FEDERAL COURT OF AUSTRALIA

Wyles on behalf of the Gurambilbarra Wulgurukaba People v State of Queensland [2019] FCA 1502

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| File number: | QUD 623 of 2016 |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 13 September 2019 |
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| Catchwords: | **NATIVE TITLE** – application for joinder as respondent to native title determination application – whether applicant for joinder has a relevant interest – whether that interest may be affected by a determination in the proceedings – whether joinder is in the interests of justice – order for joinder made. |
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| Legislation: | *Native Title Act 1993* (Cth) ss 24, 44, 47, 61, 62, 66, 84, 225 and 253 |
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| Cases cited: | *Bissett v Minister for Land and Water Conservation (NSW)* [2002] FCA 365*Blucher on behalf of the Gaangalu Nation People v State of Queensland* [2018] FCA 1369*Byron Environment Centre Inc v Arakwal* (1997) 78 FCR 1*Chapman v Minister for Land and Water Conservation (NSW)* [2000] FCA 1114*Chippendale on behalf of the Wuthathi People #2 v State of Queensland* [2012] FCA 310*Gamogab v Akiba* (2007) 159 FCR 578*Isaacs on behalf of the Turrbal People v State of Queensland (No 2)* [2011] FCA 942*Lawson v NSW Minister for Land and Water Conservation* [2007] FCA 8*Wakka Wakka People #2 v State of Queensland* [2005] FCA 1578*Walker v Western Australia* (2002) 191 ALR 654 |
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| Date of hearing: | 20 June 2019 |
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| Date of last submissions: | 22 July 2019 (Applicant) |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Native Title |
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| Category: | Catchwords |
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| Number of paragraphs: | 27 |
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| Counsel for the Applicant: | Mr A Preston  |
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| Solicitor for the Applicant: | North Queensland Land Council  |
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| Counsel for the Respondents: | Ms M Stinton  |
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| Solicitor for the Respondents: | Crown Law |
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| Counsel for the Prospective Respondent: | Mr G Carter |
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| Solicitor for the Prospective Respondent: | Preston Law |

ORDERS

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|  | QUD 623 of 2016 |
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| BETWEEN: | VIRGINIA WYLES, ESALYN AMBRYM, GAIL AMBRYM, BRENTON CREED, LYNETTE FORBES-BEITSCH, CHRISTINE GEORGE, PAMELA PETRINA HEGARTY AND FLORENCE WATSON ON BEHALF OF THE GURAMBILBARRA WULGURUKABA PEOPLEApplicant |
| AND: | STATE OF QUEENSLANDFirst RespondentCHARTERS TOWERS REGIONAL COUNCILSecond RespondentCOMMONWEALTH OF AUSTRALIA (and others named in the Schedule)Third Respondent |

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| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 13 SEPTEMBER 2019 |

THE COURT ORDERS THAT:

1. Townsville Marksmen Rifle Club Inc be joined as a respondent to the proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RANGIAH J:

1. The principal proceeding is a native title determination application brought pursuant to s 61(1) of the *Native Title Act 1993* (Cth) (**the NTA**). The application presently before the Court is for an order pursuant to s 84(5) of the NTA that Townsville Marksmen Rifle Club Inc (**TMRC**) be joined as a party to the proceeding.
2. Section 84(5) of the NTA provides:

*Joining parties*

(5) The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person’s interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.

1. In an application for joinder under s 84(5) of the NTA, it is necessary to consider:
2. whether the applicant for joinder has a relevant interest;
3. whether that interest may be affected by a determination in the proceedings; and
4. whether it is in the interests of justice to allow the joinder.
5. It is necessary for an applicant for joinder to demonstrate a prima facie case that he or she has interests that may be affected by a determination: *Wakka Wakka People #2 v State of Queensland* [2005] FCA 1578 at [6]; *Isaacs on behalf of the Turrbal People v State of Queensland (No 2)* [2011] FCA 942 at [8]; *Blucher on behalf of the Gaangalu Nation People v State of Queensland* [2018] FCA 1369 at [20].
6. The expression “interest” is defined in s 253 of the NTA, as follows:

***interest***, in relation to land or waters, means:

(a) a legal or equitable estate or interest in the land or waters; or

(b) any other right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with:

(i) the land or waters; or

(ii) an estate or interest in the land or waters; or

(c) a restriction on the use of the land or waters, whether or not annexed to other land or waters.

1. However, it has been held that the “interests” referred to in s 84(5) of the NTA are not limited to those described in s 253. In *Chippendale on behalf of the Wuthathi People #2 v State of Queensland* [2012] FCA 310, Greenwood J held at [14] that:

…The notion of “interests” for the purposes of s 84(5) is a broad conception, not confined to the statutory understanding of the term “interest” in s 253 as that term applies in relation to land or waters. The interests asserted by an applicant for joinder need not be proprietary, legal or equitable in nature; must rise above an interest that an ordinary member of the public might hold; must be genuine; must reflect an affect upon the person’s interests beyond a mere emotional, conscientious or intellectual interest; and, must not lack substance.

(Citations omitted.)

