FEDERAL COURT OF AUSTRALIA

Taylor on behalf of the Gangalidda People v State of Queensland (The Gangalidda People Konka Claim) [2019] FCA 297

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| File number: | | QUD 659 of 2017 |
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| Judge: | | **COLLIER J** |
|  | |  |
| Date of judgment: | | 11 March 2019 |
|  | |  |
| Catchwords: | | **NATIVE TITLE** – application for native title determination – *Native Title Act 1993* (Cth) s 87 – where parties agree on terms of order – whether appropriate for Court to make orders sought by consent |
|  | |  |
| Legislation: | | *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)  *Native Title Act 1993* (Cth) ss 13, 47, 47(1)(b)(ii), 47(2), 47A, 56, 57(2), 57(2)(a), 57(3), 61, 66(3), 87, 87(1)(b), 87(2), 94A, 223, 223(1), 225, 248  *Native Title (Prescribed Bodies Corporate) Regulations* 1999 (Cth) regs 4A(a), 4A(b)  *Land Act 1994* (Qld) s 164(1) |
|  | |  |
| Cases cited: | | *King on Behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group v State of South Australia* [2011] FCA 1387  *The Lardil Peoples v State of Queensland* [2004] FCA 298 |
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| Date of hearing: | | 11 March 2019 |
|  | |  |
| Registry: | | Queensland |
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| Division: | | General Division |
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| National Practice Area: | | Native Title |
|  | |  |
| Category: | | Catchwords |
|  | |  |
| Number of paragraphs: | | 30 |
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| Solicitor for the Applicant: | Ms C Griffin-Breen of HWL Ebsworth |
|  | |  |
| Solicitor for the First Respondent: | | Ms L Helu of Crown Law |
|  | |  |
| Counsel for the Second and Third Respondents: | | The Second and Third Respondents did not appear |

ORDERS

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| --- | --- | --- |
|  | | QUD 659 of 2017 |
|  | | |
| BETWEEN: | TERRANCE TAYLOR  Applicant | |
| AND: | STATE OF QUEENSLAND  First Respondent  BURKE SHIRE COUNCIL  Second Respondent  TELSTRA CORPORATION LIMITED ABN 33 051 775 556  Third Respondent | |

|  |  |
| --- | --- |
| JUDGE: | COLLIER J |
| DATE OF ORDER: | 11 MARCH 2019 |

BEING SATISFIED that an order in the terms set out below is within the power of the Court, and it appearing appropriate to the Court to do so, pursuant to s 87 of the *Native Title Act 1993* (Cth), THE COURT ORDERS BY CONSENT THAT:

1. There be a determination of native title in the terms set out below (the determination).

2. Each party to the proceedings is to bear its own costs.

THE COURT DETERMINES BY CONSENT THAT:

3. The determination area is the land and waters described in Schedule 4 and depicted in the map attached to Schedule 6 to the extent those areas are within the External Boundary and not otherwise excluded by the terms of Schedule 5 (the Determination Area). To the extent of any inconsistency between the written description and the map, the written description prevails.

4. Native title exists in the Determination Area.

5. The native title is held by the Gangalidda People described in Schedule 1 (the Native Title Holders).

6. Subject to orders 8, 9 and 10 below the nature and extent of the native title rights and interests in relation to the land and waters described in Part 1 of Schedule 4 are:

(a) other than in relation to Water, the right to possession, occupation, use and enjoyment of the area to the exclusion of all others; and

(b) in relation to Water, the non-exclusive rights to:

(i) hunt, fish and gather from the Water of the area;

(ii) take and use the Natural Resources of the Water in the area; and

(iii) take and use the Water of the area,

for personal, domestic and non-commercial communal purposes.

7. Subject to orders 8, 9 and 10 below the nature and extent of the native title rights and interests in relation to the land and waters described in Part 2 of Schedule 4 are the non-exclusive rights to:

(a) access, be present on, move about on and travel over the area;

(b) camp, and for that purpose build temporary shelters;

(c) hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal purposes;

(d) take, use, share and exchange Natural Resources from the land and waters of the area for personal, domestic and non-commercial communal purposes;

(e) take and use the Water of the area for personal, domestic and non- commercial communal purposes;

(f) conduct ceremonies on the area;

(g) be buried and bury Native Title Holders within the area;

(h) maintain places of importance and areas of significance to the Native Title Holders under their traditional laws and customs and protect those places and areas from physical harm; and

(i) light fires on the area for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation.

8. The native title rights and interests are subject to and exercisable in accordance with:

(a) the Laws of the State and the Commonwealth; and

(b) the traditional laws acknowledged and traditional customs observed by the Native Title Holders.

9. The native title rights and interests referred to in orders 6(b) and 7 do not confer possession, occupation, use or enjoyment to the exclusion of all others.

10. There are no native title rights in or in relation to minerals as defined by the *Mineral Resources Act 1989* (Qld) and petroleum as defined by the *Petroleum Act 1923* (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld).

11. The nature and extent of any other interests in relation to the Determination Area (or respective parts thereof) are set out in Schedule 2 (the Other Interests).

