AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

WHAT'S NEW IN NATIVE TITLE

JANUARY – FEBRUARY 2018

1. Case Summaries

Kemppi v Adani Mining [2018] FCA 105

15 February 2018, Application for Leave to Appeal, Federal Court of Australia, Queensland, Reeves J

In this matter the Court ordered that: (1) the application for leave to appeal filed on 5 February 2018 be dismissed and (2) the application to continue the order made on 18 December 2018 be dismissed and that the order be vacated.

In this proceeding Ms Kemppi sought leave to appeal the judgment in *Kemppi v Adani Mining Pty Ltd (No 3)* [2018] FCA 40 (see summary below).

[1] Leave is required under s 24(1A) of the *Federal Court of Australia Act 1976* (Cth) because there is no dispute that the primary judgment was an interlocutory judgment. [2] The test to be applied in an application for such leave was set out by his Honour as follows:

1. Whether in all of the circumstances of the case the decision is attended by sufficient doubt to warrant its being reconsidered by the Full Court; and
2. Whether substantial injustice would result if leave were refused, supposing the decision to be wrong (*Construction Forestry Mining an Energy Union v Australian Competition and Consumer Commission* [2016] FCAFC 97 at [13] per Dowsett, Tracey and Bromberg JJ).

[4] Ms Kemppi needed to satisfy both limbs of this test (*Rawson Finances Pty Limited v Deputy Commissioner of Taxation* [2010] FCAFC 139 at [5] per Ryan Stone and Jagot JJ).

[5] As the primary judgment involved a discretionary decision, to succeed on an appeal from it Ms Kemppi needed to establish that it was affected by one of the categories of errors identified in *House v The King* (1936) 55 CLR at 504-505. That is, that his Honour acted upon a wrong principle or that he allowed extraneous or irrelevant matters to guide or affect his decision and/or he made a mistake on the facts or did not take into account some material consideration.

[6] In addition Ms Kemppi would need to confront the more recent decisions of the High Court as noted by the Full Court in *Samsung Electronics Company v Apple Inc.* [2011] FCAFC 156 at [39] to the effect that, where the decision appealed from involves a discretionary judgment there is a strong presumption in favour of its correctness and it should be affirmed unless the appeal court is satisfied that it is clearly wrong.

[7] Ms Kemppi argued that Reeves J had made four errors in the refusal to grant an injunction set out as follows:

1. that at [33] Reeves J overlooked the possibility that even if the ILUA was declared void the Court might conclude that, while it was registered, whatever extinguishment of native title that had occurred would continue to be valid and effective pursuant to s 24 EB *Native Title Act 1993* (Cth);
2. that at [36] and [42] having regard to the error at [33] Reeves J wrongly concluded that Ms Kemppi did not have strong probability of success in her four claims in the substantive proceeding;
3. that at [42] Reeves J erred in finding Ms Kemppi would suffer no prejudice as an individual from the extinguishment of communal native title rights;
4. at [65] that Reeves J erred by concluding that the prospect of irreversible and wrongful extinguishment of native title interests was not an exceptional circumstance in that such an outcome was a matter that affects the public generally.

[8] Reeves J reiterated what he said in the primary judgment: given he was due to preside over the trial in the substantive proceeding on that basis that he should not express any concluded view on the countering submissions of counsel.

[9] With respect to the first point made by Ms. Kemppi his Honour stated that he did not intend to and had not expressed any views on the issue and did not decide upon it. For the reasons set out in [10] Reeves J rejected any relevant error with respect to the second point made by Ms. Kemppi in her application to secure leave to appeal. He did not consider either to be issues that warrant the primary judgment being reconsidered by a Full Court. [11] With respect to the third point made by Ms. Kemppi in her application to secure leave to appeal his Honour stated that he did in fact find that Ms. Kemppi and her fellow applicants may suffer prejudice as a result of the extinguishment of native title in the Surrender Zone and his Honour stated that his conclusion at [42] was directed to the prejudice Ms Kemppi specifically claimed she would suffer as a member of the Wangan Jangalingou people not as an individual. He found no error in that conclusion and found that it did not warrant the primary judgment being reconsidered by a Full Court. Finally with respect to the fourth point made by Ms Kemppi, his Honour stated that Ms Kemppi in her contention about the public interest that undoubtedly exists with respect to native title litigation failed to appreciate the distinction between litigation in which the public has an interest and the character of the interests being pursued in a particular piece of litigation (*Oshlack v Richmond River Council*

[1998] HCA 11). On the latter question his Honour re-enforced his views in *Burragubba v State of Queensland* [2016] FCA 1525 at [15].

[13] Reeves J found that Ms Kemppi had failed to identify any relevant error in the primary judgment that would warrant it being re-considered by the Full Court. [14] Since Ms Kemppi failed to meet the first limb of the test which is conjunctive, it was unnecessary to consider the second limb and the application for leave to appeal was dismissed. As a consequence since Ms Kemppi failed to obtain leave to appeal the primary judgment her application to extend the order made on 18 December 2017 pending her proposed appeal was also dismissed.

Smirke on behalf of the Jurruru People v State of Western Australia [2018] FCA 101

15 February 2018, Application to Strike Out, Federal Court of Australia, Queensland, Barker J

In this matter, Barker J ordered that: pursuant to s 84C of the *Native Title Act 1993* (Cth) (NTA), by 31 August 2018, the applicant in native title determination application WAD6007/2000 (Jurruru #1 application) is to file and serve a properly authorised interlocutory application to amend the Jurruru #1 application in a manner consistent with the description of the common law holders of native title in the Jurruru People determination made by McKerracher J on 1 September 2015 in *Smirke on behalf of the Jurruru People v State of Western Australia* [2015] FCA 939.

[1] On 22 December 2017, Barker J dismissed the application of the Jurruru respondents in WAD490/2016, for an order that the application for determination of native title made by the Yinhawangka Gobawarrah (YG) applicant in WAD490/2016 be summarily dismissed. See *Tommy on behalf of the Yinhawangka Gobawarrah v State of Western Australia* [2017] FCA 1568.

[2] The Jurruru respondents are also applicants for native title in Jurruru #1 and WAD327/2012 (Jurruru #2 application) (Jurruru applicants).The claims made on behalf of the YG and the Jurruru applicants overlap and, as a result of the orders made by Barker J on 22 December 2017, are now being case managed towards a trial in mid-2019 to determine the holder or holders of native title in the overlap area.

[4] At the time the application for summary judgment of the Jurruru respondents was heard, the YG applicant also agitated for orders set out in a minute of proposed orders for case management hearing on 25 May 2017. [5] At paragraphs (1) and (2), the minute sought the joinder of the YG applicant as a respondent in each of the Jurruru #1 and Jurruru #2 applications. The YG applicant party was joined in these proceedings on 7 July 2017.

[6] However, the YG applicant also sought orders in respect of the asserted failure of the Jurruru applicants to amend their two native title applications in a manner consistent with the description of the common law holders of native title in the Jurruru People determination made by McKerracher J on 1 September 2015. See *Smirke on behalf of the Jurruru People v State of Western Australia [2015] FCA 939*.

[23] – [24] In Barker J's view, it was appropriate, in the circumstances of the overlapping claims, that the Jurruru applicants duly amend the Jurruru #1 and Jurruru #2 applications on or before 31 August 2018. In all the circumstances, Barker J was not minded to make the suite of orders culminating in the strike out of the Jurruru #1 or the Jurruru #2 claim in the event of non-compliance, as proposed by the YG applicant. His Honour in having regard to the history of the Jurruru claims and the continuing case management of this matter and from what had been said by senior counsel for the Jurruru applicants from the bar table, that the Jurruru claim group descriptions would be amended.

Kemppi v Adani Mining Pty Ltd (No 3) [2018] FCA 40

2 February 2018, Application for Interlocutory Injunction, Federal Court of Australia, Queensland, Reeves J

In this matter the Court ordered that the application filed 1 December 2017 be dismissed.

