acting "for or on behalf of" and "in the interests of", another person, must be understood "in a reasonably strict sense, lest the criterion they formulate becomes circular". That caution follows because although, no doubt, undertaking to act in such a way is, as their Honours say, "inherent" in the position of a trustee administering a trust or a director participating in the control and management of a company (as two examples among other often recited "accepted fiduciary relationships" to use the phrase adopted by Mason J in *Hospital Products* at p 96) *and* although such an undertaking "may be found in the facts of a particular case" ad hoc, the task of isolating *whether* a person has undertaken to act for another especially in the context of a coexisting contract with a multiplicity of interests may be very difficult to determine.

261. In his *UNSW 1989 Article*, Dr Finn observes at p 85 that the received judicial wisdom is that it is "unwise" and perhaps "unhelpful" to attempt to provide a general answer to that most basic question: "when and why will a relationship be a fiduciary one?". Dr Finn acknowledges that this may be prudent because a "useful jurisdiction should not be fettered" and the "perennially repeated observation" is that the "categories of fiduciary relationship are not closed". Dr Finn observes, however, that, in the end, these observations are "an endorsement of uncertainty, not of understanding".

262. Dr Finn adds this at p 85:To the extent that judges of recent times have attempted to isolate *general characteristics* common to fiduciary relationships, they have focussed unevenly on two phenomena: first the *capacity* (the *power* or *discretion*) one party has to *affect* the interests of the other and the corresponding *vulnerability* of that other; secondly, the *reliance* one party has upon the other because of the trust or confidence reposed in, or because of the *influence* or *ascendancy* enjoyed by, that other. The seeds, but *only* the seeds, of understanding are to be found here. [emphasis added]

263. Dr Finn observes at p 87 that "[t]he critical matter is our evaluation [that is, on the facts] of the nature and purpose of a relationship (or of a part of it) and of the *roles* to be ascribed to one or both parties in it: whose *interests* is the relationship structured or contrived to serve and who in the relationship is responsible for serving them?".

264. Dr Finn also says this at p 87:

> The cases suggest that there are two distinct approaches to *relationship characterisation*, though they overlap in some factual contexts. They entail quite different inquiries. The first requires an analysis of the *actual legal incidents* [original emphasis] of a relationship itself in the setting in which it occurs and from this a conclusion is arrived at as to the purpose to be attributed to the relationship and to a party's role in it. Thus the *Restatement, Second, Agency*, for example, asserts unequivocally of the principal and agent relationship that "an agent is a fiduciary with respect to matters within the scope of the agency". The second approach focuses upon *the presence (actual or presumed)* of *factual phenomena* [original emphasis] in a relationship – an ascendancy or influence acquired, a dependence or reliance conceded, a trust or confidence given – and from these a conclusion is arrived at as to the character to be attributed to the relationship and as to the role of the 'superior' party in it. [emphasis added]

265. Dr Finn also observes at p 93 that the fiduciary question is "essentially factual in character" and "if we entrust our interests to another person's care, we should be entitled to expect that that other will act in our interests – at least where that other knows or has reason to know we are so doing and apparently accepts this". Dr Finn also observes at p 93 that the difficulty in examining the "factual phenomena in relationships" lies in isolating whether "something more" is present in a relationship so as to characterise a person as a "fiduciary" of another. Although Dr Finn was examining these matters of "relationship characterisation" in the context of whether something more is present between parties to an

existing contractual relationship so as to render one person the fiduciary of another, the quoted opinions expressed at pp 85, 87 and 93 go to matters of essential principle which determine the question of appropriate characterisation in all the circumstances of the essential forensic factual enquiry.

266. Reminiscent of some of the observations of Mason J in *Hospital Products* is this observation at p 93:

> Though the raw materials of a fiduciary finding here are a trust and confidence reposed, a dependence or reliance conceded, or an ascendancy or influence acquired, the important matter is the character to be attributed to the *role* the alleged fiduciary has, or should be taken as having, in the *circumstances* of the relationship. It must *so implicate* that person in the conduct of the other's affairs or *so align* him with the protection and promotion of that other's *interests* (or their *joint interest*) that "foundation" exists for the fiduciary expectation: it must be such as could properly entitle that other to expect that he will act in that other's interests (or their joint interests) – at least to the extent that he is *practically enabled* to *affect* those interests by *action, recommendation, advice or otherwise*. [emphasis added]

267. In *Tate v Williamson*, Lord Chelmsford put the principle this way at p 61:

> Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is *abused*, or the influence is *exerted* to obtain *an advantage* at the *expense* of the confiding party, the person so availing himself of his position will not be allowed to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