12. The relationship between the native title rights and interests described in orders 6 and 7 and the Other Interests is that:

(a) the Other Interests continue to have effect, and the rights conferred by or held under the Other Interests may be exercised notwithstanding the existence of the native title rights and interests;

(b) to the extent the Other Interests are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests in relation to the land and waters of the Determination Area, the native title continues to exist in its entirety but the native title rights and interests have no effect in relation to the Other Interests to the extent of the inconsistency for so long as the Other Interests exist; and

(c) the Other Interests and any activity that is required or permitted by or under, and done in accordance with, the Other Interests, or any activity that is associated with or incidental to such an activity, prevail over the native title rights and interests and any exercise of the native title rights and interests.

DEFINITIONS AND INTERPRETATION

13. In this determination, unless the contrary intention appears:

“descendants” includes those individuals who have been adopted by the Gangalidda People;

“External Boundary” means the area described in Schedule 3;

“land” and “waters”, respectively, have the same meanings as in the *Native Title Act 1993* (Cth);

“Laws of the State and the Commonwealth” means the common law and the laws of the State of Queensland and the Commonwealth of Australia, and includes legislation, regulations, statutory instruments, local planning instruments and local laws;

“Natural Resources” means:

(a) any animal (including, for certainty, honey), plant (including, for certainty, charcoal, sap, wax and resin), fish and bird life found on or in the lands and waters of the Determination Area; and

(b) any clays, soil, sand, gravel or rock found on or below the surface of the Determination Area,

that have traditionally been taken and used by the Native Title Holders, but does not include:

(a) animals that are the private personal property of another; and

(b) minerals as defined in the *Mineral Resources Act 1989* (Qld); or

(c) petroleum as defined in the *Petroleum Act 1923* (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld);

“Water” means:

(a) water which flows, whether permanently or intermittently, within a river, creek or stream;

(b) any natural collection of water, whether permanent or intermittent; and

(c) water from an underground water source.

Other words and expressions used in this determination have the same meanings as they have in Part 15 of the *Native Title Act 1993* (Cth).

THE COURT DETERMINES THAT:

14. The native title is not held in trust.

15. The Gangalidda and Garawa Native Title Aboriginal Corporation RNTBC ICN 7365, incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), is to:

(a) be the prescribed body corporate for the purpose of ss 57(2) and 57(3) of the *Native Title Act 1993* (Cth);

(b) act as agent for the Gangalidda People who are the common law holders of the native title rights and interests; and

(c) perform the functions set out in the *Native Title Act 1993* (Cth) and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

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# SCHEDULE 1 - NATIVE TITLE HOLDERS

1. The Native Title Holders are the Gangalidda People. The Gangalidda People are all of the descendants of one or more of the following people:

(a) Greg Thompson;

(b) Sophie Thompson;

(c) Ernest Thompson;

(d) Walter Thompson;

(e) Jimmy;

(f) Dawudawu Jimmy (King);

(g) Grant;

(h) George Nark Mirrabaliyajari;

(i) Bob Scoles Gunyarbadijarri;

(j) Lirrgagujarri;

(k) Bob Weber Milgalajarri;

(l) Maggie (or Minnie);

(m) Kitty;

(n) Kitty Wulnanda;

(o) Kitty Lirrgagujarri;

(p) Dolly;

(q) Old Nim;

(r) Stumpy Paddy;

(s) Mickey Charles;

(t) Barny Guldangara;

(u) Limilimilda;

(v) Johnny Balawayinda;

(w) Daisy Lirrgawanjinda;

(x) Sandy;

(y) Gunalumbu;

(z) Ngarilgudu;

(aa) Malurgudu;

(bb) Myrna Malalairunanda;

(cc) Didmanja;

(dd) Sandy;

(ee) Garruwala; and

(ff) Charly (Gundirrirri/Ngarrguyumbu/Gulawi),

who identify, and are identified by other Gangalidda People, as belonging to the Gangalidda People according to Gangalidda traditional laws and customs.

# SCHEDULE 2 – OTHER INTERESTS IN THE DETERMINATION AREA

The nature and extent of the Other Interests in relation to the Determination Area are the following as they exist as at the date of the determination:

1. The rights and interests of the holders of the following leases granted pursuant to the *Land Act 1994* (Qld):

(a) term lease TL 0/236665 over Lot 1 on Plan SP204559; and

(b) term lease TL 0/236666 over Lot 2 on Plan SP204559.

2. The rights and interests of Walaji Pty Ltd ACN 611 322 751 in its capacity as trustee for the Walaji Trust, being the registered lessee of Lot 4536 on Plan SP204559.

3. The rights and interests of Telstra Corporation Limited ACN 051 775 556:

(a) as the owner or operator of telecommunications facilities within the Determination Area;

(b) created pursuant to the *Post and Telegraph Act 1901* (Cth), the *Telecommunications Act 1975* (Cth), the *Australian Telecommunications Corporation Act 1989* (Cth), the *Telecommunications Act 1991* (Cth) and the *Telecommunications Act 1997* (Cth), including rights:

(i) to inspect land;

(ii) to install, occupy and operate telecommunication facilities; and

(iii) to alter, remove, replace, maintain, repair and ensure the proper functioning of its telecommunications facilities;

(c) for its employees, agents or contractors to access its telecommunication facilities in and in the vicinity of the Determination Area in the performance of their duties; and

(d) under any lease, licence, access agreement, permit or easement relating to its telecommunications facilities in the Determination Area.

4. The rights and interests of the Burke Shire Council (Council) to exercise its powers and responsibilities as a local government under the *Local Government Act 2009* (Qld) and any other legislation which confers powers and responsibilities on the Council.