[1] Ms Delia Kemppi and her fellow applicants (who are referred to jointly as 'Ms Kemppi' in the reasons for judgment), comprise five of the twelve members of the applicant (the W & J applicant) that has been authorised by the Wangan and Jangalingou people to pursue on their behalf the Wangan and Jangalou native title determination application (the W & J application). In that capacity Ms Kemppi applied for an interlocutory injunction to restrain until the final determination of this proceeding, Adani Mining Pty Ltd from seeking, and the State of Queensland from granting approval under cl 9(b) of an Indigenous Land Use Agreement (the ILUA) made and registered under the apposite provisions of the *Native Title Cth 1993* (Cth) (NTA).

[2] The hearing of the injunction was expedited because the trial of this proceeding was due to commence in six weeks and both Adani and the State indicated that they intend to proceed in the manner described above. His Honour stated that they are entitled to do so because the ILUA mentioned above was registered on the Register of Indigenous Land Use Agreements under Part 8 of the NTA (the Register) on 8 December 2017.

Background

[3] The W & J application has been on foot for 14 years having been filed on 27 May 2004. It covers an area of approximately 30,277.6 square kilometres on the western edge of Central Queensland and includes the townships of Clermont, Alpha, Rubyvale and Capella. For the purposes of this application it also includes an area where Adani proposes to develop the Carmichael coal mine.

[4] The W & J application was entered on the Register of Native Title Claims under s 190(1)(A) of the NTA on 5 July 2004. One of the consequences of that registration is that Ms Kemppi and the other members of the W & J applicant, from time to time, also comprise the Registered Native Title Claim for the claim (the registered W&J claimant) as that expression is defined in the NTA (see ss 253 and 186(1)(d)) NTA).

[5] In April 2016, Adani entered into the ILUA with the W & J registered claimant and the State. That followed a meeting of the Wangan and Jangalingou people held on 16 April 2016 which authorised the making of the ILUA under s 251A NTA.

[6] Adani then applied to the Native title Registrar under s 24CG of the NTA to have the ILUA entered on to the Register. For the purposes of that application Adani sought and obtained from Queensland South Native Title Services (QSNTS) a certificate under s 203 BE NTA. The Registrar entered the ILUA on to the Register on 8 December 2017.

[9] In the meantime, on 24 March 2017, Ms Kemppi filed this proceeding, seeking among other things, a declaration that the Certificate is void and of no effect and a declaration that, as a consequence, the Registrar lacked the jurisdiction to register the ILUA on the Register.

In June 2017, this proceeding was set down for trial to commence before his Honour on 12 March 2018.

The relevant provisions of the ILUA are set out in paragraph [11]. Clause 9 of the ILUA is particularly relevant.

[15] Ms Kemppi contended correctly in his Honour's view that the statement in cl9(g), combined with the operation of s 24 EB(1)(d) of the NTA means that whatever native title exists in the area will be extinguished permanently by the approval of surrender under cl 9(b) of the agreement.

[16] A map of the proposed mining activity and the 'surrender zone' is annexed to the reasons for judgment. [19] It comprises approximately 2,750 hectares made up of six lots. Mr Manzi, head of Environment and Sustainability at Adani stated in his affidavit filed in this proceeding that by 8 December 2017, all of the requirements Adani had to meet under its agreement with the State for that purchase had been satisfied. The land is situated in the Galilee Basin State Development Area and partly in the Abbot Point State Development Area. Adani had submitted a proposal to the State that land be compulsorily acquired for the purposes of a rail component of the Carmichael Project. [21] A Notice of Intention to resume was recorded with respect to the land on 23 March 2017. It was not clear to the Court when the process of compulsory acquisition would be completed.

The principles

[25] Reeves J stated that there are two main inter related inquiries to the grant of an interlocutory injunction.

1. Ms. Kemppi needed to make out a *prima facie* case in the sense that she needed to show that she had a sufficient likelihood of success at trial to justify the grant of an injunction to preserve the status quo.
2. She also needed to show that the balance of convenience favours that course: see *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [65] – [72] per Gummow and Hayne JJ (Gleeson CJ and Crennan agreeing at [19]; *Samsung Electronics v Apple Inc.* [2011] 217 FCAFC 156.

[26] The Court's role is to assess the strength of the probability of ultimate success and this varies from case to case. It will also depend upon the rights asserted and the practical consequences likely to flow from the grant of the injunction being sought. His Honour stated that 'In the circumstances of this case the strength of Ms Kemppi's probability of ultimate success is very much a live issue.'

[27] The second and interrelated inquiry, namely the balance of convenience, requires the Court to make an assessment of the harm that may be occasioned to the applicant if no

injunction is granted and the harm that may be occasioned to the respondent if an injunction is granted, and to weigh those two considerations along with any others of relevance.

[28] Ms Kemppi submitted that there is a third inquiry: whether the plaintiff will suffer irreparable harm for which damages will not be adequate compensation unless an injunction is granted. His Honour however disagreed for the reasons set out in *Samsung* and held that is a matter which will be assessed as part of the balance of convenience and justice.

The strength of the probability of Ms Kemppi's ultimate success

[31] In Ms Kemppi's further amended statement of claim (FASC) there are four components:

1. Unreasonableness in the issue of the certificate
2. Failure to consider relevant considerations when issuing the certificate
3. A claim that the ILUA did not contain a complete description of the surrender area as required by regs 5 and 7(2) (e) of the *Native Title (Indigenous Land Use Agreements) Regulations 1999*
4. A claim that all member of the W&J applicant had to sign the ILUA in order for it to be valid and effective.

[32] The trial of this proceeding was due to commence on 12 March 2018 and consequently his Honour did not consider it to be appropriate to express any concluded or even detailed views on the countering submissions of counsel concerning the four claims. As to the first two claims, his Honour reiterated the reservations about the probability of success of those claims as pleaded in the FASC: see *Kemppi v Adani Mining Pty Ltd (No2)* [2017] FCA 1086 at [17]-[20]; [29]-[31], [35], [39] and [46]-[48].

[33] Reeves J considered that the competing constructions advanced by counsel for Ms Kemppi and Adani each had their strengths 'so it could not be said that Ms Kemppi's construction is lacking in strength in the sense of its probability of success.' His Honour considered a more difficult question to be whether a failure to comply with the regulation caused the application for the registration of the ILUA to be invalid so that the Registrar thereafter lacked jurisdiction to consider that application. This involves an aspect of the s 24 EB issue: if Ms Kemppi is correct that the registration is void *ab intitio,* there is no need for an injunction, but if she is correct she will therefore fail on this critical aspect of her substantive proceedings at trial. Ms. Kemppi's fourth claim considers the interpretation of resolutions passed at the meeting of the claim group on 16 April 2016.

[35] Since the question posed by the claim was whether the making of an ILUA was conditional on all of the members of the W&J Applicant signing it, this additional part of the resolution 4 was significant to the strength of Ms Kemppi's probability of ultimate success on the claim.

[36] However Reeves J concluded that Ms Kemppi did not on the balance of probability have a strong prospect of success on any of the four claims pleaded in her FASC. Reeves J then turned to consider the balance of convenience and justice inquiry.

The prejudice Ms Kemppi claims she will suffer if the injunction not granted

[37] His Honour prefaced consideration of this issue by stating that 'damages are not an adequate remedy for the extinguishment of an Aboriginal person's native title rights and

interests.' He also rejected Adani's submission that the Wangan and Jagalingou people have not yet had a determination of native title in their favour.

[38] Reeves J stated that 'where there are multiple members of the applicant or a registered native title claimant the members have to act jointly and collectively in discharging their role': see *Burragubba v State of Queensland* [2016] FCA 984 at [141] – [142]. It follows that a single member or even a minority of the membership cannot claim to exercise the authority of the applicant or the registered native title claimant as Ms Kemppi purports to do in this proceeding. Therefore 'I do not see how she can validly claim to suffer any prejudice in that capacity if this injunction were not granted.'