268. Dr Finn in *The Fiduciary Principle 1989* took up the notion of abuse of confidence in this way at p 46:

> The shape of any country's fiduciary law will turn in the end on the preparedness of the courts of that country to acknowledge the role of Lord Chelmsford's "abuse of confidence" in fiduciary law's scheme of things ... [T]he courts of Canada, Australia and New Zealand, at different paces, are according it *explicit recognition*. If the *fiduciary principle* is not to suffer *artificial curtailment* then, in the writer's view, that recognition must be given. If, from *whatever combination of factual conditions*, the parties in their relationship are *so circumstanced* that one is *reasonably entitled to expect* that the other is acting or will act in his interests, then that person should be entitled, on bare grounds of public policy, to have that expectation protected.
>
> This said, *the critical question* is *when will parties be found to be so circumstanced*? It is obviously not enough that one is in an ascendant position over another: such is the invariable prerequisite for the unconscionability principle. It is obviously not enough that one has the practical capacity to *influence* the other: representations are made,

> information is supplied (or not supplied) as of course with the object of, and in fact, influencing a host of contractual dealings. It is obviously not enough that the other party is in a *position of vulnerability*: such is the almost inevitable state in greater or lesser degree of all parties in contractual relationships. It is obviously not enough that *some degree* of trust and confidence are there: these are commonly placed in the skill, integrity, fairness and honesty of the other party in contractual dealings. It is obviously not enough that there is a *dependence* by one party upon the other: as the good faith cases illustrate, a party's information needs can occasion this. Indeed elements of *all* of the above *may* be present in *a dealing* – and consumer transactions can illustrate this – *without* a relationship being in any way fiduciary.
> [emphasis added]

269. What is it that renders one person a fiduciary of another and places the two of them in a fiduciary relationship? Dr Finn answers that question in this way at p 46:

> What must be shown, in the writer's view, is that the *actual circumstances* of a relationship are such that one party is entitled to *expect* that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important *only* to the extent that they *evidence* a relationship *suggesting* that entitlement. The *critical matter* in the end is the *role* that the alleged fiduciary has, or should be taken to have, in the relationship. It must *so implicate* that party in the other's affairs or *so align* him with the protection or advancement of that other's interests that foundation exists for the "fiduciary expectation". Such a *role may generate an actual expectation* that the other's interests are being served. This is commonly so with lawyers and investment advisers.
> But *equally*, the expectation may be a *judicially prescribed one* because the law itself ordains it to be that other's entitlement. This may be so either because that party should, given the actual circumstances of the relationship, be *accorded* that entitlement irrespective of whether he had *adverted* to the matter or because the *purpose* of the relationship itself is perceived to be such that to allow disloyalty in it would be to *jeopardise its perceived social utility*. [emphasis added]

In this proceeding at paragraph [100] the Court also had regard to the following authorities: *Re Wadi Wadi Peoples* (1995) 124 FLR 110 at 124 per French J; *Weribone v Queensland (No 2)* [2013] FCA 485 at [44][46] per Rares J; *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 at [58], [60][62] per Rares J. See also, as to matters of fundamental principle, the observations of Brennan CJ in *Breen v Williams* (1996) 186 CLR 71 at pp 82 and 83. In *Wik Peoples v Queensland* (1996) 187 CLR 1 at 95, Brennan CJ considered submissions of the Wik People which asserted the existence of a fiduciary duty owed by the Crown to the indigenous inhabitants of the leased area. Although that was the context of the discussion by Brennan CJ, nevertheless the statement of general principle remains important. Brennan J said this at pp 95 and 96:

‘[In order to establish]...the existence of a fiduciary duty… [i]t is necessary to identify some action or function the doing or performance of which attracts the supposed fiduciary duty to be observed. The doing of the action or the performance of the function must be capable of affecting the interests of the beneficiary and the fiduciary must have so acted that it is reasonable for the beneficiary to believe and expect that the fiduciary will act in the interests of the beneficiary (or, in the case of a partnership or joint venture, in the common interest of the beneficiary and fiduciary) to the exclusion of the interest of any other person or the separate interest of the beneficiary.’

The Court held at [101] that 'there can simply be no doubt that Mr Woosup and Ms Tamwoy, as persons constituting the applicant at any time, undertook or agreed to act for and on behalf of and in the interests of the native title claim group in the exercise of any and all powers, responsibilities and discretions affecting the interests of the claim group in a legal or practical sense. Mr Woosup and Ms Tamwoy, by reason of that role, enjoyed a special opportunity to exercise any such powers or discretions to the detriment of the claim group, and the claim group was, plainly enough, vulnerable to any abuse of position by Mr Woosup and Ms Tamwoy. Mr Woosup and Ms Tamwoy thus stood in a fiduciary relationship, often described as a relationship of “trust or confidence” with the members of the Ankamuthi native title claim group. The members of the Ankamuthiclaim group were entitled to expect that Mr Woosup and Ms Tamwoy would act in the best interests of the claim group in exercising any of the functions, powers, responsibilities or discretions conferred upon an applicant.'