5. Any other rights and interests:

(a) held by the State of Queensland or Commonwealth of Australia; or

(b) existing by reason of the force and operation of the Laws of the State and the Commonwealth.

# SCHEDULE 3 – EXTERNAL BOUNDARY

The area of land and waters within the external boundary of Lot 4536 on Plan SP204559, including Lots 1 and 2 on Plan SP204559.

**Note**

**Data reference and source**

 Application boundary compiled by National Native Title Tribunal based on information or instructions provided by the Applicant.

 Cadastre data sourced from Department of Natural Resources and Mines, Qld (August 2015).

Prepared by Geospatial Services, National Native Title Tribunal (22 February 2016)

# SCHEDULE 4 – DESCRIPTION OF DETERMINATION AREA

The Determination Area comprises all of the land and waters described by lots on plan in the first column of the tables in the Parts immediately below, and depicted in the maps in Schedule 6, to the extent those areas are within the External Boundary and not otherwise excluded by the terms of Schedule 5.

## Part 1 – Exclusive Areas

All of the land and waters described in the following table and depicted in dark blue on the determination map contained in Schedule 6:

|  |
| --- |
| **Area description (at the time of the determination)** |
| Lot 4536 on SP204559 |

Section 47 of the *Native Title Act 1993* (Cth) applies to the area referred to above.

## Part 2 – Non-Exclusive Areas

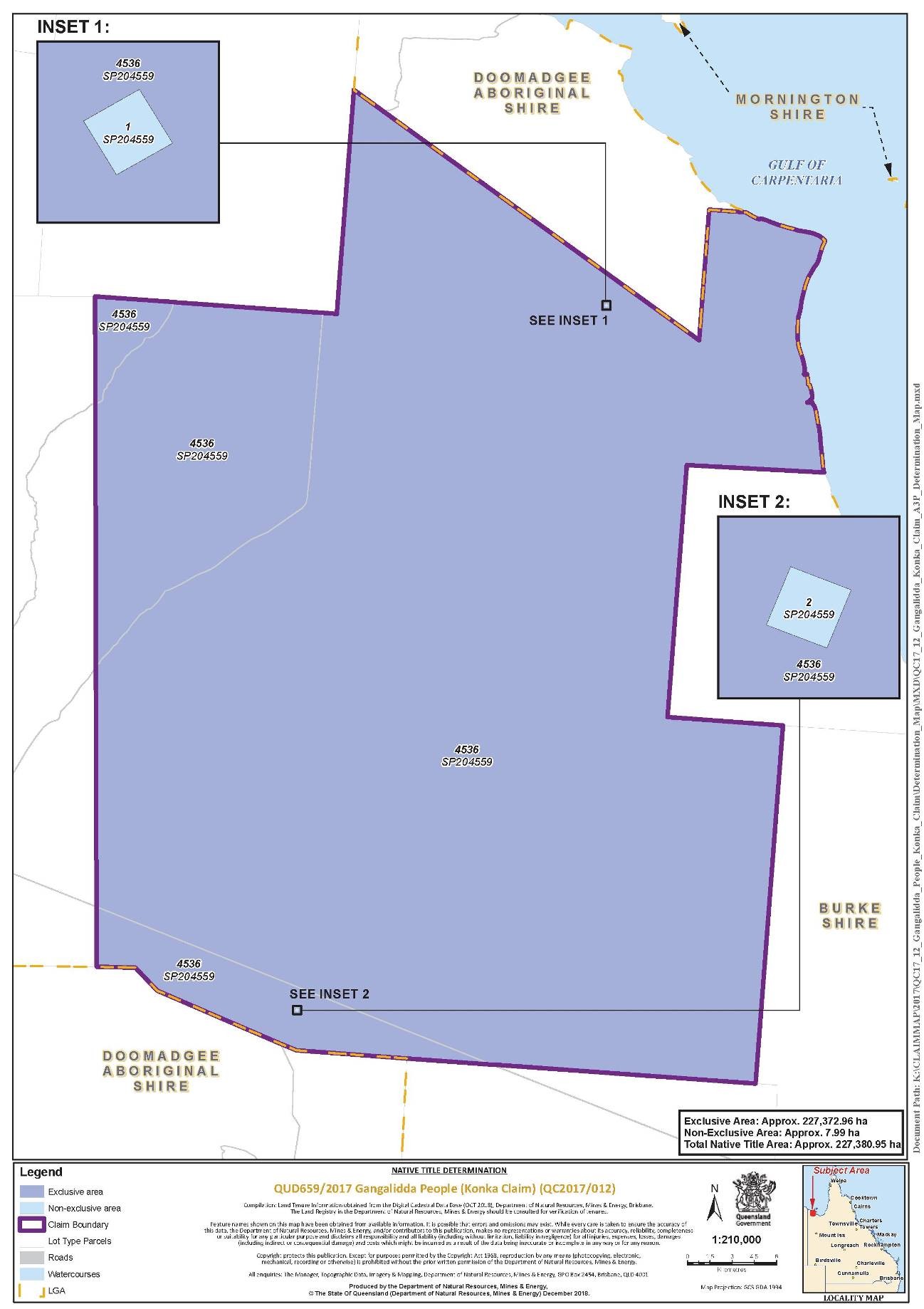
All of the land and waters described in the following table and depicted in light blue on the determination map contained in Schedule 6:

|  |
| --- |
| **Area description (at the time of the determination)** |
| 1 on SP204559 |
| 2 on SP204559 |