[42] Reeves J concluded by stating that he did not consider therefore that Ms Kemppi can validly assert that she is able to protect the native title rights and interests of the Wangan and Jangalingou people in this application'. As a consequence the Court found that she would not suffer any prejudice if the injunction was not granted. 'Put differently whatever prejudice she may suffer has already been brought about by the decision of the majority of the Wangan and Jagalingou People attending the meeting of 16 April 2016.'

[43] Affidavits filed by Adrian Burragubba and Elizabeth McAvoy deposed to the sites and features of significance within the surrender area. Mr Bradley Maher, Adani's Indigenous Engagement Manager filed affidavits in response to those affidavits. Reeves J considered this evidence in paragraphs [44] – [54].

[55] Reeves J accepted the evidence of Mr Burragubba and Ms McAvoy about the sites and features located within the vicinity of the surrender area and accepted that they are likely to be affected by construction in the area. His Honour stated: 'If any of the sites and features concerned are within the surrender area and if the native title in that particular area is extinguished, that could arguably have some consequences for access to, and control of, those sites.' Those consequences are not specifically accommodated for under the *Aboriginal Cultural Heritage Act 2003* (Qld). 'The extinguishment that will occur by operation of cl 9(b) of the ILUA could be said to cause prejudice to Ms. Kemppi and her group.' Reeves J therefore took that prejudice into account when determining whether or not the injunction should be granted.

The prejudice Adani claims it will suffer if the injunction is granted

[57] Adani claimed that any delay caused by the grant of the injunction would create uncertainty and reputational damage for the Carmichael project. Adani by way of affidavit evidence filed by its executives claimed it had spent more than $1 billion on the mine and more than $400 million on the railway line and the port components of the project. A further $18 million had been approved for release but construction would not commence until there was clarity around this proceeding. Counsel for Adani submitted that it had established a real risk of prejudice if the injunction was granted. The delay until the commencement of the trial would also need to consider the time for the Court to provide judgment.

[59] By way of reply, the evidence filed in support of Ms Kemppi stated that the ILUA and therefore the injunction only applied to a small area and not the total area of the project. Risks concerning financing of the project were also rebutted by stating that finance had not been assured for the project in any event.

[61] Reeves J in assessing the prejudice Adani might face if the injunction was granted stated that the delay would more likely be months rather than weeks to allow for the trial and

judgment. His Honour did not place much significance on the delay of several months given construction projects were notorious for delays and his Honour assessed the impact as more than very small but not significant as Adani contended.

Ms Kemppi's refusal to provide undertaking as to damages

[62] Ms. Kemppi refused to provide any undertaking as to damages and the impact that the injunction may have on third parties. [63] With respect to this refusal, Ms Kemppi submitted that this was an exceptional circumstance that justified refusal, namely that she was seeking to prevent the permanent extinguishment of her native title rights (see Rares J in *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 (*Weribone*)).

[65] Reeves J did not consider the decision in *Weribone* as justification for Ms Kemppi's refusal. His Honour stated that in *Weribone* the Court itself took the initiative to make the so called 'injunction orders' in the public interest (see at [68] – [69] and [80]). Reeves J characterised those orders as more in the nature of preservation of property orders rather than interlocutory injunction orders sought by a party to a proceeding. Reeves J also noted that no party in *Weribone* sought an undertaking as to damages. And further as Rares J put it at [86]:

The discretion to grant an interlocutory injunction or similar remedy is ordinarily to be exercised only on the condition that an undertaking as to damages is offered. If it is not the Court will proceed very cautiously but may still consider that it should grant that relied without requiring an undertaking.'

Impact on third parties

[68] Ms Kemppi submitted that there would be no impact on third parties. [69] Adani submitted that there would be adverse impacts on the members of the Wangan Jangalingou native title claim group.

[73] Reeves concluded that in taking into account the assessment of the lack of strength of the ultimate success in this proceeding; the competing fundamentally different prejudices identified did not in his Honour's view tip the balance one way or the other. Ms Kemppi's refusal to provide an undertaking as to damages in support of her application meant that on the consideration of the balance of convenience and justice in this application the grant of an injunction was refused and the status quo preserved. [74] The Court ordered that the application be dismissed.

Gomeroi People v Attorney General of New South Wales (No 3) [2018] FCA 71

14 February 2018, Application for Costs, Federal Court of Australia, New South Wales, Rangiah J

On 7 December 2017 Rangiah J gave judgment in *Gomeroi People v Attorney General of New South Wales [2017] FCA 1464*[1]. In this proceeding, Rangiah J did not make orders as to costs of the application to replace the Gomeroi claim group applicant brought under s 66B of the *Native Title Act 1993* (Cth) (NTA).

[1] See What's New in Native Title December 2017.

Rangiah J found no cause to exercise his judicial discretion and depart from the starting point in s 85A (NTA) that each party should bear its own costs: see *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* (No 2) [2011] FCAFC 163.

Section 85A NTA provides that (1) unless the Federal Court provides otherwise each party to a proceeding must bear his or her own costs. However (2) if the Court is satisfied that a party to a proceeding has by any unreasonable act or omission caused another party to incur costs in connection with the institution or conduct of the proceeding the Court may order the first mentioned party to pay some or all of those costs.

[4] The Full Court held in Cheedy that:

1. Section 85A (1) removes the expectation that costs will follow the event , but the Court retains its discretion as to costs under s43 of the FCA Act;
2. the 'unreasonable conduct' of the parties is not a jurisdictional fact which pre-conditions the exercise of the discretion, and on the other hand, s 85A(2) does not control or limit the exercise of discretion in s 85A(1);
3. whilst the exercise of the discretion when making a costs order should be judicial, the starting point is that each party will bear its own costs; and
4. it is not proper to use the power to award costs to punish either a successful or unsuccessful party or as a deterrent to other would be applicants.

In this proceeding, the Court was not satisfied that there was conduct to justify an order for costs against the current applicant.

The unreasonable conduct issue

[6] The replacement applicant submitted that the current applicant had [7] unreasonably failed to adhere to the expectations of the claim group expressed by resolutions passed at the 2013 authorisation meeting. The Court found that NTSCORP may have been partly responsible for the current applicant's failure to call claim group meetings by refusing to assist in facilitating the meetings.

The replacement applicant also submitted that unreasonable conduct of the current applicant caused unnecessary complexity and prolongation of the hearing. The replacement applicant relied upon:

1. the current applicant having raised new allegations shortly before the hearing;
2. the serving of written submissions in excess of the length permitted under orders made by the Court;
3. the making of allegations of misconduct against NTSCORP solicitor Mr Chalmers that were not sustained; and
4. the making of a number of technical and pedantic challenges to the conduct of the 2016 authorisation meeting.

The Court found that both parties had contributed to the complexity and length of the case. [8] –[10] In saying so, his Honour noted that the replacement applicant had filed an affidavit shortly before the hearing, without leave, which contained substantial new evidence that was rejected after lengthy argument, but later admitted by agreement of the parties. [9] In the circumstances the Court was not prepared to depart from the starting point that each party

should bear its own costs and [11] there was no order made as to costs. Substantive cases must be considered in the light of the balance of convenience considerations set out above.

GunaiKurnai People Native Title Claim Group v State of Victoria [2018] FCA 23

30 January 2018, Authorisation of New Applicant and Application for Joinder, Federal Court of Australia, Victoria, Mortimer J

In this case, Mortimer J ordered: (1) the application under s 66B of the *Native Title Act 1993 (Cth)* (NTA) to change the constitution of the applicant be granted; (2) the applicant in the GunaiKurnai People native title determination application VID737/2014, jointly comprising Beryl Booth, Roderick Mullett and Barry Kenny be replaced with Beryl Booth, Collon Mullett, Russell Mullett and Wayne Thorpe; and (3) that the application by Pauline Mullett to be joined as a respondent under s 84(5) of the NTA be dismissed.

