FEDERAL COURT OF AUSTRALIA

McGlade v Native Title Registrar [2017] FCAFC 10

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| File numbers: | WAD 137 of 2016  WAD 138 of 2016  WAD 139 of 2016  WAD 140 of 2016 |
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| Judges: | **NORTH, BARKER AND MORTIMER JJ** |
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| Date of judgment: | 2 February 2017 |
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| Catchwords: | **NATIVE TITLE** – South West Native Title Settlement – registration requirements for indigenous land use agreements (area agreements) (***ILUAs***) – where meeting resolutions authorising ILUA provided not necessary for all persons comprising the registered native title claimant or claimants to sign the ILUA – where ILUA signed in accordance with meeting resolutions but not signed by all persons who jointly comprised registered native title claimant or claimants – who must be party to an ILUA under s 24CD of the *Native Title Act 1993* (Cth) – whether each individual comprising registered native title claimant or claimants must be party to an ILUA – whether deceased individual comprising registered native title claimant or claimants must be party to an ILUA – whether individual comprising registered native title claimant or claimants must sign an ILUA prior to application for registration being made |
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| Legislation: | *Native Title Act 1993* (Cth) ss 24AA(3), 24BD(2), 24CA, 24CB, 24CC, 24CD(1), 24CD(2), 24CD(3), 24CD(5), 24CE, 24CG, 24CG(1), 24CG(3), 24CK, 24CL(3), 24CM, 24DC(2)(c), 24EA, 24EB(1), 24FA, 24NA, 25(1), 25(2), 25(3), 25(4), 29(2)(b), 30(1), 32, 38, 39, 61, 61(1), 61(2), 62A, 66B, 87A(4), 203B, 203BE(1), 203BE(5), 223, 251, 251A, 251B, 253  *Federal Court of Australia Act 1976* (Cth) ss 20(1A), 25(6)  *Federal Court Rules 1979* (Cth) O 6 r 9  *Federal Court Rules 2011* (Cth) r 38.01  *Property Law Act 1969* (WA) s 9  *Native Title Amendment Bill 1997* (Cth)  *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) reg 8(1), 8(2), 8(3), 8(4), 8(6), 8(7) |
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| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27  *Anderson and Others v Queensland and Others* (2011) 197 FCR 404 at [62]; [2011] FCA 1158  *Ankamuthi People v State of Queensland and Others* (2002) 121 FCR 68 at [8]; [2002] FCA 897  *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* [1932] HCA 9; 47 CLR 1  *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473  *R v Gough; Ex parte Australasian Meat Industry Employees’ Union* [1965] HCA 52; 114 CLR 394  *Australian Woollen Mills Pty Ltd v Commonwealth* [1954] HCA 20; 92 CLR 424  *Bennell v Western Australia* [2006] FCA 1243; 153 FCR 120  *Bodney and Others v Bennell and Others* (2008) 167 FCR 84; [2008] FCAFC 63  *Brown v State of South* *Australia* [2009] FCA 206  *Butchulla* *People v Queensland and Others* (2006) 154 FCR 233; [2006] FCA 1063  *Carr v Western Australia* [2007] HCA 47; 232 CLR 138  *Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; 248 CLR 378  *Chaff and Hay Acquisition Committee v JA Hemphill & Sons Pty Ltd* [1947] HCA 20; 74 CLR 375  *Chapman and Others v Queensland and Others* (2007) 159 FCR 507; [2007] FCA 597  *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384; [1997] HCA 2  *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11; 256 CLR 171  *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36; 248 CLR 619  *Cooper Brookes (Wollongong) Proprietary Limited v The Commissioner of Taxation of the Commonwealth of Australia* (1981) 147 CLR 297; [1981] HCA 26  *Daniel and Others v Western Australia and Others* (2002) 194 ALR 278; [2002] FCA 1147  *De Rose and Others v South Australia and Others (No 2)* (2005) 145 FCR 290; [2005] FCAFC 110  *Doolan