# SCHEDULE 5 – AREAS NOT FORMING PART OF THE DETERMINATION AREA

For the avoidance of doubt, the Determination Area does not include the land and waters on which any public work, as defined in s 253 of the *Native Title Act 1993* (Cth), is or was constructed, established or situated, and to which ss 23B(7) and 23C(2) of the *Native Title Act 1993* (Cth) and to which s 21 of the *Native Title (Queensland) Act 1993* (Qld) applies, together with any adjacent land or waters in accordance with s 251D of the *Native Title Act 1993* (Cth). Such areas were the subject of one or more Previous Exclusive Possession Acts, within the meaning of s 23B of the *Native Title Act 1993* (Cth), and could not be claimed in accordance with s 61A of the *Native Title Act 1993* (Cth).

# SCHEDULE 6 – MAP OF DETERMINATION AREA



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

REASONS FOR JUDGMENT

COLLIER J:

# BACKGROUND

1 On 24 November 2017 the Gangalidda People filed two native title determination applications in this Court. In file QUD 659 of 2017 Mr Terrence Taylor on behalf of the Gangalidda People filed an application in respect of an area in the southern region of the Gulf of Carpentaria in North Queensland, covering an area of approximately 2,273.81 square kilometres, and more particularly described as Lot 4536 on SP204559 and Lots 1 and 2 on SP204559 (**Konka claim**). In file QUD 660 of 2017 Mr Terrence Taylor on behalf of the Gangalidda People filed an application in respect of another area in the southern region of the Gulf of Carpentaria in North Queensland, covering an area of approximately 1,269.75 square kilometres, and more particularly described as Lot 4597 on PH 1605 (**Pendine claim**). I note, for clarity, that the claim group is the same for both native title determination applications.

2 In this judgment I will deal with the application in the Konka claim. I will examine the Pendine claim in a separate judgment.

3 The Gangalidda People have sought orders under s 87(2) of the *Native Title Act 1993* (Cth) (the **Act**) in the Konka claim. Section 87 relevantly provides:

**Power of Federal Court if parties reach agreement**

*Application*

(1) This section applies if, at any stage of proceedings after the end of the period specified in the notice given under section 66:

(a) agreement is reached between the parties on the terms of an order of the Federal Court in relation to:

(i) the proceedings; or

(ii) a part of the proceedings; or

(iii) a matter arising out of the proceedings; and

(b) the terms of the agreement, in writing signed by or on behalf of the parties, are filed with the Court; and

(c) the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court.

*Power of Court*

(1A) The Court may, if it appears to the Court to be appropriate to do so, act in accordance with:

(a) whichever of subsection (2) or (3) is relevant in the particular case; and

(b) if subsection (5) applies in the particular case--that subsection.

*Agreement as to order*

(2) If the agreement is on the terms of an order of the Court in relation to the proceedings, the Court may make an order in, or consistent with, those terms without holding a hearing or, if a hearing has started, without completing the hearing.

Note: If the application involves making a determination of native title, the Court's order would need to comply with section 94A (which deals with the requirements of native title determination orders).

…

4 The parties are in agreement that consent orders in the terms of the proposed native title determination (**Proposed Determination**) filed on 15 February 2019 (**the s 87 Agreement**) be made by the Court. The applicant submits that it is appropriate for the Court to make the consent orders sought without holding a hearing because:

(1) All parties have freely entered into the s 87 Agreement;

(2) All parties have had the benefit of competent, independent legal advice throughout the proceeding;

(3) It is consistent with an objective of the Act that issues and disputes concerning native title are resolved by agreement;

(4) The State of Queensland had taken a real interest in the proceeding on behalf of the community and given appropriate consideration to the applicant’s connection material;

(5) The connection material filed and served by the applicant satisfies s 223 of the Act and supports the making of the Proposed Determination;

(6) The requirements of ss 47, 56, 94A and 225 of the Act are satisfied; and

(7) The Proposed Determination is unambiguous and certain as to the rights declared.

5 I am satisfied that the provisions of s 87(2) have been satisfied, and to that extent it is appropriate to make orders without holding a hearing. The key issues for consideration by the Court in both matters are whether the Court has power to make orders consistent with the agreement of the parties, and whether it is appropriate for the Court to make the orders sought.

# APPLICATION IN THIS PROCEEDING

6 As I noted earlier in this judgment, on 24 November 2017, pursuant to ss 13 and 61 of the Act, Mr Terrence Taylor, on his own behalf and on behalf of other Gangalidda People, applied for a determination that native title exists in all the land and waters and covering approximately 2,273.81 square kilometres within the outer external boundary the Konka pastoral holding Lot 4536 on SP204559, including Lots 1 and 2 on SP204559, situated in the southern region of the Gulf of Carpentaria (**the Konka application**). The Konka application was filed in conjunction with QUD 660 of 2017 made over the adjoining Pendine pastoral holding.