[1]-[7] The two applications relate to a claim yet to be settled over land and waters that include Wilson's Promontory National Park in south eastern Victoria. The principal respondent is the State of Victoria.

A previous GunaiKurnai consent determination made over an area north-east of the current claim area was ordered in *Mullett on behalf of the GunaiKurnai People v State of Victoria* [2010] FCA 1144. Shortly before then, the Court heard lengthy arguments in relation to the correctness of the composition of the GunaiKurnai claim group when the Kurnai unsuccessfully sought a separate native title determination in *Rose on behalf of the Kurnai Clans v State of Victoria* [2010] FCA 460 (*'Rose')*. Ms Mullett, the applicant for joinder in this proceeding, had been the lead advocate for recognition of the Kurnai as a group separate from the Gunai in *Rose*. After the 2010 consent determination, the GunaiKurnai claim group combined the names 'Gunai' and 'Kurnai' in an effort to remove perceptions of difference. In the case at hand, Mortimer J found no reason to depart from the basis of North J's decision in *Rose* that the Kurnai formed part of a larger Gunai/Kurnai society.

The section 66B application

The GunaiKurnai People claim group filed the s 66B NTA application to change the constitution of the applicant after the Court raised the issue of whether the Prescribed Body Corporate, the GunaiKurnai Land and Waters Aboriginal Corporation RNTBC (GLaWAC), was properly constituted. GLaWAC had earlier filed progress reports with the Court indicating that its office holders had been replaced with different individuals.

In holding that the application complied with s 66B of the NTA, Mortimer J followed the principles recently set out by Rangiah J in *Gomeroi People v Attorney General of New South Wales* [2017] FCA 1464[2] at [40]- [54].

[28]- [43] Her Honour was satisfied that:

- the GunaiKurnai claim group had adopted a particular decision-making process, at a properly conducted meeting held on 2 September 2017 for the purpose of making the s 66B NTA application, in accordance with s 251B(b) of the NTA;

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

- the decisions taken at the meeting were taken in accordance with the process adopted;
- the claim group identified themselves as the descendants of apical ancestors being the 25 individuals and couples set out in a resolution of the meeting, and that this claim group composition is the same as that accepted by North J for the 2010 consent determination*;*
- the claim group resolved at the meeting to replace the three individuals who constitute the applicant with the four individuals who constitute the proposed applicant, so that they be authorised to act, consistently with s 62A of the NTA, in all proceedings.

The joinder application

[44] – [62] The issue of whether the applicant, Ms Mullett, should be joined as a respondent party to the current native title application turned on whether her position that the Kurnai was a group separate from the GunaiKurnai could be sustained. Mortimer J ultimately determined that joinder was not available to simply re-litigate matters already decided by North J and his Honour's extensive written reasons for judgment in *Rose*.

The Court noted at [62] that the applicant, being a member of the GunaiKurnai claim group is undoubtedly a person whose interests are affected by the current application.

[76] However, the Court found no sufficient cause had been demonstrated to not follow the decision of North J in *Rose*, wherein the Court had considered the issue of the composition of the GunaiKurnai claim group in great detail. Ms Mullet's application for joinder was made on the same basis as the arguments made in *Rose*. [77] The Court noted that Ms Mullet did not apply for leave to appeal from North J's decision in in *Rose*.

Mortimer J also noted at [62], that it was made clear to the Court that the GunaiKurnai claim group's intention is to reach settlement of the current claim under the *Traditional Owner Settlement Act 2010* (Vic) (TOS Act), a course that the applicant for joinder opposed. The Court concluded by noting that Ms Mullett, and those who share her views about the Kurnai, will have an opportunity during the TOS Act process to make submissions about the composition of the claim group, and to make contentions about who are the right people for the country of the current claim area.

Her Honour stated at [80]:

I consider the findings of North J, given after some detailed consideration and with his Honour's usual thoroughness are findings that I should follow as a matter of judicial comity unless I am persuaded that they are clearly wrong. That is the sense in which I explained to Ms Mullett at the case management hearing that I would be "bound" by his Honour's findings. As I pointed out to Ms Mullett, new evidence, new documents, different anthropology, could have been sufficient to persuade me there was a range of information not available to North J which could, realistically, result in different findings being made about the composition of the claim group, and that would have been a sufficient basis on which to allow Ms Mullett to be joined as a respondent party. However, no such evidence has been produced.

[84] The Court held that it was not in the interests of justice to grant the joinder application under s 84(5) of the NTA. On that basis orders were made pursuant to s 66B NTA and a further order was made dismissing Ms Mullet's application.

BHP Billiton Nickel West Pty Ltd v KN (deceased) (TJIWARL and TJIWARL #2) [2018] FCAFC 8

1 February 2018, Appeal, Federal Court of Australia – Full Court, Western Australia, North, Dowsett, Jagot JJ

In this appeal proceeding North, Dowsett and Jagot JJ constituting the Full Court of the Federal of Australia made the following orders:

In WAD 217 of 2017 the Court ordered that (1) the appeal be allowed, (2) the determination contained in the orders given on 27 April 2017 be amended by (a) deleting miscellaneous licence L53/109 from Part 2, Schedule 4 of the Attachment 'A' and (b) inserting miscellaneous licence L53/109 into Part 1, Schedule 4 of attachment 'A' and (3) each party pay its or their own costs of the appeal.

In WAD 218 of 2017 the Court ordered that: (1) the appeal be allowed, (2) the determination contained in the orders given on 27 April 2017 be amended by: (a) deleting miscellaneous licences L53/161 and L53/177 from Part 2 Schedule 4 of attachment 'A' (b) inserting miscellaneous licences L53/161 and L53/177 into Part 1, Schedule 4 of attachment 'A' (c) removing from Schedule 5 that part of UCL 245 which is covered by exploration licence E57/676, (3) the cross appeal be dismissed, (4) each party bear its or their own costs of the appeal and cross appeal, (5) the appellant file and serve a consolidated determination, reflecting the orders in this matter and WAD 217 of 2017, within 14 days.

[1] After a 15 day hearing in July, August, October and December 2015 Mortimer J gave judgment in *Narrier v State of Western Australia* [2016] FCA 1519. In the course of doing so the appellants contend that her Honour erred in some respects.

[2] BHP Billiton Nickel West Pty Ltd contends that the primary judge erred in respect of one of the multitude of interests in the land which she was confronted: being miscellaneous licence L53/109 relating to an access road. The primary judge held the BHP licence to be invalid because it had been granted without complying with the future act provisions of the *Native Title Act 1993* (Cth) (NTA). The Full Court allowed BHP's appeal on the basis that failure to comply with the future act provisions of the NTA does not affect the validity of the BHP licence.

[3] The State of Western Australia contends that the primary judge erred in respect of two other miscellaneous licences, L53/161 and L 53/177 which both relate to 'search for groundwater'. The primary judge held these licences to be invalid future acts. The Full Court allowed the State's appeal because the licences were valid future acts by operation of s 24HA of the NTA which provides for the management of regulation of water or airspace.

[4] The State further contended that the primary judge erred in respect of an exploration licence, E57/676 granted under s 59 of the *Mining Act 1978* (WA) in that her Honour ought to have found that this licence was a 'lease' for the purposes of the NTA and that as a result s 47B(1) could not apply to the area of land covered by E57/676. The Full Court allowed this aspect of the State's appeal holding that E57/676 is a lease for the purposes of the NTA and thus the area which it covers cannot be subject s 47B NTA.