and Others v Native Title Registrar and Others* (2007) 158 FCR 56; [2007] FCA 192  *Far West Coast Native Title Claim v South Australia and Others (No 2)* (2012) 204 FCR 542; [2012] FCA 733  *Ford v Perpetual Trustees Victoria Ltd* [2009] NSWCA 186; 75 NSWLR 42  *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; [1994] HCA 6  *Gibbons v Wright* [1954] HCA 17; 91 CLR 423  *Gomeroi People v Attorney-General of New South Wales* [2016] FCAFC 75  *Holborow v State of Western Australia* [2002] FCA 1428  *Independent Commission Against Corruption v Cunneen and Others* (2015) 256 CLR 1; [2015] HCA 14  *Johns v Australian Securities Commission* [1993] HCA 56; 178 CLR 408  *Johnson on behalf of the Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2003] FCA 981  *Kendle and Another v Melsom and Another* (1998) 193 CLR 46; [1998] HCA 13  *KK and Others v Western Australia* (2013) 217 FCR 115; [2013] FCA 1234  *Lacey v Attorney-General (Qld)* [2011] HCA 102; 42 CLR 573  *Laing v State of South Australia (No 2)* [2012] FCA 980  *Lee and Another v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39  *Lehman Brothers Holdings Inc. v City of Swan and Others* (2010) 240 CLR 509; [2010] HCA 11  *Lennon v South Australia*[2010] FCA 743; 217 FCR 438  *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1  *Military Rehabilitation and Compensation Commission v May* (2016) 331 ALR 369; [2016] HCA 19  *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; 228 CLR 566  *Monkey Mia Dolphin Resort Pty Ltd v Western Australia* (2001) 164 FLR 361; [2001] NNTTA 50  *Murray v Registrar of the National Native Title Tribunal and Others* (2003) 132 FCR 402; [2003] FCAFC 220  *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2; 185 CLR 595  *Placer (Granny Smith) Pty Ltd and Granny Smith Mines Limited/Western Australia/Ron Harrington-Smith & Ors on behalf of the Wongatha people* [2000] NNTA 75 (24 February 2000)  *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28  *QGC Pty Ltd v Bygrave and Others (No 2)* (2010) 189 FCR 412; [2010] FCA 1019  *R & R Fazzolari Pty Limited v Parramatta City Council* (2009) 237 CLR 603; [2009] HCA 12  *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd.* (1949) 78 CLR 389; [1949] HCA 33  *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* [1983] HCA 29; 158 CLR 535  *R v Wallis* [1949] HCA 30; 78 CLR 529  *Re Refugee Tribunal and Another; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57  *Residual Assco Group Ltd v Spalvins* [2000] HCA 33; 202 CLR 629  *Roe and Another v Kimberley Land Council Aboriginal Corporation* (2010) 215 FCR 131; [2010] FCA 809  *Sambo v Western Australia* [2008] FCA 1575; 172 FCR 271  *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] UKHL 1; [1901] AC 426  *The Commonwealth of Australia v Mewett* (1997) 191 CLR 471; [1997] HCA 29  *The Commonwealth of Australia v Yarmirr and Others* (2001) 206 CLR 1; [2001] HCA 56  *Thiess v Collector of Customs and Others* (2014) 250 CLR 664; [2014] HCA 12  *Tigan and Others v Western Australia* (2010) 188 FCR 533; [2010] FCA 993  *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165  *Victorian Gold Mines NL v Victoria and Others* (2002) 170 FLR 1; [2002] NNTTA 30  *Weribone and Others v Queensland and Others* (2011) 197 FCR 397; [2011] FCA 1169  *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255  *Yanner v Eaton* (1999) 201 CLR 351; [1999] HCA 53 |
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| Date of hearing: | 28 and 29 July 2016 |
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| Registry: | Western Australia |
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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: | 521 |
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| Solicitor for the Third, Fourth and Fifth Respondents: | Clayton Utz Lawyers |