## History of the claim

7 The land and waters covered by the Konka application is described in both a written description (Attachment B) and map (Attachment C) to the Konka application (**the Konka Claim Area**). The Konka Claim Area includes two term leases for communication purposes, Lots 1 and 2 on SP204559, held by Telstra Corporation Limited (**the Telstra Lease Area**). The Konka Claim Area was previously included in the claim area of native title determination application QUD 84 of 2004 made by the Gangalidda People. Pursuant to the orders of the Court made in QUD 84 of 2004 on 7 March and 13 May 2011, the applicant amended that application on 19 May 2011 to remove the Konka and Pendine pastoral holdings. I understand (and this is not in dispute) that this was done with a view to the Gangalidda People authorising and filing new native title determination applications over the Konka and Pendine pastoral holdings once the leases had been transferred to an entity that would enable the Gangalidda People to seek the benefit of the application of ss 47 and/or 47A of the Act to the Konka and Pendine leases.

8 The Konka application was accepted for registration on 27 February 2018 and notified under s 66(3) of the Act on 18 April 2018. There are three respondent parties to the Konka application, namely the State of Queensland, the Burke Shire Council, and Telstra Corporation Limited.

9 It is also common ground that the Konka application is in respect of a claim area which in turn relates to four other sets of native title determinations involving the Gangalidda People. In particular I understand that:

(1) In *The Lardil Peoples v State of Queensland* [2004] FCA 298 the Court recognised the native title of the Gangalidda People to land and waters in the Gulf of Carpentaria which adjoined parts of the northern boundary of the area covered by the Konka application;

(2) An approved determination of native title in native title application QUD 7 of 2006 was made on 9 December 2008, whereby native title was determined, by consent, to be held, in the case of the Gangalidda People, over Pains (or Robert) Island and Bayley (or Francis) Island jointly with the Yangkaal People and in Allen Island, Horeshoe Island and Little Allen Island jointly with the Kaiadilt and Yangkaal Peoples;

(3) Approved determinations of native title by consent were made on 23 June 2010 in native title applications QUD 84 of 2004 (by which non-exclusive native title was determined to be held by the Gangalidda People over Cliffdale and Escott pastoral holdings) and QUD 66 of 2005, (by which exclusive native title was determined to be held by the Gangalidda People over Troutbeck (part), Bundella, Brokera and Tarrant pastoral holdings and the Old Doomadgee Reserve);

(4) Approved determinations of native title by consent were made on 1 April 2015 in native title applications QUD 84 of 2004 (by which non-exclusive native title was determined to be held by the Gangalidda People over a small part of Wentworth pastoral holding east of the line marked “Gangalidda and Garawa line” and exclusive native title was determined to be held by the Gangalidda People over a small part of Troutbeck pastoral holding east of the Gangalidda and Garawa line, and QUD 66 of 2005 (by which exclusive native title was determined to be held by the Gangalidda People over reserves and unallocated State land within the town of Burketown, parts of the Reserve for Township Purposes (Burketown), part of the Doomadgee Deed of Grant in Trust, Lot 6 on SP243581, and other areas of unallocated State land, and non-exclusive native title was determined to be held by the Gangalidda People over Yarrum (part), Turn Off Lagoons (part), Lawn Hill (part), Westmoreland (part), Almora (part), Armraynald (part), Beamesbrook, Birkalla, Nierrana (part), Little Doab, Doab (part); Brinawa (part), Kotupna (part) and Punjaub (part) pastoral holdings and part of Finucane Island National Park, as well as certain land and waters on the seaward side of the High-Water Mark which were not otherwise covered).

10 In summary, it is common ground that the Konka Claim Area is surrounded by land and waters in which the Gangalidda People have been determined to hold exclusive and non-exclusive native title.

## Connection material

11 On 15 February 2019 the applicant filed the following connection material relating to the Konka Claim Area:

 Report Concerning Gangalidda People (December 1998) prepared by Dr David Trigger;

 Wellesley Islands Sea Claim – Report Concerning Gangalidda People – Register of sites in Coastal Estates A to J (December 1998) prepared by Dr David Trigger;

 Wellesley Islands Sea Claim – Report Concerning Gangalidda People – Register of Sites in Albert River, Nicholson River, Gin Arm Creek Area (December 1998) prepared by Dr David Trigger; and

 Genealogical sheets (Gangalidda People) prepared by Dr David Trigger.

12 The applicant also filed further expert documents previously filed, namely:

 Register of Sites and Significant Areas (filed 30 June 2010) prepared by Dr David Trigger (filed in QUD 84 of 2004 and QUD 66 of 2005);

 Expert Report to the Federal Court of Australia Gangalidda and Garawa People #2 (20 March 2012) prepared by Dr David Trigger (filed in QUD 84 of 2004 and QUD 66 of 2005); and

 Gangalidda Eastern Area Report (1 February 2013) prepared by Dr Richard Martin (filed 8 August 2013 in QUD 66 of 2005).

13 The applicant also relies on evidence of Gangalidda lay witnesses, in particular:

(1) Written evidence of the following lay witnesses filed in *Lardil v State of Queensland*:

(a) Bill Kurubaba sworn 8 August 1999;

(b) Allan Ned sworn 10 August 1999;

(c) Major Walden dated 13 August 1999;

(d) Clarence Walden dated 12 August 1999;

(e) Michael Booth dated 12 August 1999;

(f) June Gilbert dated 12 August 1999;

(g) Murrandoo Yanner sworn 20 August 1999;

(h) Bill Westmoreland dated 11 August 1999;

(i) Clara Foster dated 12 August 1999;

(j) Valerie Douglas dated 13 August 1999;

(k) Valerie Douglas dated 13 April 2000;

(l) Reggie Robertson dated 5 August 1999;

(m) Melville Escott dated 17 August 1999;

(n) Melville Escott dated 27 May 2000; and

(o) Wadjularbinna dated 31 May 2000.