[5] The applicant for the native title claim group by way of cross appeal contended that the primary judge erred in finding certain areas of Crown land, referred to as UCL 239, UCL 14 and UCL 15, were not occupied by the claim group when the application claiming native title

were made, which meant that s 47B did not apply to those areas of land. The Full Court dismissed this aspect of the applicant's cross-appeal because: 'her Honour made reasonably open findings of fact on the evidence, without any error of principle and in circumstances where her Honour had the substantial advantage of hearing the witnesses and viewing the relevant locations, with the consequences that the findings of fact are not amenable to appellate review.'

[6] The applicant also contended that the primary judge erred in not holding that s 47B of the NTA applied to 'that part of UCL 11 in relation to which the condition of occupation was satisfied'. The Full Court held that this aspect of the applicants' cross-appeal be dismissed because 'it is founded on a misunderstanding of the applicant's own case and her Honour's findings.'

BHP Licence

[8] It was common ground before the primary judge and in BHP's appeal that miscellaneous licence L53/109 (referred to as the BHP licence) was a future act that passed the freehold test but in respect of which the State did not comply with the requirements of s 24MD(6B) of the NTA.

[17] Section 24AA(4)(j) refers to s 24MD that provides for acts that pass the freehold test. The freehold test is provided for in ss 24 MA (legislative acts) and 24 MB (non-legislative acts) of the NTA. The BHP licence is a non-legislative act. By s 24MB(1)(b)(i) such an act passes the freehold test if 'the act could be done in relation to the land concerned if the native title holders concerned instead held ordinary title to it.' As noted, the BHP licence passed the freehold test and s 24MD applies.

[18] It was also common ground before the primary judge that s 24MD(6B)(b) (which refers to the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility…associated with mining) applied with the consequence that the State was required to comply with the notification and consultation requirements in s 24MD (6B)(c)-(g). In the primary hearing the applicant also attempted to submit that there was non-compliance with s 24MD(6A) however no such case was put in the appeal proceeding. Nor can the case be put on appeal as it would require BHP to have an opportunity to adduce further evidence.

[19] Section 24MD(1) refers to Subdivision P. Section 26 NTA specifies the future acts to which Subdivision P applies. The grant of the BHP licence is not identified in s 26 as an act to which Subdivision P applied because it falls within an exclusion in s 26(1)(c)(i) being a right to mine created for the purpose of construction of an infrastructure facility… associated with mining. Section 24OA provides that: 'Unless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title.'

[20] The Full Court concluded that the primary judges' conclusion that the BHP licence was invalid because it was granted without compliance with s24MD(6B) was an error and that it follows from section 24MD(1) that the BHP licence is valid. [21] Whilst the primary judge concluded that the context of the NTA read as whole supported the contrary view the Full Court disagreed for nine substantive reasons.

[22] First s 10 NTA recognises and protects native title 'in accordance with this Act'. The provisions of the NTA and the objects specified in s 3(a) to provide for the recognition and protection of native title and s 3(b) to establish ways in which future dealings affecting native

title may proceed set the standards for those dealings and how they may be achieved. They are not to be achieved other than in accordance with the provisions of the NTA.

[23] Second ss 24 AA (2) and (4) both use the concept of 'covered by' as the criterion for validity. Thus, a future act will be valid if it is 'covered' by the nominated provisions, which includes s 24MD. The Full Court agreed with BHP's submissions that: to be 'covered by' a provision means no more than that the particular act in question is an act of the class to which any of the listed sections in s 24 AA(4) apply. The Full Court found that contrary to the applicant's submission there is a difference between s 24 AA(5) and (6). Section 24AA(5) identifies that for certain acts to be valid it is necessary to satisfy subdivision P. 'Section 24AA(6) states that the Division 'also deals with procedural rights and compensation for the acts.' The Full Court found that it is apparent that the procedural rights in Division 3 are not said by s24AA(6) to condition validity and that the requirements of Subdivision P, by contrast are said by s 24 AA(5) to condition validity.

[24] Third the Full Court concurred with BHP's description of the categories of future acts and the statutory scheme thereby established set out in this paragraph in summary:

Subdivision F-N of Part 2 covers various future acts and validation on 3 levels:

- future acts that are likely to have the least impact on native title are validated without conditions or further requirements (other than payment of compensation)
- future acts that are likely to have a greater impact on native title are validated and an associated notification regime is imposed (Subdivision JAA, Subdivision KA and Subdivision M for example)
- two species of future acts that have the greatest impact on native title because they involve a right to mine (or certain types of compulsory acquisition) are validated subject to compliance with the right to negotiate in Subdivision P.

BHP argued that 'This three-fold classification evinces a legislative intention that future acts that do not involve rights to mine will not be invalidated by a failure to adhere to procedural requirements.'

[25] Fourth the language of the provisions is internally consistent. Thus s 24MD(1) NTA states that if Subdivision M applied to a future act then, subject to Subdivision P, the act is valid. The same structure is evident in a number of other provisions including: s 24GB(5), s 24HA(3), s 24ID(1), s 24JB(1), s 24KA(3), s 24LA(3), s 24LA(3), s 24NA(2).

[27] Fifth the Explanatory Memorandum to the *Native Title Amendment Bill 1997* (Cth) referred to s 24HA(7) of the NTA – management and regulation of air space and the associated notification requirements. Importantly the Full Court notes that a failure to notify under that regime 'will not affect the validity of the future act'…'There is no discernible difference between this provision and other procedural provisions in Div 3 of Pt 2 of the NTA.'

[29] Sixth the role of s 24OA in the statutory scheme is apparent from s 24AB particularly s 24AB(2) which provides that: 'To the extent that a future act is covered by a particular section in the list in paragraphs s 24AA(4)(a) to (k), it is not covered by a section that is lower in the list.' Sections 24FA to 24NA are part of a hierarchy. If an act is in an earlier provision it cannot be in a later provision. This is critical because the procedural and other compensation rights in the nominated provisions are different. Section 24 OA is a residual provision which immediately follows the last provision in the hierarchy, s 24 NA.

[30] Seventh the text and structure of Subdivision M itself also supports the conclusion that this part of the NTA expressly identifies those provisions which, if not satisfied, result in the invalidity of the future act. The Full Court stated that: 'It is also apparent that the procedural requirements are not expressed to condition validity.' Section 24MD(6) makes plain that the procedural requirements in ss 24MD(6A) and (6B) only apply if Subdivision P does not apply. The Full Court further stated that: 'It cannot be said, as the applicant would have it, that such a consequence should be implied in ss 24MD(6A)-(8) because those provisions are a substitute for Subdivision P; the provisions constitute their own regime in respect of which the legislature has not provided for invalidity to the consequence of non-compliance.'

[31] Eighth the Full Court agreed with BHP's submission that if 'a failure to comply with the notification requirements in s 24 MD96B) renders invalid the relevant future act, then the same must presumably be so of the other procedural requirements in Subdivisions F-N, since there is no meaningful distinction between them.'

[32] Ninth and again with the Full Court concurring with BHP's submission:

'A number of procedural requirements in Subdivision F-N afford native title holders or claimants procedural rights sourced outside the NTA. For example s 24MD(6A) gives native title holders the same rights they would have if they instead held ordinary title to land…There is no discernible legislative intention to invalidate future acts in the event that they are in breach of State and Territory laws over which the Commonwealth legislature has no control.'

[33] The Full Court concluded that 'for these reasons the text, structure and context of the NTA do not support the primary judge's conclusion about the consequences of non-compliance with these procedural requirements. In particular when the statutory scheme is considered as a whole the primary judge's analysis of the function of s 24OA cannot be sustained.'

[34] The Full Court disagreed with the primary judge's conclusion at [1034] that 's 24OA provides sufficient statutory indication of a legislative intention that compliance with procedural requirements is a precondition to a future act having force and effect against native title.' For the reasons provided by the Full Court they asserted that s 24OA supports the contrary conclusion.