ORDERS

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|  | | WAD 137 of 2016 |
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| BETWEEN: | MINGLI WANJURRI MCGLADE (FORMERLY WANJURRI-NUNGALA)  Applicant | |
| AND: | NATIVE TITLE REGISTRAR  First Respondent  STATE OF WESTERN AUSTRALIA (SUED ON ITS OWN BEHALF AND AS REPRESENTING THE GOVERNMENT PARTIES TO THE WAGYL KAIP & SOUTHERN NOONGAR INDIGENOUS LAND USE AGREEMENT)  Second Respondent  SOUTH WEST ABORIGINAL LAND & SEA COUNCIL ABORIGINAL CORPORATION [ICN 3832] (and others named in the Schedule)  Third Respondent | |

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| JUDGES: | NORTH, BARKER AND MORTIMER JJ |
| DATE OF ORDER: | 2 FEBRUARY 2017 |

THE COURT ORDERS THAT:

1. The name of the First Respondent be changed to Native Title Registrar.
2. The answers to the questions reserved at [28] of the joint judgment of North and Barker JJ are answered as follows:
   1. yes;
   2. a declaratory order should be made. Because the Registrar is a public office holder who will comply with the law, it is not necessary for the court to cause the issue of a writ of prohibition;
   3. not applicable;
   4. unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.
3. The Court declares that the Wagyl Kaip and Southern Noongar ILUA is not an indigenous land use agreement within the meaning of s 24CA of the NTA and the Native Title Registrar has no jurisdiction under Div 3 of Pt 2 of the NTA to register it.
4. The Court orders that unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

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

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|  | WAD 138 of 2016 |
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| BETWEEN: | **MERVYN EADES**  Applicant |
| AND: | NATIVE TITLE REGISTRAR  First Respondent  STATE OF WESTERN AUSTRALIA (SUED ON ITS OWN BEHALF AND AS REPRESENTING THE GOVERNMENT PARTIES TO THE BALLARDON PEOPLE INDIGENOUS LAND USE AGREEMENT)  Second Respondent  SOUTH WEST ABORIGINAL LAND & SEA COUNCIL ABORIGINAL CORPORATION [ICN 3832] (and another named in the Schedule)  Third Respondent |

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| JUDGES: | NORTH, BARKER AND MORTIMER JJ |
| DATE OF ORDER: | 2 FEBRUARY 2017 |

THE COURT ORDERS THAT:

1. The name of the First Respondent be changed to Native Title Registrar.
2. The answers to the questions reserved at [29] of the joint judgment of North and Barker JJ are answered as follows:

(1) yes;

(2) yes;

(3) a declaratory order should be made. Because the Registrar is a public office holder who will comply with the law, it is not necessary for the court to cause the issue of a writ of prohibition;

(4) not applicable;

(5) unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

1. The Court declares that the Ballardong People ILUA is not an indigenous land use agreement within the meaning of s 24CA of the NTA and the Native Title Registrar has no jurisdiction under Div 3 of Pt 2 of the NTA to register it.
2. The Court orders that unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

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

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|  | WAD 139 of 2016 |
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| BETWEEN: | NAOMI SMITH  Applicant |
| AND: | NATIVE TITLE REGISTRAR  First Respondent  STATE OF WESTERN AUSTRALIA (SUED ON ITS OWN BEHALF AND AS REPRESENTING THE GOVERNMENT PARTIES TO THE WHADJUK PEOPLE INDIGENOUS LAND USE AGREEMENT)  Second Respondent  SOUTH WEST ABORIGINAL LAND & SEA COUNCIL ABORIGINAL CORPORATION [ICN 3832] (and another named in the Schedule)  Third Respondent |

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| JUDGES: | NORTH, BARKER AND MORTIMER JJ |
| DATE OF ORDER: | 2 FEBRUARY 2017 |

THE COURT ORDERS THAT:

1. The name of the First Respondent be changed to Native Title Registrar.
2. The answers to the questions reserved at [30] of the joint judgment of North and Barker JJ are answered as follows:

(1) yes;

(2) no;

(3) a declaratory order should be made. Because the Registrar is a public office holder who will comply with the law, it is not necessary for the court to cause the issue of a writ of prohibition;

(4) not applicable;

(5) unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

1. The Court declares that the Whadjuk People ILUA is not an indigenous land use agreement within the meaning of s 24CA of the NTA and the Native Title Registrar has no jurisdiction under Div 3 of Pt 2 of the NTA to register it.
2. The Court orders that unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

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

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|  | WAD 140 of 2016 |
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| BETWEEN: | **MARGARET CULBONG**  Applicant |
| AND: | NATIVE TITLE REGISTRAR  First Respondent  STATE OF WESTERN AUSTRALIA (SUED ON ITS OWN BEHALF AND AS REPRESENTING THE GOVERNMENT PARTIES TO THE SOUTH WEST BOOJARAH #2 INDIGENOUS LAND USE AGREEMENT)  Second Respondent  SOUTH WEST ABORIGINAL LAND & SEA COUNCIL ABORIGINAL CORPORATION [ICN 3832] (and another named in the Schedule)  Third Respondent |

