Federal Court of Australia

 Williams on behalf of the Githabul People v State of Queensland [2022] FCA 569

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| File number(s): |  |
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| Judgment of: | **COLLIER J** |
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| Date of judgment: | 18 May 2022 |
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| Catchwords: |  **NATIVE TITLE** – Interlocutory Application seeking to remove Indigenous Respondents – whether Indigenous Respondents are in representative capacity – Section 84 *Native Title Act* – application granted  |
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| Legislation: | *Native Title Act 1993* (Cth) |
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| Cases cited: | *Blucher on behalf of the Gaangalu Nation People v State of Queensland* [2018] FCA 1369*Harrington-Smith on behalf of the Darlot Native Title Claim Group v State of Western Australia* [2022] FCA 114*Kum Sing on behalf of the Mitakoodi People # 5 v State of Queensland (No 2)* [2022] FCA 248*Miller v State of South Australia (Far West Coast Sea Claim) (No 2)* [2018] FCA 599*Moses v Western Australia* (2007) 160 FCR 148*TR (Deceased) on behalf of the Kariyarra Pipingarra People v State of Western Australia* [2016] FCA 1158 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Native Title |
|  |  |
| Number of paragraphs: | 26 |
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| Date of hearing: | 16 May 2022  |
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| Solicitor for the Applicant: | Mr T Wishart of QSNTS  |
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| Counsel for the Indigenous Respondents: | Mr A Wrenn |
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| Solicitor for the Indigenous Respondents: | Mr C Blishen of Arnell & Cooper Lawyers Pty Ltd  |

ORDERS

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|  | QUD 87 of 2021 |
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| BETWEEN: | ROBERT WILLIAMS SNR & ORS ON BEHALF OF THE GITHABUL PEOPLE (WARINGH WARINGH)Applicant |
| AND: | STATE OF QUEENSLANDRespondent |

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| order made by: | COLLIER J |
| DATE OF ORDER: | 18 MAY 2022 |

THE COURT ORDERS THAT:

1. Pursuant to section 84(8) of the Native Title Act 1993 (Cth) Berice Rita Anning and Isobelle Francis Anderson cease to be a party to the proceedings.

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

REASONS FOR JUDGMENT

COLLIER J:

1. Before the Court is an interlocutory application filed by the Native Title Applicant on 31 March 2022 seeking the following relief:
2. Pursuant to section 84(8) of the *Native Title Act 1993* (Cth) Berice Rita Anning and Isobelle Francis Anderson cease to be a party to the proceedings.
3. Such further or other orders as the Court considers fit.
4. The Native Title Applicant was represented at the hearing, as were Ms Anning and Ms Anderson.
5. In my view Ms Anning and Ms Anderson should be removed as a party to the proceedings, for reasons that follow.

# background

1. By Native Title Determination Application (**Form 1**) filed on 24 March 2021 the Native Title Applicant, being Robert Williams Snr, Nathaniel (Charlie) Ord, Dianne Torrens, Queenie Speeding, Melissa Chalmers, Gabriel Boota, Delphine Charles, Jacob Polzin, Nathan Charles and Kim Rush, applied for a determination of native title under s 61 (1) of the *Native Title Act 1993* (Cth) (**the Act**).
2. The application followed an authorisation meeting of the Githabul People claim group conducted at the Warwick Town Hall on 20 March 2021, authorising the applicant on behalf of the claim group to make the application and deal with matters arising in relation to the application under the Act. It also followed a number of information sessions held at Kyogle, Mulli Mulli and Warwick, which were advertised by public notice published by Queensland South Native Title Services.
3. The Githabul People Native Title Claim Group for the purposes of s 61 of the Act is described in the Form 1 as follows:

The Githabul People are the biological and adopted descendants of:

Yagoi, Billy Williams, Doctor or Billy Williams, Julia Charles, Hughie Williams, Mary Williams, Elizabeth Williams, Lily Williams, Elsa/Eileen Williams, Euston Williams, Jimmy Sambo, Dan Sambo, Emily Sambo, Margaret Sambo, Jean Sambo, Timegar Sambo, Jerry Wagner, Alec Bond, Rene Bond, Anne Hippine, Lily Harrison, Dillon Harrison, Elizabeth Sutherland, Arthur Bundock, Fred Yarrie, Margaret Yarrie, Sam Yarrie, Bob Yarrie, Syd Yarrie, Kitty, Billy McBride, Elizabeth McBride, Gergan Williams, Minnie Williams, Clara Williams, Girlille, Lena Weekly, Emily Weekly, John Devan, Dolly Devan, Tom Close, Nellie Devine, Roy Close, Violet Cliff, Sarah Kenny, Lizzy Andrew, Digger Marine or Mareen, Bill Williams, Nellie Williams, Alice Williams, Arthur Williams, Faraway Hart, Tommy Boyd, Roger Boyd, Bill Hill Snr, King Edward Derry, Billy King Snr, Bill Brown, and Tommy Kenny, who identify themselves as members of the Githabul People under Githabul traditional lore and custom.

The native title claim group is comprised of the same persons found to be native title holders in the Determination of native made in favour of the Githabul People in *Trevor Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847.

1. Evidence was given by Ms Sheree Sharma, Deputy Principal Legal Officer of Queensland South Native Title Services (**QSNTS**) on behalf of the Native Title Applicant in her affidavit dated 31 March 2022. Ms Sharma’s evidence included that at the information session held on 14 March 2021 in Warwick for prospective Githabul claim group members, people who identified themselves as Berice Anning, Mathew Anderson, Fiona Hornung and Tommy Daniels attended and asked to enter the information session. They were informed by Mr Nicolas Daza, a research officer employed by QSNTS, that they could not attend as they were not descendants of the ancestors listed in the public notice, and therefore were not part of the putative native title claim group.
2. On 27 October 2021 Ms Anning and Ms Anderson filed a notice of intention to become a party to the present proceedings (**Form 5**). In the column headed “*Describe the nature of your interests and the manner in which it/they may be affected by a Native Title Determination*”, Ms Anning and Ms Anderson stated the following :

We\* give notice under paragraph 84(3)(b) of the Act that I/ we\* want to be a party in relation to the application under section 61 of the Act.

The basis on which we\* want to become a party is:

The Keinjan Tribe have traditional rights and interests including cultural interests, which have been and are recognised under British Common law, and we are the first and prior owners of the land being claimed by the parties in the matter of Robert Williams Snr & Ors on behalf of the Githabul People (Waringh Waringh) v State of Queensland.

The attached map (refer to Attachment A), published by Norman B Tindale, titled “*Tribal Boundaries in Aboriginal Australia*” details the area that the Keinjan Tribe have traditional rights and interests to and over, but which the Githabul Tribe are alleging belongs to them.

The Githabul claim is seeking to remove the rightful traditional owners (that is, the Keinjan Tribe) of their lands which denies them their occupation, possession and enjoyment in practicing their traditional rights and interests.

The Tindale Map identifies the coordinates for the Keinjan tribal boundaries, as cited in the publication of Norman B Tindale (1974) titled “*Aboriginal Tribes of Australia*”. (refer to **Attachment A**).

These coordinates for the Keinjan tribal boundaries are on page 175.

(refer to **Attachment B**)

The descendants of the Keinjan apical ancestors have signed a petition (**Attachment C**) that authorises the Keinjan Elders, as named on the petition and in accordance it the resolutions from the Authorisation meetings in July and October 2021 (**Attachments D and E**), and on their behalf to become a respondent party and to represent the traditional rights and interests of the Keinjan tribe in responding to the Githabul Claim QUD87/2021 - *Robert Williams Snr & Ors on behalf of the Githabul People (Waringh Waringh) v State of Queensland*.

**Attachment A- Tindale Map Identifying the Keinjan Tribe's boundaries**

**Attachment B - Page 175, of the publication of Norman B. Tindale (1974) titled 'Aboriginal Tribes of Australia'.**

**Attachment C - Petition signed by Keinjan descendants**

**Attachment D - Notice of Authorisation Meeting and Minutes/Resolutions of Authorisation Meeting of Keinjan members held 4 July2021**

**Attachment E - Notice of Authorisation Meeting and Minutes/Resolutions of Authorisation Meeting of Keinjan members held 10 October 2021**

1. On 8 March 2022 Ms Anning and Ms Anderson filed a document described as “Indigenous Respondents Progress Report”. Importantly, paragraph 1 of that report states:

1. This progress report is prepared and filed by the Indigenous Respondents Berice Rita Anning and Isobelle Francis Anders on behalf of the Keinjan People, pursuant to the request of the Court for the Southern call over listed for 11 March 2022.