[102] The Court found that the obligations or duties Mr Woosup and Ms Tamwoy owed to the members of the Ankamuthi native title claim group were:

1. an obligation to not place themselves in a position where their private or personal interests came into conflict with the interests of the members of the Ankamuthi native title claim group: a conflict of interest and duty;
2. an obligation to not pursue and secure a personal benefit: a conflict of interest and duty;
3. an obligation to not make a profit from their position of trust unless expressly permitted to do so with the informed consent of the Ankamuthi native title claim group: a conflict of interest and duty;
4. an obligation to not place themselves in a position where their personal interests or duties conflicted with duties owed to the Ankamuthi native title claim group: a conflict of interest and duty, and a conflict of duty and duty.

When Mr Woosup and Ms Tamwoy entered into the ancillary agreement with Gulf on 4 December 2013, they owed those duties to the Ankamuthi native title claim group.

[108] Mr Gebadi deposed that he first became aware of the SRBM Project involving Gulf during negotiations with the new owner of Gulf, Metro Mining Limited in 2014. He was a member of the negotiating committee for the Ankamuthi people in negotiations concerning Metro’s proposed projects on Ankamuthi country and during those meetings it was

mentioned that Gulf had already commenced their project on Ankamuthi country. He says that he had 'no previous knowledge of the agreement or negotiations for the agreement before it was signed', nor was he aware of the money paid under the agreement, at paragraphs [6] and [7].

[108] Mr Gebadi outlined the decision-making process of the Ankamuthi people: 'When Ankamuthi People need to make a decision about something that will happen on Ankamuthi Country we hold a community authorisation meeting. There is a clear understanding that the negotiating committee does not have authority to make a decision until they go back to their people at an authorisation meeting. At that meeting the negotiating committee make[s] a presentation about the negotiations from start to finish, there is an open for discussion and people can ask questions, and then we see if there is a consensus.

Similarly, if there is a decision to be made about what to do with payments from a mining company we would hold a community authorisation meeting, some options would be presented; everyone gets to have their say; and the people present will vote on the options.'

[109]–[113] The evidence of Ms Tracey Ludwick, Ms Catherine Salee, Mr Nelson Stephen, Mr Benjamin Tamwoy, Mr Charles Woosup reflected that of Mr Gebadi.

[117] The applicants also relied on the evidence of Mr Wone, an accountant that provided advice to Mr Woosup about the establishment of a trust to manage the payments under the agreement. The Ankamuthi Western Cape Community Trust was established in June 2010, with Mr Larry Woosup as trustee. Clause 4.1 of the trust deed provides that no later than one calendar month after the date of the deed, the trustee is to appoint a steering committee comprised of five persons to represent the interests of the Ankamuthi Western Cape Community in respect of the trust. This did not occur.

[124]–[126] Mr Wone deposed, 'during the time I acted for Mr Woosup, he frequently said to me that he was the only decision maker for the Ankamuthi people...On many occasions I strongly cautioned Mr Woosup about making decisions on behalf of the Ankamuthi people, and frequently told him about matters which needed to go to a full community meeting for approval. As I was not a legal advisor, I did not advise in detail about this, but I understand that Chalk & Fitzgerald did so...'

[129]–[141] The payments were made in the form of bank cheques payable to the Ankamuthi Western Cape Community Trust and were received into the control of Mr Woosup (either directly or into accounts operated by him in the name of the Ankamuthi Western Cape Community Trust) or paid to a party in discharge of obligations owed by Mr Woosup and Ms Tamwoy to that party:

1. an amount of $20,000 paid by Gulf by bank cheque dated 28 November 2013 made out to the Ankamuthi Western Cape Community Trust and paid into a National Australian Bank account on 6 December 2013 in the account name Ankamuthi Western Cape Community Trust, operated by Mr Larry Woosup;