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| JUDGES: | NORTH, BARKER AND MORTIMER JJ |
| DATE OF ORDER: | 2 FEBRUARY 2017 |

THE COURT ORDERS THAT:

1. The name of the First Respondent be changed to Native Title Registrar.
2. The answers to the questions reserved at [28] of the joint judgment of North and Barker JJ are answered as follows:

(1) yes;

(2) a declaratory order should be made. Because the Registrar is a public office holder who will comply with the law, it is not necessary for the court to cause the issue of a writ of prohibition;

(3) not applicable;

(4) unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

1. The Court declares that the South West Boojarah #2 ILUA is not an indigenous land use agreement within the meaning of s 24CA of the NTA and the Native Title Registrar has no jurisdiction under Div 3 of Pt 2 of the NTA to register it.
2. The Court orders that unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

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

REASONS FOR JUDGMENT

NORTH AND BARKER JJ:

# INTRODUCTION

1. Six indigenous land use agreements – commonly referred to as ILUAs – have been negotiated between the ***State*** of Western Australia and Noongar People.
2. Taken together, the agreements provide for a full and final settlement of all current and future claims made or to be made by Noongar People under the *Native Title Act 1993* (Cth) (***NTA***) in respect of land and waters in the South West of Western Australia.
3. Four of the agreements – which are more particularly known as “area agreements” – are the subject of these proceedings, namely, the Wagyl Kaip and Southern Noongar ILUA, the Ballardong People ILUA, the South West Boojarah #2 ILUA and the Whadjuk People ILUA.
4. Two relate to the area covered by a single registered native title determination application (claimant application). The other two relate to the area covered by two existing, registered claimant applications.
5. In the case of each agreement, which may together be referred to as ***the ILUAs***, there are a number of persons who, jointly, comprise the registered native title claimant or claimants. Each person is identified within the “Parties” description of the relevant ILUA (save in one instance where a person had passed away before the ILUA was negotiated), together with “such other persons as are duly authorised by the Native Title Agreement Group”, as the “Representative Parties” who make the agreement “for and on behalf of the Native Title Agreement Group”.
6. The “Native Title Agreement Group” is defined in each ILUA to mean the people described in Sch 2 to the agreement, being all of the people who:

(1) have been identified as people who hold or may hold Native Title in relation to land and waters within the Agreement Area; and

(2) having been so identified, have (within the meaning of s 251A of the NTA) authorised the making of this Agreement.

1. The State and the following State entities are parties to each ILUA:

* Minister for Aboriginal Affairs;
* Minister for Lands;
* Minister for Mines and Petroleum;
* Minister for Environment;
* Minister for Water;
* Conservation Commission of Western Australia;
* Conservation and Land Management Executive Body;
* Housing Authority;
* Marine Parks and Reserves Authority;
* Water Corporation; and
* Western Australian Land Authority (LandCorp).

1. Additionally, the South West Aboriginal Land and Sea Council (***SWALSC***) is a party to each ILUA. SWALSC is the relevant ***representative*** Aboriginal/Torres Strait Islander ***body,*** pursuant to the NTA, for the South West of Western Australia, including the areas the subject of the ILUAs.
2. As a representative body, SWALSC has a number of functions under s 203B of the NTA, which include an “agreement making function” and a “certification function”.
3. The agreement making function, as provided in more detail by s 203BH, is to be a party to indigenous land use agreements. In performing its agreement making function in respect of an area, it must, as far as practicable, having regard to the matters proposed to be covered by the agreement, consult with, and have regard to the interests of, persons who hold or may hold native title in relation to land or waters in that area.
4. Pursuant to its agreement making function, SWALSC, with certain Noongar People who are considered to hold or who may hold native title in relation to different areas in the South West, has negotiated the ILUAs with the State.
5. Once made, any party to an agreement may, if all the other parties agree, apply in writing to the Native Title ***Registrar***, under s 24CG of the NTA, for the agreement to be registered on the ***Register*** of Indigenous Land Use Agreements.
6. Section 24EA deals with the effect of registration of indigenous land use agreements. In short, while registered, and in addition to any effect it may have apart from subs (1), an agreement has effect as if it were a contract among the parties to the agreement, and the native title holders in relation to any of the land and waters in the area covered by the agreement (who are not already parties) are also bound by it.
7. Under s 24CG(3)(a) and s 203BE(1)(b), all representative bodies must certify the application for registration.
8. In that regard, s 203BE(5) provides that:

(5) A representative body must not certify under paragraph (1)(b) an application for registration of an indigenous land use agreement unless it is of the opinion that:

(a) all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified; and

(b) all the persons so identified have authorised the making of the agreement.