(2) Additional written evidence of the following Gangalidda lay witnesses filed in QUD 84 of 2004 and QUD 66 of 2005:

(a) Melville Butcher filed 8 November 2006;

(b) Martin Evans filed 3 March 2015;

(c) Clara Foster sworn 14 November 2006;

(d) Kenneth Gilbert 30 April 2014;

(e) June Gilbert 29 August 2006;

(f) Myron Johnny 31 August 2006;

(g) Cheryl Johnny 1 May 2014;

(h) Catherine O'Keefe 1 May 2014;

(i) Betty O’Loughlin filed 3 March 2015;

(j) Terrence Taylor sworn 20 April 2010;

(k) Phillip Vernon Yanner sworn 28 June 2010;

(l) Shane Yanner 4 October 2010;

(m) Murrandoo Yanner 18 September 2007; and

(n) Clarence Walden sworn 25 October 2007.

(3) Additional written evidence of the following Gangalidda lay witnesses filed in this application; and

(a) Terrence Taylor sworn 7 December 2017; and

(b) Murrandoo Yanner sworn 7 December 2017.

(4) The oral evidence of the following Gangalidda lay witnesses in *Lardil v State of Queensland*:

(a) Bill Kurubaba;

(b) April Peter;

(c) Bill Westmoreland;

(d) Michael Booth ;

(e) Allan Ned;

(f) Clara Foster;

(g) Reggie Robertson;

(h) Major Walden;

(i) Andrew Marmies;

(j) Eva Gilbert;

(k) June Gilbert;

(l) Clara Reid;

(m) Melville Escott;

(n) Valerie Douglas;

(o) Murrandoo Yanner;

(p) Wadjularbinna;

(q) Aelan Thompson; and

(r) Clarence Walden.

## Authorisation to enter the s 87 Agreement

14 At a meeting at Burketown in Queensland on 21 November 2018, the Gangalidda native title claim group authorised Mr Taylor to enter the s 87 Agreement. It is common ground that the s 87 Agreement was filed by Mr Taylor in accordance with s 87(1)(b) of the Act on 15 February 2019, and that it contains the agreement of the parties to the Proposed Determination. All parties were represented.

15 I understand that all respondents had the opportunity to consider the evidence of the applicant in their consideration of whether to enter the s 87 Agreement.

## The Proposed Determination

16 In summary, in the Proposed Determination the parties agree in respect of the following matters:

 The determination area.

 That native title exists in the determination area, and is held by the Gangalidda People.

 The Gangalidda People are those who identify and identified by other Gangalidda People as belonging to the Gangalidda People according to Gangalidda traditional laws and customs, and who are the descendants of one or more of the following people:

(a) Greg Thompson;

(b) Sophie Thompson;

(c) Ernest Thompson;

(d) Walter Thompson;

(e) Jimmy;

(f) Dawdawu Jimmy (King);

(g) Grant;

(h) George Nark Mirrabaliyajari;

(i) Bob Scoles Gunyarbadijarri;

(j) Lirrgagujarri;

(k) Bob Weber Milgalajarri;

(l) Maggie (or Minnie);

(m) Kitty;

(n) Kitty Wulnanda;

(o) Kitty Lirrgagujarri;

(p) Dolly;

(q) Old Nim;

(r) Stumpy Paddy;

(s) Mickey Charles;

(t) Barny Galdangara;

(u) Limilimilda;

(v) Johnny Balawayinda;

(w) Daisy Lirrgawanjinda;

(x) Sandy;

(y) Gunalumbu;

(z) Ngarilgudu;

(aa) Malurgudu;

(bb) Myrna Matalairunanda;

(cc) Didmanja;

(dd) Sandy;

(ee) Garruwala; and

(ff) Charly (Gundirrirri/Ngarrguyumbu/Gulawai).

 The native title rights and interests in the land are subject to and exercisable in accordance with the laws of the State of Queensland and the Commonwealth, and the traditional laws acknowledged and traditional customs observed by the native title holders. Further there are no native title rights in or in relation to minerals and petroleum.

 The nature and extent of native title in relation to the use and enjoyment of the determination area, other than in relation to water, is the right to possession, occupation, use and enjoyment of the area to the exclusion of all others.

 In relation to water, the nature and extent of native title was the non-exclusive right to hunt, fish and gather from the water of the area; take and use the natural resources of the water in the area; and take and use the water of the area for personal, domestic and non-commercial communal purposes.

 The claim group had the non-exclusive rights and interests in relation to the use and enjoyment of Lots 1 and 2 on SP20404559 to:

(a) Access, be present on, move about on and travel over the area;

(b) Camp, and for that purpose build temporary shelters;

(c) Hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal purposes;

(d) Take, use, share and exchange natural resources from the land and waters of the area for personal, domestic and non-commercial communal purposes;

(e) Take and use the water of the area for personal, domestic and non-commercial communal purposes;

(f) Conduct ceremonies on the area;

(g) Be buried and bury native title holders within the area;

(h) Maintain places and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm; and

(i) Light fires on the area for domestic purposes including cooking, but not for the purposes of hunting or clearing vegetation.