2. an amount of $95,000 paid by Gulf by bank cheque dated 27 February 2014 made out to the Ankamuthi Western Cape Community Trust and paid into a Queensland Country Credit Union Account in the name of the Ankamuthi Western Cape Community Trust also operated by Mr Woosup;
3. an amount of $150,000 paid by Gulf by bank cheque into the Supreme Court of Queensland on 31 March 2014 (as part of the payment by Gulf of $255,562.56 into Court) and paid out of Court to Chalk & Fitzgerald;
4. an amount of $75,000 paid by Gulf into Court by bank cheque on 31 March 2014 (as part of the $255,562.56 payment) and paid out of Court into an account operated by Mr Woosup in the name of the Ankamuthi Western Cape Community Trust at the CBA on 7 August 2014;
5. an amount of $30,000 paid by Gulf into Court by bank cheque on 31 March 2014 (as part of the $255,562.56 payment) and paid out of Court to MacDonnells Law for and on behalf of Mr Woosup and Ms Tamwoy;
6. an amount of $1,267.25 paid from the trust account of MacDonnells Law on 12 January 2015 to the Ankamuthi Western Cape Community Trust (which amount formed part of the amount of $31,267.25 paid out of Court to MacDonnells Law for the benefit of Mr Woosup and Ms Tamwoy)

The bank statements produced on subpoena show that an account was opened at the Commonwealth Bank branch at 76 Lake Street, Cairns in the name 'Larry Joe Woosup as trustee for the Ankamuthi Western Cape Community Trust' on 28 January 2014. On 29 January 2014, there was a cash withdrawal of $50,000 at Cairns from that account and a further cash withdrawal at Cairns from that account of $50,000 on 31 January 2014. By 31 January 2014, the account was overdrawn by an amount of $100,160 with a temporary excess limit of $135,000. It is not clear what happened to the $50,000 cash withdrawal from the CBA Woosup Trust Account 188 on 29 January 2014. However, the $50,000 cash withdrawal from that account on 31 January 2014 was paid into the CBA Woosup Personal Account 343 on 31 January 2014.

[137] In all, these amounts constitute total payments of $371,267.25 paid either into the hands of Mr Woosup, by payment into accounts controlled and operated by him in the name of the Ankamuthi Western Cape Community Trust or to him personally, or payments made in discharge of obligations owed by Mr Woosup and Ms Tamwoy to Chalk & Fitzgerald and then to MacDonnells Law. Of that sum of $371,267.25, an amount of $370,562.56 was paid by Gulf. The remaining amount of $1,267.25 represents the accretions on Gulf's payment into Court of $255,562.56.

[247] Greenwood J accepted the evidence given by all of the deponents relied upon by the applicants and at paragraph [248] apart from accepting the evidence of the deponents relied upon by the applicants. The Court found as facts all of those matters of fact described in these reasons.

[154] The Court made the following findings:

1. Mr Woosup and Ms Tamwoy entered into the Gulf Ancillary agreement without prior disclosure to the Ankamuthi native title claim group of the outcome of the negotiations. They also failed to disclose to the Ankamuthi native title claim group, prior to entering into the agreement, the terms of any proposed agreement with Gulf or a draft of a proposed agreement. In particular, they also failed to disclose to the Ankamuthi native title claim group, prior to entering into the agreement, the arrangements for the payment of royalties, prepayments and other benefits payable by Gulf under the agreement. They also failed to disclose to the Ankamuthi native title claim group prior to entering into the agreement, the rights they purported to confer upon Gulf in consideration of Gulf performing the terms of the agreement and, in particular, in consideration of Gulf paying the prepayments and the royalty payments contemplated by the agreement.

2. By engaging in the conduct described at, Mr Woosup and Ms Tamwoy deprived the Ankamuthi native title claim group of the opportunity of considering any proposed agreement with Gulf at a meeting of the members of the Ankamuthi People, consistent with their cultural traditions. Mr Woosup engaged in the conduct described above, despite having been told by Mr Wone and Chalk & Fitzgerald Lawyers that he, in undertaking discussions with Gulf, was acting for and on behalf of the Ankamuthi people as a whole and acting on behalf of the Ankamuthi native title claim group as a whole and owed his people 'strict duties'.

3. Mr Woosup and Ms Tamwoy did not disclose to the Ankamuthi native title claim group the fact of the agreement or details of the receipt of payments from Gulf pursuant to that agreement. Rather, representatives of the Ankamuthi native title claim group became aware of the terms of the agreement during the course of these proceedings.

4. Mr Woosup appropriated for his own benefit all of the payments and failed to deal with those monies for and on behalf of his people. Mr Woosup treated his people’s money, benefits and compensation, as his own, and has entirely failed to account for the way in which it was used.

5. Mr Woosup has acted in breach of the fiduciary obligations he owed to his own people. He has preferred his own interests to their interests. All of the monies paid by Gulf have been used and applied by Mr Woosup in furtherance of his own interests and in derogation and disregard of the interests of his people, the Ankamuthi native title claim group.