1. Sections 24CH to 24CL deal with the Registrar’s functions, powers and duties concerning registration of an agreement.
2. In February and March 2015, meetings of Noongar People were held for the specific purpose of enabling the persons who respectively hold or may hold native title in relation to land or waters in the areas covered by the ILUAs to authorise the making of each agreement.
3. At those meetings, resolutions were passed in terms relevantly identical to the terms of the resolution concerning one of the ILUAs, the Wagyl Kaip and Southern Noongar ILUA:

**RESOLUTION 1**

The people attending this ILUA Authorisation Meeting:

(a) acknowledge that they:

i. have been identified as people who hold or may hold native title in relation to land or waters in the area (**Agreement Area**) covered by the proposed South West Indigenous Land Use Agreement (Wagyl Kaip/Southern Noongar area) (**Settlement ILUA**);and

ii. include people who hold or may hold the common or group rights comprising such native title;

(b) confirm they are satisfied that this is a proper meeting of those people who hold or may hold native title in relation to land or waters in the Agreement Area (as indicated in the notice for the Meeting), and that this Meeting is being held to give them an opportunity to consider - and to decide whether to authorise - the making of an agreement binding on them in relation to the Agreement Area;

(c) confirm that they are satisfied that adequate notice was given of the Meeting;

(d) confirm that there is no particular process of decision-making that, under the traditional laws and customs of the people who hold or may hold the common or group rights comprising the native title in relation to the Agreement Area, **must** be complied with in relation to authorising such things as making of the proposed Settlement ILUA;

(e) in the absence of any such process, acknowledge that the process of decision‑making that has been agreed to and adopted, by the people who hold or may hold the common or group rights comprising the native title, in relation to authorising the making of the proposed Settlement ILUA (or of things of that kind) is by majority decision by secret ballot of all of the people present at today’s ILUA Authorisation Meeting;

(f) agree and acknowledge that a decision made in accordance with the process of decision-making described at paragraph (e) above will be taken to be a decision of all of the people who hold or may hold native title in relation to land or waters in the Agreement Area, and no person will have a right to challenge or veto a decision made in accordance with such process.

**RESOLUTION 2**

In accordance with process of decision-making that has been agreed to and adopted at today’s ILUA Authorisation Meeting in relation to authorising the making of the proposed Settlement ILUA, the people who hold or may hold native title in relation to land or waters in the area covered by the proposed Settlement ILUA (**Agreement Area**):

(a) **authorise** the making of the proposed Settlement ILUA, as tabled and presented at today’s ILUA Authorisation Meeting;

(b) **authorise and direct** the following people to be named as Parties to, and to sign, the proposed Settlement ILUA as Representative Parties for all of the people who hold or may hold native title in relation to land or waters in the Agreement Area;

i. the people comprising the Applicant for *Alan Bolton, Hazel Brown & Ors -v- the State of Western Australia & Ors (Wagyl Kaip)* (WAD6286/1998; WC1998/070) (**Wagyl Kaip Claim**);

ii. the people comprising the Applicant for *Dallas Coyne & Ors and State of Western Australia & Ors (Southern Noongar)* (WAD6134/1998; WC1996/109) (**Southern Noongar Claim**);

iii. any of the people comprising the Applicant for *Gerald Williams & Ors and State of Western Australia (Wagyl Kaip - Dillon Bay People)* (WAD33/2007; WC2007/001) (**Wagyl Kalp - Dillon Bay People Claim**) who wish to be named as Representative Parties;

iv. any of the people comprising the Applicant for *Anthony Bennell & Ors v State of Westem Australia (Single Noongar Claim (Area 1))* (WAD6006/2003; WC2003/006) (**Single Noongar Claim (Area 1)**) who wish to be named as Representative Parties;

v. any other members of the ‘Native Title Agreement Group’, as that group is described in the proposed Settlement ILUA, who wish to be named as Representative Parties;