1. The expression “affected” in s 84(5) of the NTA contemplates both adverse and enhanced effects: *Bissett v Minister for Land and Water Conservation (NSW)* [2002] FCA 365 at [10]. Whatever the affection, it must be genuine and discernible or demonstrable: *Byron Environment Centre Inc v Arakwal* (1997) 78 FCR 1 at [7]–[10].
2. The reference to a “determination” in s 84(5) of the NTA includes a determination of native title made under s 225, and extends to any other determinations made in the proceedings: *Bissett* at [23]; *Lawson v NSW Minister for Land and Water Conservation* [2007] FCA 8 at [7].
3. TMRC claims to hold the following interests in the claim area:
4. A freehold interest in Lot 10 on SP277791 (**the Freehold Land**);
5. A lease described as Trustee Lease No. 71777368 over part of Lot 26 on SP149308 (**the Leased Land**);
6. A conditional offer by the Minister administering the *Land Act 1994* (Qld) to grant TMRC a term lease over part of Lot 9 on AP20276 (**the Conditional Offer Land**).
7. TMRC operates a rifle range upon the Freehold Land. The Leased Land and the Conditional Offer Land adjoin the Freehold Land. TMRC uses the Leased Land as a buffer zone to avoid people being hit by stray bullets when shooting is carried out at the rifle range.
8. The Leased Land is State land reserved for environmental purposes, held in trust by the Townsville City Council. On 1 August 2016, TMRC was granted a lease over the Leased Land for a period of 30 years. The only permitted use of the Leased Land is, “Exclusion Buffer Zone for Rifle Range”. There is no option to renew the lease.
9. TMRC also wishes to lease the Conditional Offer Land to use as a buffer zone. On 4 April 2018, TMRC received a conditional offer of a 30 year lease. The offer requires TMRC to address any requirements of the NTA before the proposed lease may be progressed. The native title applicant has advised that they will not negotiate an Indigenous Land Use Agreement with TMRC. That is because the land is unallocated State land and they seek to take advantage of s 47B of the NTA to secure a determination of exclusive native title over the land.
10. The native title applicant accepts that TMRC has interests in the Freehold Land and the Leased Land, but contends that those interests would not be affected by a determination of native title. The native title applicant also submits that TMRC lacks any relevant interest in the Conditional Offer Land.
11. Any consideration of whether the interests of an applicant for joinder may be affected by a determination of native title must start with the terms of the native title determination application. It is common ground that the three parcels of land involved are within the geographical area of the claim.
12. However, the native title determination application provides that the land covered by the application excludes freehold estates. Therefore, there is no claim in respect of TMRC’s Freehold Land. Although the native title determination application also excludes leases that confer a right of exclusive possession over particular land, the applicant accepts that the application covers the Leased Land. The application clearly covers the Conditional Offer Land.
13. The native title applicant submits that the interests of TMRC in the Leased Land will not be affected by any determination of native title. They point out that the lease is expressed to be, “entered into in accordance with the provision of Section 24JA of the *Native Title Act 1993* (Cth)”. The native title applicant submits that as the lease is a future act done under s 24JA, it is valid by operation of s 24JB(1), notwithstanding the existence of any underlying native title. The expression “valid” is defined to include “having full force and effect” under s 253. The native title applicant submits that by operation of s 44H of the NTA, if a lease is valid, any activity permitted or done in accordance with the lease would prevail over any native title rights and interests, and the native title holders are not entitled to compensation. They submit that the existence and exercise of any native title rights would not prevent the exercise of TMRC’s rights under the lease. The 30 year term would be unaffected. The rent would remain the same. The same terms and conditions would apply, including that there is no option to renew the lease. The native title applicant submits that even if the application for a determination of native title were unsuccessful, the position for TMRC would be no different than at present.
14. Some of the premises of the applicant’s argument may be open to doubt. For example, an assertion in the lease that it was entered into in accordance with s 24JA of the NTA does not, of itself, establish the truth of that assertion However, it is not necessary to determine the accuracy of the applicant’s submissions on a final basis.
15. The native title applicant seeks a determination of native title over land including the Leased Land. The native title rights and interests claimed include the right to use, access, traverse, enjoy and camp on the claim area. If the applicant succeeds in obtaining a determination of native title in accordance with the terms of the application, the determined rights and interests would, prima facie, be inconsistent with the right of TMRC to use the Leased Land as an exclusionary buffer zone. In the absence of an application to amend the application, or a clear concession that the applicant would not seek a determination that would allow native title holders to access and make use of the land in the ways claimed in the application, there is at least a risk that a determination could conflict with TMRC’s use of the land. Section 253 of the NTA indicates that a restriction upon use of land may be an “interest” under the Act. Whether or not that definition extends to a merely practical restriction upon the use of the land, the practical restriction in this case provides a sufficient affection of interests to engage s 84(5). TMRC has established a prima facie case that its interests in the Leased Land may be affected by a determination of native title.
16. TMRC’s Freehold Land is not directly the subject of the application for a determination of native title. However, TMRC’s use of its Freehold Land as a rifle range requires a buffer zone to ensure that people are not accidentally shot. The practical ability of TMRC to use its freehold could be detrimentally affected by a grant of native title which allows native title holders to enter and remain on either the Leased Land or the Conditional Offer Land. In that sense, TMRC has an interest in opposing the native title determination application.
17. Further, in my opinion, TMRC has a sufficient interest in the Conditional Offer Land to allow it to be joined as a respondent. It is not essential that the interest required under s 84(5) of the NTA be a proprietary interest.
18. In *Chapman v Minister for Land and Water Conservation (NSW)* [2000] FCA 1114 at [10], Emmett J observed at [10]:

 Whilst the interests must be genuine and not indirect, remote or lacking substance, there is no indication that a person who has a special, well established, non-proprietary connection with land or waters, which is of significance to that person, is not to be regarded as having interests that may be affected by a determination. Rather, the consensual objects of the Act would be advanced if a person with genuine interests of that nature, which might or would be affected, has the rights of involvement in the process of Native Title determination given by the Act to person who is a party.

(Citation omitted.)

1. In *Walker v Western Australia* (2002) 191 ALR 654, French J (as his Honour then was) stated at [20]:

 It may be seen from the preceding that AngloGold has no legal or equitable interest in relation to the land by virtue of having lodged applications for exploration licences, notwithstanding that recommendations have been made for their approval…It may be that a single application, early in the stages of processing under the Act, and unsupported by other evidence, would not be sufficient to grant an interest which would support joinder. In the present case, however, a number of the applications are well advanced and they are directed to the furtherance of a substantial economic interest that AngloGold has in the area. That interest cannot be dismissed as speculative or nebulous. The applications represent steps taken as part of an ongoing exploration activity in the region which encompasses parts of the claim area. It is plainly qualified for joinder.

1. In this case, TMRC has not merely sought a lease over the Conditional Offer Land, but has received a conditional offer from the relevant Minister to enter a lease. Further, TMRC has a particular or special connection with the Conditional Offer Land because of its connection with the use of the Freehold Land as a rifle range. One of the conditions of the conditional offer is compliance with any requirements of the NTA. Accordingly, it may be in TMRC’s interests to oppose any determination of native title in favour of the applicant.
2. Having found that TMRC has interests that may be affected by a determination in the proceedings, it is necessary to consider whether it is in the interests of justice to allow the joinder. In *Gamogab v Akiba* (2007) 159 FCR 578, Gyles J (with whom Sundberg J agreed) observed that:
3. It is relevant that the applicant for joinder could have been joined as of right if he or she had applied in time. That indicates that the principal issue is to assess the prejudice occasioned to the other parties and the Court by the delay in applying to be joined (at [59]).
4. It would be odd in this day and age if delay in applying, in itself, were to radically prejudice a potential party (at [59]).
5. It is fundamental that an order which directly affects a third person's rights or liabilities should not be made unless the person is joined as a party (at [60]).
6. Considerable weight should be given to the statutory intention of having all parties whose interests may be affected before the Court at the one time to be dealt with by the one determination (at [64]).
7. If necessary, conditions may be imposed upon a joinder (at [63]).
8. Under s 66(3)(a)(iv) of the NTA, the Native Title Registrar was required to give notice of the details of the application to any person who held a proprietary interest in relation to any of the area covered by the native title determination application. It is common ground that TMRC, as a leaseholder, held a relevant proprietary interest. Through oversight, notice of the application was not given to TMRC. If notice had been given, TMRC would have been entitled as of right to become party to the proceeding by giving notice pursuant to s 84(3)(b) of the NTA. I accept that TMRC has provided a reasonable explanation for why it did not join during the notification period.
9. The native title applicant has not identified any relevant prejudice. On the other hand, the interests of TMRC may be adversely affected if it is not joined as a party.
10. In these circumstances, I am satisfied that the interests of justice require that TMRC should be joined as a party.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 13 September 2019

SCHEDULE OF PARTIES

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|  | QUD 623 of 2016 |
| Respondents |  |
| Fourth Respondent: | TOWNSVILLE CITY COUNCIL |
| Fifth Respondent: | EVELYN LYMBURNER |
| Sixth Respondent: | ERGON ENERGY CORPORATION LIMITED (ACN 087 646 062) |
| Seventh Respondent: | PORT OF TOWNSVILLE LIMITED |
| Eighth Respondent: | TELSTRA CORPORATION LIMITED (ACN 33 051 775 556) |
| Ninth Respondent: | GRANBO PTY LTD |
| Tenth Respondent: | PARKSIDE DEVELOPMENT PTY LTD (ACN 009 802 233) |
| Eleventh Respondent: | PETER ALLAN |
| Twelfth Respondent: | LEE-ANN FRYER |
| Thirteenth Respondent: | SPORTING SHOOTERS ASSOCIATION AUSTRALIA (QLD) INC |
| Fourteenth Respondent: | BLACK RIVER GRAZING |
| Prospective Respondent |  |
| Prospective Respondent: | TOWNSVILLE MARKSMEN RIFLE CLUB INC |