6. The monies paid by Gulf under the Ancillary agreement to the Ankamuthi Western Cape Community Trust, were held on trust by Mr Woosup (whether in his own capacity or in his contended capacity as trustee of the Western Cape Community Trust) for and on behalf of the Ankamuthi native title claim group. Once banked, the monies were held in those accounts (in either capacity in which Mr Woosup held the monies) on trust for the Ankamuthi native title claim group as beneficiaries.

7. Every day that Mr Woosup and Ms Tamwoy failed to fully disclose the terms of the Ancillary agreement with Gulf and the payment to Mr Woosup either personally or in his capacity as trustee of the Western Cape Community Trust (a trust controlled by him), of any benefits payable by Gulf under the agreement, constituted a continuing breach of duty owed to the Ankamuthi native title claim group by them.

8. Every transaction by which Mr Woosup applied the monies received by him from Gulf, to his own use, constituted a breach of fiduciary duty owed to the Ankamuthi native title claim group and a breach of trust by applying the monies to his own use rather than applying the monies for and on behalf of the Ankamuthi native title claim group.

[160] The total amount paid to or for the benefit of Mr Woosup is $371,267.25 as described in these reasons and, in particular, the matters set out at [128][137]). However, the applicants abandon any claim in relation to the accretions and thus they confine their claim on behalf of the Ankamuthi people to recovery from Mr Woosup of an amount of $370,000.00.

[161] The Court stated that by the well settled doctrines of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust, or violation of fiduciary duty, and the like. His Honour made a declaration that he held the monies on a constructive trust from the moment in time that Mr Woosup received any part of the benefits.

[163]–[171] Greenwood J granted the following relief:

'First, a declaration that Larry Woosup and Beverley Tamwoy (also known as Beverley Mamoose) breached the duties they owed to the native title claim group for the *Ankamuthi* native title determination application QUD 6158 of 1998 being a native title claim group as described at [4] of the reasons for judgment published today by entering into an agreement described as an "Ancillary agreement" with Gulf Alumina Limited without first obtaining the authority of the native title claim group for the *Ankamuthi* native title determination application QUD 6158 of 1998.

Second, a declaration that the financial benefits set out in the schedule to the declaration paid by Gulf Alumina Limited pursuant to the Ancillary agreement dated 4 December 2013 and received by Larry Woosup whether in his own capacity or in purported exercise of a capacity as trustee of the Ankamuthi Western Cape Community Trust were at all relevant times benefits held by Larry Woosup for and on behalf of the native title claim group for the *Ankamuthi* native title determination application QUD 6158 of 1998 being a native title claim group as described at [4] of the reasons published today.

Third, a declaration that as to the benefits described in Declaration 2, Mr Woosup held those benefits on a constructive trust for and on behalf of the *Ankamuthi* native title claim

group (the "beneficiaries") being the native title claim group described at [4] of the reasons for judgment published today, from the moment Mr Woosup received those benefits represented by each payment whether he received them by bank cheque in the way described or whether the monies were received from Gulf by payment of the monies into the Supreme Court of Queensland and then paid out in the way described in these reasons.

Fourth, an order that Larry Woosup account for the financial benefits derived by him or under his control identified in Declaration 2 and the schedule to Declaration 2, to the native title claim group for the *Ankamuthi* claim being a native title claim group as described at [4] of the reasons published today.

Fifth, an order that Larry Woosup pay to and for the benefit of the native title claim group being a native title claim group as described at [4] of the reasons published today an amount of $370,000 by paying that sum to *Seven Rivers Aboriginal Corporation (ICN 8522).*

Sixth, an order that Larry Woosup pay the monies contemplated by the above order by paying those monies into Court by 6 February 2018.

Seventh, Larry Woosup and Beverley Tamwoy pay the costs of the applicants of and incidental to these proceedings.

Greenwood J made an order that the proceeding be adjourned to a date to be nominated by the Court after 6 February 2018.'

[173] The Court deemed it appropriate to act to protect the interests of the beneficiaries of the constructive trust, the Ankamuthi people, by making an order, returnable when the proceeding is listed at a date after 6 February 2018, directing that Mr Woosup be prevented from exercising any power or authority to effect transactions on any account held by the PBC as trustee for the native title holders to which any monies are deposited by Gulf or any other party for and on behalf of the native title holders. To the extent that the beneficiaries are potentially exposed to the adverse consequences of any conduct by Mr Woosup, by reason of his position within the PBC, which may provide him with an opportunity to act to the detriment of the native title holders, the jurisdiction in equity is sufficiently broad to enable the Court to protect the interests of the beneficiaries by making the order contemplated by [172] of these reasons.