1. At the case management hearing on 11 March 2022 the Native Title Applicant made an oral interlocutory application to have Ms Anning and Ms Anderson removed as respondents to the proceeding, pursuant to s 84 (8) of the Act. The Native Title Applicant filed the present interlocutory application seeking the same relief on 31 March 2022.

# SUBMISSIONS OF THE PARTIES

1. In summary, the Native Title Applicant’s submissions are as follows:
* It is apparent from the Form 5 and the Indigenous Respondents Progress Report filed by Ms Anning and Ms Anderson that they purport to be before the Court in a representative capacity on behalf of the Keinjan People.
* The case law in respect of respondent parties is well settled, namely it is not permissible that a respondent to a native title determination application act in a representative capacity or secure recognition of native title rights and interests without bringing their own properly authorised native title determination application.
* Ms Anning and Ms Anderson are not actively seeking and cannot seek a determination in favour of the Keinjan People.
* Although an interest asserting individual native title rights and interests is sufficient to be joined as a respondent, the native title rights and interests asserted by Ms Anning and Ms Anderson would not satisfy this principle.
* Ms Anning and Ms Anderson should be removed as respondents to the proceedings.
1. Ms Anning and Ms Anderson submitted, in summary, that:
* They did not dispute legal principles as stated by the Native Title Applicant, namely that for them to continue as parties to the proceeding they must make an application for Native Title Determination on behalf of the Keinjan People.
* They were willing to participate in mediation and conferencing to assist in facilitating the conduct and determination of the proceeding.
* They wanted to remain as respondents until they successfully filed and served a native title claim.
* Removing the Keinjan People would be prejudicial to their right to seek protection of the Court against erosion, dilution or discount of their native title rights.
* Ms Anning and Ms Anderson also assert individual native title rights and interests which are sufficient to allow them to remain as respondents.

# CONSIDERATION

1. Section 84 of the Native Title Act makes provision for parties to proceedings under that legislation. Materially for the purposes of the present application, s 84 (3)(a)(iii) of the Native Title Act provides that another person is a party to the proceedings if, *inter alia*:

(iii) the person's interest, in relation to land or waters, may be affected by a determination in the proceedings;

1. Section 84 (5) provides in relation to 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. Further, s 84 (9) provides for circumstances where the Court may consider dismissing parties, as follows:

(9) The Federal Court is to consider making an order under subsection (8) in respect of a person who is a party to the proceedings if the Court is satisfied that:

(a) the following apply:

(i) the person's interests may be affected by a determination in the proceedings merely because the person has a public right of access over, or use of, any of the area covered by the application; and

(ii) the person's interests are properly represented in the proceedings by another party; or

(b) the person never had, or no longer has, interests that may be affected by a determination in the proceedings.

1. The material before the Court – in particular the Form 5 and the Progress Report filed by Ms Anning and Ms Anderson – indicate that they are respondents to the Githabul Native Title claim in a representative capacity, seeking to advance a competing native title claim on behalf of the Keinjan People.
2. A determination of native title can only be made if there is native title application for determination before the Court: see *Moses v Western Australia* (2007) 160 FCR 148 at [18]. As North ACJ observed in *TR (Deceased) on behalf of the Kariyarra Pipingarra People v State of Western Australia* [2016] FCA 1158 at [28], such a position would require them to bring a separate native title application and obtain authorisation for that purpose. More recently Rangiah J in *Blucher on behalf of the Gaangalu Nation People v State of Queensland* [2018] FCA 1369 said at [21]:

21. The authorities establish that for the purposes of an application for joinder under s 84(5) of the NTA:

(1) The interests of persons who claim to hold native title rights and interests in relation to the land or waters the subject of a proceeding may be sufficient interests.