 The native title rights and interests are subject to and exercisable in accordance with the laws of the State of Queensland and the Commonwealth, and the traditional laws acknowledged and traditional customs observed by native title holders.

 “Other Interests” as defined in Schedule 2 of the agreement were preserved and continued to have effect, and could be exercised notwithstanding the existence of native title rights and interests. In summary, those Other Interests were holders of term leases (being term lease TL 0/236665 over Lot 1 on Plan SP204559 and term lease TL 0/236666 over Lot 2 on Plan SP204559); the rights and interests of Walaji Pty Ltd in its capacity as trustee for the Walaji Trust, being the registered lessee of Lot 4536 on Plan SP204559 in the Claim Area; the rights and interests of Telstra Corporation including pursuant to relevant legislation; the rights and interests of the Burke Shire Council; and any other rights and interests held by the State of Queensland or Commonwealth of Australia existing by reason of the force and operation of State and Commonwealth laws.

 The Gangalidda and Garawa Native Title Aboriginal Corporation RNTBC was to be the prescribed body corporate for the purposes of ss 57(2) and 57(3) of the Act, and would act as agent for the Gangalidda People who were the common law holders of the native title rights and interests.

## Exercise of power under s 87 of the Act

17 As I noted earlier the Court has power to make an order consistent with the terms in the s 87 Agreement without holding a hearing if the Court is satisfied that an order in or consistent with those terms would be within the power of the Court, and the Court considers it appropriate to make the orders sought. In circumstances where the parties have provided consent orders for the resolution of a native title claim, as a general proposition the Court is more likely to accept that the requirements of s 223 of the Act have been met, and that native title exists, such that the orders sought by the parties are appropriate. In *King on Behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group v State of South Australia* [2011] FCA 1387 for example Keane CJ said:

The Court does not therefore routinely embark on its own inquiry of the merits of the claim made in the application to be satisfied that the orders sought are supportable and in accordance with the law*: Cox on behalf of the Yungngora People v State of Western Australia* [2007] FCA 588 at [3] per French J. However, it might consider that evidence for the limited purpose of being satisfied that the State is acting in good faith and rationally: *Munn* at [29]-[30] per Emmett J. See also *Smith v State of Western Australia* [2000] FCA 1249; (2000) 104 FCR 494 at [38] per Madgwick J:

State governments are necessarily obliged to subject claims for native title over lands and waters owned and occupied by the State and State agencies, to scrutiny just as careful as the community would expect in relation to claims by non-Aborigines to significant rights over such land.

18 In this case it is clear that the State of Queensland has taken steps to satisfy itself that there is a credible basis for this application and the s 87 Agreement between the parties. As I noted earlier, there is no reason to infer otherwise than that the s 87 Agreement was freely entered into on an informed basis by all parties.

19 Section 225 of the Act provides:

**Determination of native title**

A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land or waters and, if it does exist, a determination of:

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease--whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

Note: The determination may deal with the matters in paragraphs (c) and (d) by referring to a particular kind or particular kinds of non-native title interests.

20 The Proposed Determination satisfies s 225 of the Act by proposing orders identifying the Gangalidda People, the nature and extent of their respective native title rights and interests, the nature and extent of Other Interests and the relationship of those non-native title interests with the determined native title rights and interests, and the extent of the Determination Area in which native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others. I am satisfied that these native title rights and interests are consistent with the native title rights and interests identified in evidence on which the applicant relies, and the law.

21 I also note the strong connection between the Konka Claim and the findings of the Court in *Lardil v State of Queensland*, where the successful native title application was made by the same Gangalidda People with the same traditional laws and customs, and similar rights and interests, to the claimants in this application. To that extent I am prepared to accept the evidence in the proceedings of *Lardil v State of Queensland* as relevant in this case. Importantly, in *Lardil v State of Queensland* Cooper J was satisfied that the descendants of the Gangalidda People as presented in the genealogies relied on that case were the descendants of a pre-sovereignty society or community governed by traditional law and customs, and thus satisfied s 223(1) of the Act. I also note as relevant in this case the following finding of Cooper J in *Lardil v State of Queensland*:

197 In respect of the original Gangalidda people, I am satisfied that at the time of sovereignty, the following rights and interests were possessed under traditional laws acknowledged, and traditional customs observed, by them in relation to part of the land and waters of the area claimed as the traditional territory of the Gangalidda peoples, and that such rights survived the assertion of sovereignty:

1. The right to access the land and waters seaward of the high water mark in accordance with and for the purposes allowed by and under those traditional laws and customs.

2. The right to fish, hunt and gather, including the right to hunt and take turtle and dugong in the inter-tidal zones and the waters above and adjacent thereto, for personal, domestic or non-commercial communal consumption in accordance with and for the purposes allowed by and under those traditional laws and customs.

3. The right to take and consume fresh drinking water from fresh water springs in the inter-tidal zone in accordance with and for the purposes allowed by and under those traditional laws and customs.

4. The right to access the land and waters seaward of the high water mark, and so much of the waters of the Albert River as fall within the claim area, in accordance with and for the purposes allowed under traditional laws and customs for religious or spiritual purposes and to access sites of spiritual or religious significance in the land and waters within the traditional territory of the Gangalidda peoples for the purposes of ritual or ceremony.

5. The right to construct, repair and maintain rock fishtraps in the inter-tidal zone and to take fish therefrom in accordance with such traditional laws and customs.