[36] The Full Court stated that whilst 'Her Honour's perceptions of unfairness are hardly ill founded'…'the text and structure of the provisions, construed in context, all point to the legislature having intended precisely that which her Honour found objectionable.' The Court also found that 'there is some force in her Honour's observations that the possible remedies of declarations and injunctions to restrain a future act which has not been the subject of the required notification and consultation is "wholly unsatisfactory"'. The Full Court asserted however that 'the consequence of breach of statutory requirement is always dictated by legislative purpose alone.' And legislative purpose is determined by reference to 'the language of the relevant provision and the scope and object of the whole statute.' See *Project Blue Sky Inc. v Australian Broadcasting Authority* [1998] HCA 28 at [388]-[391] citing *Tasker v Fullwood* [1978] 1 NSWLR 20 at [24].

[37] The Full Court asserted that 'fidelity to the statute and to the principles of statutory construction, in which legislative purpose is identified from the terms of the legislation construed in context, demand a conclusion contrary to that of the primary judge…Here the scope and objects and context of the NTA as a whole support the conclusion, inescapable

once the structure and language of s 24MD(6B) is considered, that the legislature did not intend that an act done in breach of s 24 MD(6B) would be invalid.' The Full Court could not distinguish as the primary judge had, the Full Court decision in *Lardil Peoples v Queensland* [2001] FCA 414 in so far as failure to comply with the notification and consultation requirements in the future act regime is not sufficient to invalidate the future act itself. See French J as he then was at [58]-[59]; Merkel J at paragraph [72] and Dowsett J at [117]-[120]

[38] The primary judge recognised that her construction was inconsistent with that of the Full Court in *Lardil* which had been followed by two single judges of the Court in *Banjima People v Western Australia and others (No 2)* [2013] FCA 868 and *Daniel v State of Western Australia* [2004] FCA 1388. Her Honour distinguished *Lardil* on two bases. Firstly, because the observations in *Lardil* were *obiter dicta* ([at 1003]) and secondly, as her Honour put it, 'Lardil was not a case dealing with native title rights and interests which had been recognised as existing.' The Full Court regarded this to be an error identifying the importance of the doctrine of precedent to the question of whether one Full Court should reconsider a previous Full Court decision: *Transurban City Link Ltd v Allan* [1999] FCA 1723.

[39] The Full Court in this appeal proceeding stated that 'the *obiter dicta* in *Lardil* was fully reasoned'…'and has been followed by two single Judges of this Court', and therefore the characterisation of the reasoning as *obiter dicta* was not a proper foundation to depart from the Full Court's construction. In the Full Court's view the distinction that the primary judge drew between claimed and established native title was not supported by the NTA. The Full Court cited *Lardil* at paragraph [120]: 'if invalidity is the consequence of the non-compliance with the procedural requirements, then that consequence applies to native title claims irrespective of their merits.' [43] The Full Court found that the fact that the claim to native title in the present case had been established could not affect the question of construction and found the construction in *Lardil* to be correct.

[44] The Full Court also disagreed with the applicant's submission that *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 supported the primary judge's conclusion. The Full Court distinguished the decision in *Forrest*. In that case the failure to comply with the requirements for the granting of a mining lease under the Mining Act invalidated the mining lease based upon the reasoning in *Project Blue Sky*.

[45] The Full Court allowed BHP's appeal and consequently the orders constituting the determination of native title made on 27 April 2017 required amendment to confirm the validity of the BHP licence.

Groundwater licences

[46] The primary judge dealt with miscellaneous licences L53/161 and L53/177 at [1098]-[1120]. Her Honour concluded that these licences were not future acts to which s 24HA(2) applied.

[47] It was common ground that each licence had been granted under s 91 *Mining Act 1978* (WA) and regulation 42B(ia) of the *Mining Regulations 1981 (WA)* for the purpose of 'search for groundwater.' [53] By s 24HA(3) NTA such an act is valid.

[53] The primary judge observed at [1113] that by s 24HA(2) 'the requisite connection must be between the legislation and the management/regulation of surface or subterranean water'. This was not in dispute. However at [1115]-[1119] her Honour concluded that, given s 91(6) of the *Mining Act,* the legislation requires the prescribed purposes to be 'directly

connected with the mining' so that the prescription of water related purposes in the regulations also had to be directly connected with mining and thus did not satisfy s 24HA(2). At [1118] her Honour stated: 'Section 24HA is concerned with the legislation (and administrative or executive acts authorised by the legislation) having a connection with water (in its usual sense as the State submits). It is not concerned with legislation (and administrative or executive acts authorised by the legislation) having a connection with mining.'

[54] The Full Court considered the distinction that her Honour had drawn between the *Mining Act* and the regulations to be unwarranted. 'It is s 91 of the *Mining Act* together with the Regulations which constitute the relevant "legislation" under s 24HA(2), not the *Mining Act* as a whole. This is because, on the terms of s 24HA(2), the only relevant legislation is the legislation under which the future act has been granted.' [55] In the *Commonwealth v Grunseit* [1943] HCA 47 at [82] Latham CJ said: 'The general distinction between legislation and the execution of legislation is that the legislation determines the content of the law as a rule of conduct or a declaration as to the power, right or duty, whereas executive authority applies the laws in particular cases.'

[57] The issue is whether the legislation under which the future act was granted, wherever the legislation be found and whatever form it may take (Act, regulation, by law ordinance or otherwise) relates to the management or the regulation of identified matters. The Full Court found that if the grant of a lease, licence, permit or authority is under that legislation, s 24HA(2) applies. This construction of s 24HA(2) is supported by extrinsic material.

[58] The State pointed out in its submission that s 24HA was enacted as part of the substantive amendments in the *Native Title Amendment Act 1998* (Cth). Point 8 of that 10 point plan was concerned with 'the ability of governments to regulate and manage surface and subsurface water; off shore resources and airspace, and the rights of those with interests under any such regulatory or management regime would be put beyond doubt.'

[59] The Full Court said that the construction that it prefers accords with the language of s 24HA(2) and the legislative intention: 'On that basis it matters not where the provision is located, what form it takes, whether it is embedded in laws dealing with other topics or stands alone, or whether it is part of a statute or delegated legislation. Provided the provision under which the future act is granted is legislation and relates to the management or regulation of water, s 24HA(2) is engaged.'

[62] The Full Court then stated that it is readily apparent that the miscellaneous licenses L53/161 and L53/177 were granted under legislation that relates to the management or regulation of subterranean water: 'Together, s 91(1) and reg 42B(ia) are legislation that relates to the management or regulation of subterranean water because they authorise the grant of a relevant act under which the licence holder may search for groundwater…Legislation which provides for the grant of a licence to search for groundwater directly connected with mining is legislation which relates to the management or regulation of subterranean water.'

[63] It follows that in [1115] of her reasons the primary judge's question whether the *Mining Act* related to surface or subterranean water 'was not posed by s 24HA(2) as this section is not concerned with the character of the *Mining Act*.…It is only concerned with whether the future act was granted under legislation...Provisions which enable the grant of a licence authorising a search for groundwater directly connected with mining satisfy this description.'

[64] The Full Court allowed grounds one and two of the State's appeal and held that miscellaneous licences L53/161 and L53/177 are valid by operation of s 24HA(3) of the NTA and the determination made by the primary judge was to be amended accordingly as part of the Court's orders.

Exploration licence

[65] Although the State identified eight exploration licences granted under s 59 of the *Mining Act,* the State accepted that only one such licence (E57/676) is affected because the other exploration licences did not exist at the date of one of the claimant applications and the relevant time under s 47B NTA is 'when the application is made'. The issue was whether contrary to the primary judge's conclusion, an exploration licence under the *Mining Act* is a lease for the purposes of the NTA, including s 47B(1)(b)(i) NTA. If so, s 47B(2) NTA, requiring prior extinguishment of native title to be disregarded, cannot operate.

[67] Division 3 of Part 15 of the NTA concerns leases. [70] If an exploration licence under s 59 of the *Mining Act* (WA) is a lease for the purposes of the NTA, including s 47B then by s 47B(1)(B)(i) the area the subject of the exploration licence is excluded from the operation of s 47B(1) and thus prior extinguishment under s 47B(2) cannot be disregarded.