Peterson on behalf of the Wunna Nyiyaparli People v State of Western Australia (No 2) **[2017] FCA 1468**

6 December 2017, Costs Application, Federal Court of Australia, Western Australia, McKerracher J

In this matter McKerracher J ordered that the appellant pay the Nyiyaparli respondent's costs of appeal and the objection to the competency of the appeal, in a lump sum of $14, 561.00.

In *Peterson on behalf of the Wunna Nyiyaparli People v State of Western Australia* [2017] FCA 1056 (*Peterson No 1*), McKerracher J upheld an application for the appeal's summary dismissal on the basis of lack of competency. The Nyiyaparli people sought an order that the appellant pay the Nyiyaparli respondent's costs of the appeal and objection to the competency of the appeal in the sum of $14,561.00, or, alternatively, for an order that the costs be taxed if not agreed. No submissions were filed by any other respondent and the appellant did not file any submissions in response.

The Court noted that, in accordance with *Far West Coast Native Title Claim v State of South Australia (No 8)* [2014] FCA 635, the fact that the Nyiyaparli Respondent was represented by an ATSI representative body, did not preclude the award of costs [9].

The Nyiyaparli respondent submitted that the appellant had acted unreasonably as per s 85A(2) of the *Native Title Act 1993* (Cth) in:

1. purporting to serve and proceed with an appeal which was back-dated and not filed within the required 21 days

2. purporting to serve and proceed with an appeal against an interlocutory order for which no leave had been sought or granted and would not have been granted because no substantial injustice would occur from refusal

3. purporting to serve and proceed with an appeal against an order removing them as respondents to an action which is not possible due to s 24(1AA)(b)(i) of the *Federal Court of Australia Act 1976* (Cth)

4. putting the Nyiyaparli respondent to the expense of participating in the incompetent appeal and in having to lodge an objection to the competency of the appeal.

The affidavit of Cheryl Collins submitted a draft bill of costs outlining the costs incurred by the Yamatji Marlpa Aboriginal Corporation as legal representative of the Nyiyaparli Respondent. The lump sum for the order of costs may be made in accordance with rule 40.02(b) of the *Federal Court Rules 2001* (Cth). His Honour noted that an order of lump sum costs was deemed to save the additional costs of taxation in *Stock v Native Title Registrar (No 2)* [2014] FCA 202.

The Court held that the success of the respondent was comprehensive, and upheld the validity of respondent submissions to varying degrees. Arguments on appeal were deemed to have no prospects of success and for the reasons outlined in *Peterson No 1*, appellant proceedings were before the primary judge were validly refused. The pursuit of appeal was rendered unreasonable and the Court held that the respondent should have costs awarded and that the costs sought were reasonable.

Griffith Local Aboriginal Land Council v Attorney-General of New South Wales [2017] FCA 1452

4 December 2017, Non-claimant Application, Federal Court of Australia, New South Wales, Griffiths J

In this case Griffiths J determined that native title does not exist in relation to land held in fee simple by the applicant, the Griffith Local Aboriginal Land Council. The respondents were the Attorney-General of NSW and NTSCORP Ltd. The applicant had been transferred the land from the State of NSW under *s 36 of the Aboriginal Land Rights Act 1983* (NSW) (ALR Act) in 2015 and intends to develop the unused police station on the land as a Community Centre for Wiradjuri culture. The determination sought relates to restrictions in dealing with the land as a result of ss 36(9) and 42 of the ALR Act.

The Court was satisfied on the applicant's evidence of a 1934 Gazette Notice, together with aerial photographs and historical work from the Griffith Library, that native title had been extinguished due to the establishment of a public work, that is, the former Griffith Police Station, on the land before 23 December 1996. The evidence was sufficient to establish the former police station as an exclusive possession act under *s 23B(7)(b) of the Native Title Act 1993* (Cth). Furthermore, there were no submissions of native title existing in the land and the respondents did not oppose the orders being made.

Akiba on behalf of the Torres Strait Regional Seas Claim v State of Queensland [2017] FCA 1438

1 December 2017, Practice and Procedure, Federal Court of Australia, Queensland, Mortimer J

In this matter, Mortimer J vacated an order for confidentiality with respect to the transcript of proceedings of a closed session on 22 November 2017.

[2] On 22 November the Court heard evidence from Mr Leo Akiba in a closed session. Mr Akiba is the only individual who constitutes the applicant in this proceeding. Pursuant to an order the transcript of those proceedings remained confidential to those who remained in the Closed Court session. Her Honour concluded in these proceedings that the confidentiality order made on 22 November 2017 in relation to the transcript should be vacated.