6. The right to access so much of the waters of the Albert River as fall within the claim area for the purpose of hunting, fishing and foraging for living and plant resources for personal, domestic or non-commercial consumption in accordance with and for the purposes allowed by and under those traditional laws and customs.

22 Similarly, the determinations in 2010 and 2015 giving effect to the existence of exclusive and non-exclusive rights in the Gangalidda People in country contiguous to the Konka Claim area, and which also relied on the evidence outlined earlier in this judgment, are supportive of agreement of the parties in respect of native title vesting in the Gangalidda People in respect of the Konka Claim area and the entry of the parties into the s 87 Agreement.

23 I note that, at the time the Konka application was made, a pastoral lease was held over the Konka Claim area. The pastoral lease was held by Walaji Pty Ltd from 13 September 2017, on trust for the Walaji Trust, being a charitable trust for the benefit of current and future generations of members of the community including the Gangalidda People. The lease is for a period of 30 years, and is for the purpose of “rolling term lease – pastoral” within the meaning of s 164(1) of the *Land Act 1994* (Qld). It is common ground that this lease is a pastoral lease held by native title claimants within the meaning of ss 47 and 248 of the Act. The sole shareholder of Walaji Pty Ltd is Gangalidda and Garawa Native Title Aboriginal Corporation RNTBC ICN 7365 (**GGNTAC**), incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

24 Relevantly, s 47 of the Act provides:

**Pastoral leases held by native title claimants**

*When section applies*

(1) This section applies if:

(a) an application under section 61 is made in relation to an area; and

(b) when the application is made, a pastoral lease is held over the area by:

(i) any of the persons who made the application claiming to hold the native title or any other persons with whom they claimed to hold the title; or

(ii) a trustee, on trust for any of those persons; or

(iii) a company whose only shareholders are any of those persons.

*Prior extinguishment to be disregarded*

(2) For all purposes under this Act in relation to the application, any extinguishment of the native title rights and interests by any of the following acts must be disregarded:

(a) the grant of the lease itself;

(b) the creation of any other interest itself in relation to the area;

(c) the doing of any act under the lease or by virtue of holding the interest.

Note: The applicant will still need to show the existence of any connection with the land or waters concerned that may be required by the common law concept of native title.

*Effect of determination*

(3) If the determination on the application is that the native title exists and is held by the persons mentioned in subparagraph (1)(b)(i), (ii) or (iii):

(a) the determination does not affect:

(i) the validity of the lease; or

(ii) any interest of the Crown in any capacity, or of any statutory authority, in any public works on the land or waters concerned; and

(b) the non-extinguishment principle applies in relation to the grant of the lease and any other prior act affecting the native title; and

(c) any person, trustee or company holding the lease as mentioned in subparagraph (1)(b)(i), (ii) or (iii) has no procedural rights as holder of the lease in relation to any act, in relation to the land or waters, to which Subdivision P of Division 3 (which deals with the right to negotiate) applies.

25 It is common ground that, in this case, the terms of the s 87 Agreement satisfied ss 47(1)(b)(ii) and 47(2) of the Act, such that it is within the Court’s power to make orders granting the applicant the exclusive right to possession, occupation, use and enjoyment of the area described as Lot 4536 on SP204559.

26 The Proposed Determination provides that GGNTAC is to be the prescribed body corporate for the purposes of ss 57(2) and (3) of the Act, act as agent for the Gangalidda people who are the common law holders of the native title rights and interests, and perform the functions set out in the Act and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**PBC Regulations**). The applicant submits that the rules of the GGNTAC satisfy the requirements of the PBC Regulations on the basis that:

 its list of members and rules of membership provide that all Gangalidda members are persons who are included, or proposed to be included, in the Proposed Determination as native title holders; and

 the objects of the GGNTAC provide that one of its purposes is to become a registered native title body corporate.

27 In his affidavit of 18 February 2019 Mr Phillip Hunter, the solicitor for the applicant, deposed that:

 A properly notified and convened meeting of the Gangalidda people and the Garawa people was held at Burketown on 21 November 2018, at which time the Gangalidda People and the Garawa people gave their consent as initial holders for GGNTAC to be the agent prescribed body corporate for the Proposed Determination as required for reg 4A(a) of the PBC Regulations.

 The Gangalidda People – as the proposed subsequent holders – then nominated GGNTAC to be the agent prescribed body corporate for the Proposed Determination, as required by reg 4A(b).

 Following the conclusion of the meeting of the Gangalidda people and the Garawa people the board of GGNTAC met and resolved unanimously to accept the nomination of GGNTAC to be the agent prescribed body corporate for the Proposed Determination.

28 The applicant further submitted that a nomination by the Gangalidda People that GGNTAC would perform the functions in s 57(3) of the Act, and GGNTAC’s consent to do so for the Proposed Determination, were filed by the applicant in this proceeding on 15 February 2019, satisfying the requirements of s 57(2)(a) of the Act.

29 Finally, I understand that the applicant provided successive drafts of his outline of submissions to the respondents, that the State of Queensland has responded with comments, and that those comments have been accepted by the applicant.

30 In the circumstances of this case I am satisfied that the requirements of s 87 have been satisfied. The Court has power to make the orders sought by the applicant, to which the respondents have agreed, and I consider it appropriate that the Court do so.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associate:

Dated: 11 March 2019