[71] The primary judge dealt with the issue at paragraphs [1194]-[1210]. Her Honour held that: 'Despite the definition given to the verb 'mine' in s 253, in my opinion the NT Act defines a mining lease more narrowly, even taking into account s 242(2). It looks to the use of the land, and requires that the land be used "solely" or "primarily" for mining. There is no evidence that the exploration licences in question permitted the licensee to use the land or waters they covered "solely" or "primarily" for mining.'

[72] The Full Court disagreed stating that:

The verb includes "explore or prospect for things that may be mined". By s 253, this meaning must be given to "mine" in the NTA unless the contrary intention appears. It follows that cognate words such as "mining" are to be construed consistently with the word "mine" (s 18A of the *Acts Interpretation Act 1901 Cth*).

[76] The Full Court rejected the applicant's argument that s 242(2) NTA operates only where the words 'mining lease' appears in the NTA so that s 47B(1)(b)(i) was not engaged by exploration licence E57/676. [77] The Full Court held that 'the reference to "lease" in s 47B(1)(b)(i) thus includes any mining lease. And "mining lease" includes any licence to mine. And a licence to mine includes a licence to explore or prospect things to mine.' The Full Court held that the primary judge 'erred in concluding at [1207] that a "mining lease" involves a narrower concept than that of the defined verb "mine".' [81] For these reasons the Full Court accepted and allowed the State's grounds of appeal 3 to 7, to the extent they relate to exploration licence E57/676.

Occupation in s 47B(1)(c) of the NTA

For s 47B(2) to apply s 47B(1)(c) requires that when the application is made one or more members of the claim group occupy the area.

[82] The applicant contended in their cross-appeal that the primary judge erred in her approach to s47B(1)(c) by 'requiring that presence or activity in an area by members be coupled with proof of some further or other more specific sense of purpose or entitlement in order to demonstrate occupation of the area by that presence or activity and that presence

or activity not be opportunistic [1236] – [1245]. According to the applicant this placed an unwarranted gloss on the statute that jars with the statutory text and context and fails to recognise that presence and activities are in the context of traditional law and custom.

[83] The Full Court disagreed with the applicant and held that the primary judge had not fallen into error: 'The submissions for the applicant attempt to take observations in her Honour's reasons out of context, elevate those observations to the level of principle and then attribute alleged errors of principle to her Honour. The Full Court upheld her Honour's reasons at [1212] – [1232] as comprehensive and accurate. See paragraphs [83] – [87].

[88] The State submitted that proof of connection does not equate to proof of occupation. The Full Court 'accepted that where there is a native title right of exclusive occupation that right to exclude strangers from the land indicates occupation, but this does not mean that any form of presence or activity on land establishes occupation (*Moses v Western Australia* [2007] FCAFC 78 at [216]). [89] The Full Court also set out in its reasons for judgment that the primary judge's references to 'opportunistic' needed to be seen in context. See paragraphs [89]-[92].

[96] The applicant's cross appeal that the findings of the primary judge with respect to UCL 14/15 (Tjiwarl) were not occupied by one or more members of the claim group as wrong was rejected by the Full Court. [97] The primary judge did not accept the occupation requirement with respect to UCL 239 at [1233]-[1239]. The primary judge accepted the occupation requirement for UCL 245 and UCL 246 and the Full Court concluded that appellate restraint was required because the primary judge observed more evidence with respect to UCL 245 and UCL 246 than she did with respect to UCL 239. The Full Court upheld her Honour's findings – see paragraphs [98]-[100].

[101] With respect to UCL 14 and UCL 15 the primary judge's findings were upheld and the applicant's cross appeal rejected. [102] The Full Court upheld her Honour's findings with respect to the BHP Billiton sign that had been erected with the involvement of the Aboriginal community to keep non-Aboriginal people out. The applicant asserted that Mr James was involved in the erection of the sign and therefore occupied the land, but the Full Court did not find in favour of the applicant in their cross appeal and argument on this issue. [104]-[106] The Full Court rejected any allegations of error on the primary judge's part with respect to Mr Muir's evidence.

[107] Their Honours further considered the applicant's approach taken to the primary judge's reasons 'untenble' with respect to the final ground for appeal relating to UCL 11 (Yakabindie Homestead). The Full Court upheld her Honour's findings. [111] The Full Court stated that 'The applicant never identified for the primary judge which part of UCL 11 was said to be the subject of s 47 B' with such level of detail which is necessary. The Full Court further stated that: 'It is apparent that the primary judge took the most beneficial view of the evidence as reasonably possible but was cofounded (sic) [confounded] by the fact that one way or another an applicant must identify the area it contends to be the subject of s 47B.

[112] The Full Court concluded stating that: having given the applicant the opportunity to make further submissions about the issue it was incumbent upon the applicant to give the primary judge sufficient information to a clearly articulated claim to UCL 11 and it did not do so: and on that basis the application for leave to amend was rejected as in the Court's opinion it would be meaningless as it would still not be known which part of UCL11 was subject to s 47B.

[113] For the reasons provided the Full Court rejected the applicant's cross appeal and the notice of contention was not pressed by the applicant and the Court felt no need to make comments upon the notice.

2. Legislation

Commonwealth

Aboriginal Land Rights (Northern Territory Amendment Bill) 2017

Status: Introduced on 6 December 2017, second reading speech moved 6 December 2017

Stated purpose: The Bill adds areas 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) so that the Kakadu Land can be granted as Aboriginal land, and provides for the leaseback of the Kakadu Land to the Director of National Parks.

Native title implications: The Bill also adds areas in the town of Urapunga that are subject to the Township of Urapunga Indigenous Land Use Agreement (Urapunga Land) to Schedule 1 of the *Aboriginal Land Rights (Northern Territory) Act 1976* so that the Urapunga Land can be granted as Aboriginal land.

For further information please see the Second Reading Speech from the Legislative Council.

3. Native Title Determinations

Between 1 January 2018 and 28 February 2018 there were no native title determinations listed on the NNTT website.

4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate

The Native Title Research Unit within AIATSIS maintains a RNTBC summary document which provides details about RNTBCs and PBCs in each state/territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information. The statistics for RNTBCs as of 15 March 2018 can be found in the table below.

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

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

State/Territory	RNTBCs	No. of successful (& conditional) claimant determinations for which RNTBC to be advised
Australian Capital Territory	0	0
New South Wales	6	0
Northern Territory	26	2
Queensland	82	0
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 15 March 2018.

5. Indigenous Land Use Agreements

In January 2018 & February 2018 four ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
21/02/18	Melsonby ILUA	QI2015/046	Body Corporate	Qld	Government, Infrastructure
30/01/18	Sandstone Western Lands Transfer	Q12016/047	Area Agreement	WA	Government, Co-management
21/02/18	Bromley Land Transfer ILUA	Q12017/015	Body Corporate	Qld	Access, Co-management
21/02/18	Red Gum Store ILUA	D12017/02	Area Agreement	NT	Commercial, Extinguishment