[14] Mr Akiba and the members of the claim group were invited to speak directly to the Court around the bar table in an informal court session; 'a practice that which has been commonly adopted in native title case management in Queensland and is useful when there are concerns about the applicant, conduct of the native title procedure or a disagreement. In the present proceeding the issue was that no one who is entitled to speak for the waters of the Part B Sea Claim is a member of the applicant. However, the chairs of

the Prescribed Body Corporate (PBC) who represent native title holders from that claim had no official recognised role in the proceeding.'

On 22 November 2017, Mr Akiba gave evidence that he could only speak for his islands: Saibai, Dauan and Boigu and that he could not speak for the other island and therefore could not speak for Part B of the Sea claim and consequently there was an urgent need to reconstitute the applicant. The employed solicitor for the Torres Strait Regional Authority said that there would be practical difficulties in authorising the constitution of a new applicant given the size and diaspora of the claim group and suggested that Mr Akiba should remain the sole applicant until at least April 2018. Mr Akiba subsequently instructed the employed solicitor that he no longer wished for him to act as his legal representative for Part B of the Seas claim and subsequently a notice of ceasing to act was filed later that day.

Proposed orders sought a process for authorising a new applicant for Part B of the Sea Claim to be completed by 29 March 2018. The TSRA did not consent nor oppose the making of such orders.

The closed session to hear evidence from Mr Akiba involved only the Court asking questions to Mr Akiba who is now an elderly man. The Court gave leave to the other parties and legal representatives present to submit any additional questions they wished her Honour to ask Mr Akiba, and it would be within her Honour's discretion whether or not to put those questions to Mr Akiba.

At the end of the closed session the Court had determined that nothing could occur or be progressed until an authorisation meeting was organised by the three new Indigenous respondents and Mr Akiba via their legal representatives.

[56] The Court vacated the order for confidentiality with respect of the transcript Mr Akiba consented to this course of action and the confidentiality order was vacated.

2. Legislation

Commonwealth

Aboriginal Land Rights (Northern Territory) Amendment Bill 2017

Status: Introduced and second reading moved on 6 December 2017

Stated purpose: The Bill adds land subject to traditional land claims in the Kakadu region, in the Northern Territory (Kakadu Land), to Schedule 1 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*Land Rights Act*). This enables Kakadu Land can be granted as Aboriginal land. The Bill also provides for the leaseback of the Kakadu Land to the Director of National Parks (Director).

The Bill also adds land in the town of Urapunga, subject to the Township of Urapunga Indigenous Land Use Agreement (Urapunga Land) to Schedule 1, of the *Land Rights Act*. This enables Urapunga Land to be granted as Aboriginal land.

Native title implications: The Kakadu Land is subject to four, currently unresolved, land claims. These claims may be settled on the basis that Kakadu Land will be granted as Aboriginal land, under the *Land Rights Act,* but subject to immediate leaseback of the land, to the Director.

For further information please see the Second Reading Speech.

Victoria

Planning and Environmental Amendment (Distinctive Areas and Landscapes) Bill 2017

Status: Introduced and second reading moved on 14 December 2017

Stated purpose: The Bill amends the *Planning and Environment Act 1987* to provide for the protection and conservation of distinctive areas and landscapes, to make consequential amendments to other Acts and for other purposes.

The Bill also provides for the preparation and implementation of a Statement of Planning Policy for a declared area, to ensure coordinated decision-making by public entities in relation to declared areas.

Native title implications: The Bill requires that the Statement of Planning Policy for a declared area must set out Aboriginal tangible and intangible cultural values, and other cultural and heritage values, in relation to the declared area.

For further information please see the Second Reading Speech.

Marine and Coastal Bill 2017

Status: Introduced and second reading moved on 13 December 2017

Stated purpose: The Bill repeals and partially re-enacts the *Coastal Management Act 1995* and provides for the integrated and coordinated planning and management of the marine and coastal environment of Victoria. The Bill is designed to facilitate integrated and co-ordinated policy, planning, management, decision-making and reporting across catchment, coastal and marine areas.

Native title implications: The Bill outlines that the objectives of the planning and management of the marine and coastal environments, require 1) acknowledgement of traditional owner groups' knowledge, rights and aspirations for land and sea country and 2) engagement with specified Aboriginal parties, the community, user groups and industry in marine and coastal planning, management and protection.

For further information please see the Second Reading Speech.