(2) ***A member of another native title group cannot be joined as a respondent for the purpose of acting as a representative to assert native title rights on behalf of the other group. That is because the combined effect of ss 13, 61, 213 and 225 is that an application for a determination of native title can only be made by a duly authorised applicant using the procedures in Pt 3 of the NTA***.

(3) A member of another native title group may be joined as a respondent for the purpose of “defensively asserting” native title rights and interests. ***Such a person is only permitted to pursue a personal claim to such rights and interests: that is, to protect them from erosion, dilution or discount***.

1. I note that in support of these propositions Rangiah J cited extensive authority, which I respectfully adopt. (see also more recently *Miller v State of South Australia (Far West Coast Sea Claim) (No 2)* [2018] FCA 599 at [110] *Harrington-Smith on behalf of the Darlot Native Title Claim Group v State of Western Australia* [2022] FCA 114 at [17] and *Kum Sing on behalf of the Mitakoodi People # 5 v State of Queensland (No 2)* [2022] FCA 248 at [14]). As I have already noted, these principles were not disputed by Ms Anning or Ms Anderson.
2. To the extent that Ms Anning and Ms Anderson act in a representative capacity on behalf of the Keinjin People as respondents to the Githabul native title application, they do not have interests that may be affected by a determination in the substantive proceedings.
3. The question remaining is whether Ms Anning or Ms Anderson have personal rights and interests affected by the native title application, which would be eroded such as to warrant them remaining respondents. In my view they do not. In particular:
* They do not identify how they will protect their individual native title rights as respondents to the Githabul Native Title application in the absence of a competing claim by the Keinjin People;
* Their reliance on a proposed independent anthropologist’s report “that will allow all the Geynyan members to have an input” (as submitted at the case management hearing on 11 March 2022) simply reinforces the representative nature of their position as respondents;
* On the material before me their personal rights and interests other than their claimed representation of the Keinjin People are simply not articulated.
1. I note the submission of Counsel for Ms Anning and Ms Anderson that they anticipate seeking authorisation in conformance with s 251B of the Native Title Act to file their own native title application on behalf of the Keinjin People. Such an approach would be consistent with the terms of the Native Title Actand the state of the law. However they also seek, as an exercise of the Court’s discretion, the opportunity to remain as respondents to the Githabul Native Title Application until they successfully file and serve their own Form 1, and the opportunity to mediate with the Githabul Native Title Applicant.
2. I am not persuaded that these submissions support an order in favour of Ms Anning and Ms Anderson. Such evidence as is before the Court (in particular the affidavit of Ms Sharma dated 31 March 2022) indicates that the Native Title Applicant has previously been prepared to attend mediation, however Ms Anning and Ms Anderson were unprepared to do so. Now the Native Title Applicant no longer wishes to attend mediation, however Ms Anning and Ms Anderson have altered their own attitude towards mediation.
3. The fact that Ms Anning and Ms Anderson are now prepared to attend mediation, in circumstances where they acknowledge that their position as respondents in a representative capacity has no merit, does not persuade me of the benefit of ordering a mediation, and requiring the Native Title Applicant to attend a mediation in which it no longer wishes to participate, with persons who have no basis on which to remain respondents.
4. I also see little utility in Ms Anning and Ms Anderson remaining as respondents, contrary to established legal principle, simply because of a hypothetical future Native Title determination application on behalf of the Keinjin People. Such an application may or may not eventuate. If it does not, as matters presently stand no prejudice will be occasioned to the position of Ms Anning and Ms Anderson by their removal as respondents to the Githabul proceedings, when they have identified no personal rights or interests to protect arising from the Githabul Native Title Application.
5. Further, and practically, as Mr Wishart for the Native Title Applicant properly submitted at the interlocutory hearing, the Githabul Native Title Application is presently ongoing with further work to be done to progress it. There is nothing to prevent Ms Anning and Ms Anderson applying to rejoin these proceedings as respondents, on proper articulation of personal rights and interests they seek to protect.

# CONCLUSION

1. The proper order is that Ms Anning and Ms Anderson should cease to be parties to the proceedings.

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| I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier. |

Associate:

Dated: 18 May 2022