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

6. Future Act Determinations

In January and February 2018 nine Future Act Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
28/02/18	Western Lands Desert Aboriginal Corporation (Jamukurnu Yapalikunu) v John Williams and Western Australia	WO2017/0314	WA	Objection - Expedited Procedure Applies	WDLAC exercised their right to lodge an objection against the State's assertion that the expedited procedure applies to the grant of exploration licence E45/4568 (the licence) to Mr John Williams, and argued that the expedited procedure should not apply as interference or disturbance with one or more of the s 237 criteria was likely. [65] Member McNamara did not accept the native title party's contention that the grant of the licence would cause major disturbance to land or waters and determined that the grant of E45/4568 to John Williams is an act that attracts the expedited procedure.
26/02/18	Derrick Smith and Ors on behalf of Gnaala Karla Booja and PMR Quarries Pty Ltd and Western Australia	WF2017/0020 WF2017/0021	WA	Future Act - May be done	This was a determination that the State of Western Australia may grant mining leases M70/1319 and M70/1320 ('the leases') to PMR Quarries Pty Ltd made in the absence of an agreement of the kind mentioned in s 31(1)(b) of the *Native Title Act 1993* (Cth) (NTA). The native title party and the grantee party consented to Member McNamara taking into account that they have addressed the matters set out to their mutual satisfaction and had reached agreement on those issues. The Government party relied upon the agreement of the native title party and the grantee party and consented to Member McNamara having no further regard to those matters. Member McNamara at [20] determined that the acts, being the grant of mining leases M70/1319 and M70/1320 to PMR Quarries Pty Ltd, may be done.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
23/02/18	Raymond William Ashwin (dec.) and Ors on behalf of With and CNN Investments Pty Ltd and Western Australia	WO2017/0389	WA	Objection - Dismissed	The area of the proposed prospecting licence P51/3011 is wholly overlapped by the Wutha claim group's native title claim (WC1999/010). The Wutha claim group did not provide contentions or evidence in support of the objection, or request further time to provide the documents, by 31 January 2018. [8] The objection against the grant of P51/3011 to CNN Investments Pty Ltd was dismissed by Member Shurven, according to s 148(b) *Native Title Act 1993* (Cth).
19/02/18	Tjurabalan Native Title Lands Aboriginal Corporation v Inventum Resources Pty Ltd and Western Australia	WO2016/0858	WA	Objection - Expedited Procedure Does Not Apply	Exploration licence E80/5024 covers approximately 84 square kilometres north east of Balgo Community. The Tjurabalan Native Title Lands Aboriginal Corporation (Tjurabalan NTLAC) hold exclusive native title rights and interests in the whole of the licence area. The Tjurabalan NTLAC lodged an objection against the State's assertion that the expedited procedure applies, and argued the expedited procedure should not apply as interference or disturbance with one or more of the criteria in s 237 of the Act was likely. [44] Member Shurven was satisfied that the grant of the licence was likely to interfere with sites of particular significance to the Tjurabalan People, in accordance with their traditions. [45] On that basis Member Shurven found the grant of exploration licence E80/5024 to Inventum Resources Pty Ltd was not an act attracting the expedited procedure.
12/02/18	Kevin Allen and Ors on behalf of Njamal and Cuvier Resources Pty Ltd and Western Australia	WO2017/0035	WA	Objection – Dismissed	On 20 January 2017, the Njamal claim group lodged an objection with the National Native Title Tribunal against the application of the expedited procedure to the grant of exploration licence E46/1134 to Cuvier Resources Pty Ltd. The objection application was dismissed by Member Shurven for failure by the native title party to meet directions for the filing of evidence, according to s 148(b) *Native Title Act 1993* (Cth).

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
31/01/18	Raymond William Ashwin & Ors on behalf of Wutha v John Joseph Paul Legendre and Western Australia	WO2017/0249	WA	Objection dismissed	The area of proposed exploration licence E57/1058-1 is overlapped by the Wutha native title claim (WC1999/010). Member Shurven held that the Wutha native title group failed to meet directions for the filing of evidence and on the 15 January 2018. [10] Member Shurven held that the objection to E57/1058 be dismissed pursuant to s 148(b) *Native Title Act 1993* (Cth).
30/01/18	Tarlka Matuwa Piarku Aboriginal Corporation RNTBC and Piper Preston Pty Ltd and Western Australia	WO2016/0939	WA	Objection - Expedited Procedure Does Not Apply	This was a decision about whether the expedited procedure applies exploration licence E53/1897. The licence covers 76.45 square kilometres in the Shire of Wiluna. Tarlka Matuwa Paiarku Aboriginal Corporation (TMPAC) are the native title holders for the interests in the whole of the licence area. TMPAC lodged an objection to the expedited future act and Piper Preston the grantee party pressed that it should apply. [21] Member Shurven accepted the evidence of the TMPAC that the grant of the licence would directly interfere with the native titleholders' community or social activities in accordance with s237 of the Native Title Act. At [39] Member Shurven concluded that E53/1897 to Piper Preston is not an act that attracts the expedited procedure.
22/01/18	Kulyamba Aboriginal Corporation RNTBC and Cuvier Resources Pty Ltd and Western Australia	WO2016/0604	WA	Objection - Expedited Procedure Does Not Apply	The Kulyamba Aboriginal Corporation RNTBC holds native title rights and interests, on behalf of the Thudgari People over 86.31 per cent of the licence area. The Kulyamba Aboriginal Corporation argued the expedited procedure should not apply as interference or disturbance with one or more of the s 237 criteria is likely to occur. Member Shurven accepted that the sites were of particular significance to the native title holders. Member Shurven found that the grant of exploration licence E08/2843 to Cuvier Resources Pty Ltd is not an act attracting the expedited procedure.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
05/01/18	Raymond William Ashwin (dec) & Others on behalf of Wutha and Nova Energy Pty Ltd and Western Australia	WO2017/0109	WA	Objection - Dismissed	The area of the proposed retention licence R51/3 is wholly overlapped by the Wutha native title claim .On 10 February 2017 the Wutha claim group lodged an objection with the NNTT against the application of an expedited procedure to the grant. On 1 November 2017 the NNTT made directions to file evidence by 13 December 2017. No evidence was received from the native title party and the matter was listed for hearing on 5 January 2018. Member Shurven dismissed the objection for failure to comply with directions.

7. Publications

Attorney General's Department

Reforms to the Native Title Act 1993 (Cth) Options Paper

On 29 November 2017 the Commonwealth Attorney General and Minister for Indigenous Affairs released an options paper – Reforms to the *Native Title Act 1993* (Cth). Submissions were due on 28 February 2018. They may be viewed on the Attorney-General's Department website.

Northern Land Council

Land Rights News

The February 2018 edition of Land Rights News is now available for download.

For further information, please visit the Northern Land Council's website.

South Australian Native Title Services

Aboriginal Way

The summer edition of Aboriginal Way is now available for download.

For further information, please visit the South Australian Native Title Services website.

8. Training and Professional Development Opportunities

AIATSIS

Youth Engagement in Native Title Project

The Native Title Research Unit (NTRU) has recently commenced a new project, 'Youth Engagement in Native Title'. The aim of this research is to investigate and report on the experiences of young Aboriginal and Torres Strait Islander people involved in native title throughout Australia. This project supports AIATSIS ongoing commitment to foster and support young Aboriginal and Torres Strait Islander people involved in native title.

The research team would like to connect and interview young people (18-35 years) to get their views on the challenges and opportunities presented by native title. This involvement may be through a PBC, NTRB or other related bodies such as cultural heritage, Indigenous organisations and land and sea management groups.

For further information or to participate, please contact Stacey Little on Stacey.Little@aiatsis.gov.au or (02) 6261 4227.

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 AIATSIS website.

9. Events

AIATSIS

National Native Title Conference 2018

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

Date: 5–7 June 2018

Location: Cable Beach Resort, Broome WA

Registrations close on 30 March 2018. For more information and to register, visit the AIATSIS website.

Arts Libraries Society of Australia and New Zealand

Biennial Conference 2018 – Expanding our Reach: Art, Research and Access

The conference theme is *Expanding our Reach: Art, Research and Access*, delving into the expanded uses and users of Art Library collections. The organisers welcome contributions from a range of people including art librarians, archivists, artists, scholars, authors, curators, critics, educators, students and other visual arts professionals.

Date: 4–5 October 2018

Location: National Portrait Gallery (day one) and the National Gallery of Australia (day two), Canberra, ACT

Abstracts are due by 30 March 2018 to PetaJane.Blessing@nga.gov.au or Duncan.McColl@aiatsis.gov.au. For more information, please visit the ARLIS/ANZ 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.