3. Native Title Determinations

In December 2017, the NNTT website listed 7 native title determinations.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC/ PBC
Tjayuwara Unmuru Compensation Application	Pearson on behalf of the Tjayuwara Unmuru Native Title Holders v South Australia	20/12/2017	SA	Native title does not exist	Consent	Compensation	N/A
Ngarrindjeri and Others Native Title Claim	Sumner v State of South Australia (Ngarrindjeri Native Title Claim Part A)	14/12/2017	SA	Native title exists in parts of the determination area	Consent	Claimant	Ngarrindjeri Aboriginal Corporation
Bar Barrum People #9	Congoo on behalf of the Bar Barrum People #9 v State of Queensland	12/12/2017	Qld	Native title exists in the entire determination area	Consent	Claimant	Mbabaram Aboriginal Corporation RNTBC
Bar Barrum Rivers Claim	Congoo on behalf of the Bar Barrum People #10 v State of Queensland	12/12/2017	Qld	Native title exists in the entire determination area	Consent	Claimant	Mbabaram Aboriginal Corporation RNTBC
Gumbaynggirr People	Kelly on behalf of the Gumbaynggirr People v Attorney General of New South Wales	8/12/2017	NSW	Native title exists in parts of the determination area	Claimant	Consent	N/A
Gingirana	Atkins on behalf of the Gingirana People v State of Western Australia	7/12/2017	WA	Native title exists in the entire determination area	Claimant	Consent	N/A
Griffith Local Aboriginal Land Council	Griffith Local Aboriginal Land Council v Attorney-General of New South Wales	4/12/2017	NSW	Native title does not exist	Non-claimant	Unopposed	N/A

4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate

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	2
Queensland	82	5
South Australia	16	0
Tasmania	0	0
Victoria	4	0
Western Australia	45	2
NATIONAL TOTAL	**179**	**4**

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 11 January 2018.

5. Indigenous Land Use Agreements

In December 2017, 2 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
21/12/2017	Ugar Community Hall ILUA	QI2017/011	Body Corporate	Qld	Community, Infrastructure
8/12/2017	Wangan & Jagalingou People and Adani Mining Carmichael Project ILUA	QI2016/015	Area Agreement	Qld	Mining, Extinguishment, Large mining

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

6. Future Act Determinations

In December 2017, 2 Future Act Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
21/12/2017	Kevin Allen & Others on behalf of Njamal and David John Taylor and Western Australia	WO2017/0516	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. Member 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).
11/12/2017	Kevin Allen & Others on behalf of Njamal and Raymond John Thomas Butler and Western Australia	WO2017/0102	WA	Future Act - Dismissed	As above.

7. Publications

Attorney General's Department

Reforms to the Native Title Act 1993 (Cth)

On 29 November 2017 the Attorney General and Minister for Indigenous Affairs released an options paper – *Reforms to the Native Title Act 1993* (Cth). The paper is available on the Attorney-General's Department website. Submissions on the options paper will be accepted until **Thursday 25 January 2018**. Submissions can be emailed to native.title@ag.gov.au or posted to:

Native Title Unit

Attorney-General's Department

3–5 National Circuit BARTON ACT 2600

If you have any questions about the reforms process or the options included in the paper, please contact the Native Title Unit at native.title@ag.gov.au or (02) 6141 3615.

Carpentaria Land Council Aboriginal Corporation

Newsletter

The July–December edition of the CLCAC newsletter is now available. To download, please visit the CLCAC website.

Indigenous Business Australia

Annual Report

The IBA's 2016–2017 annual report is now available. For more information, visit the IBA website.

Lexis Nexis

Native Title News

The latest article by Robert Blowes SC, 'Getting to native title – roles and important distinctions for anthropologists and advocates' is now available in Volume 12 No 8 (December 2017) of Native Title News.

North Queensland Land Council

Message Stick

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

Indigenous Business Australia (IBA)

IBA Investment Partnerships: call for expression of interest

IBA invites expression of interest for co-investment in commercial opportunities. For more information see the IBA Investment Partnership web page.

Submissions close on 28 February 2018.

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.

For further information on training courses, visit the ORIC website.

9. Events

AIATSIS

National Native Title Conference 2018

In 2018 the annual 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

The call for papers will close on 16 February. For more information and to register, visit the AIATSIS website.

NTRB Legal Workshop 2018

Native Title Representative Body and Service Provider (NTRB) lawyers are at the forefront of native title law, policy and practice. This workshop provides a space for NTRB lawyers to share and develop their knowledge of contemporary native title legal issues.

In 2018, AIATSIS will partner with the Jumbunna Institute for Indigenous Education and Research at the University of Technology Sydney to offer unique professional development and networking opportunities.

Date: 21–22 February 2018

Location: University of Technology Sydney, NSW

For more information or to register, please visit the AIATSIS 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.