(c) **agree and acknowledge** that it is not necessary for all of the people mentioned at paragraph (b) above to sign the proposed Settlement ILUA, and that the signatures of those of such people who have signed by **3 April 2015** (**Settlement ILUA Signatories**) will be sufficient evidence of the decision of all of the people who hold or may hold native title in relation to land or waters in the Agreement Area to authorise the making of the proposed Settlement ILUA;

(d) **agree to, and will do all things necessary to support**, the State making an application to have the proposed Settlement ILUA registered on the Register of Indigenous Land Use Agreements in accordance with the *Native Title Act 1993* (Cth), and thereafter taking all steps as are usual and necessary to have the proposed Settlement ILUA so registered;

(e) **authorise and direct** Settlement ILUA Signatories to approve and sign, after this meeting, any further technical, typographical, or other minor amendment to the proposed Settlement ILUA that they consider to be appropriate and necessary to ensure the registration of the proposed Settlement ILUA, without the need for another ILUA Authorisation Meeting; and

(f) **acknowledge, and confirm their understanding**, that in exchange for the Settlement Package, the registration of the proposed Settlement ILUA is intended ultimately to result in:

i. the surrender to the State of all native title rights and interests that might exist in relation to land and waters in the Agreement Area; and

ii. the Applicant for each of the Wagyl Kaip Claim, the Southern Noongar Claim, the Wagyl Kaip/Dillon Bay Claim and the Single Noongar Claim (Area 1) executing such consent orders (and otherwise doing such things) as are appropriate and necessary to ensure the making, by the Federal Court, of one or more determinations that native title does not exist in relation to the area within the external boundaries of their respective Claims.

(Emphasis in original.)

1. Subsequently, the State applied for registration of the ILUAs, the ILUAs having been signed in conformity with the relevant meeting resolutions but, significantly so far as these proceedings are concerned, not by all persons who, jointly, comprise the registered native title claimant or claimants in each case. In the case of the Whadjuk People ILUA, a person also did not sign the agreement before the making of the registration application, but did sign after the application was made.
2. The factual position that gives rise to the issues raised by these proceedings may then be summarised as follows:

Wagyl Kaip and Southern Noongar ILUA – the McGlade proceeding

15. There are two registered native title applications within the Wagyl Kaip and Southern Noongar ILUA Agreement Area:

(a) WAD 628611998 (Hazel Brown and others v State of Western Australia)(Wagyl Kaip); and

(b) WAD 6134/1998 (Dallas Coyne and others v State of Western Australia) (Southern Noongar).

16. Each of the five persons who comprise the Southern Noongar registered native title claimant has executed the agreement.

17. The Applicant in the McGlade proceeding is one of three people who jointly comprise the Wagyl Kaip registered native title claimant and is the only such person who has not signed that agreement or agreed to become a party to it.

Ballardong People ILUA – the Eades proceeding

18. WAD 618111998 (Alan Jones and others v State of Western Australia) (Ballardong) is the only registered native title application within the Ballaradong ILUA Agreement Area. Eleven people jointly comprise the Ballardong registered native title claimant:

(a) eight of those eleven people have executed that agreement.

(b) one of those eleven people died before the Ballardong ILUA was agreed.

(c) two of those eleven people have not signed the agreement or agreed to become parties to it.

19. The Applicant in the Eades proceeding does not, whether alone or jointly with others, comprise the registered native title claimant in the Ballardong native title claim. Mr Eades is a person who asserts to hold native title rights and interests in the Ballardong ILUA Agreement Area and who was included within the identified native title holding group.

Whadjuk People ILUA – the Smith proceeding

20. WAD 242/2011 (Clive Davis and others v State of Western Australia) (Whadjuk) is the only registered native title application within the Whadjuk ILUA Agreement Area. Five people jointly comprise the Whadjuk registered native title claimant:

(a) four of the five people who comprise the registered native title claimant have executed that agreement;

(b) the fifth person, Mr Davis, died after the agreement was made and has not signed that agreement.

21. The Applicant in the Smith proceeding does not, whether alone or jointly with others, comprise the registered native title claimant in the Whadjuk native title claim. Ms Smith is a person who asserts to hold native title rights and interests in the Whadjuk ILUA Agreement Area and who was included within the identified native title holding group.

South West Boojarah ILUA – the Culbong proceeding

22. There are two registered native title determination applications within the South West Boojarah ILUA Agreement Area:

(a) WAD 253/2006 (William Webb and others v State of Western Australia) **(South West Boojarah #2);** and

(b) WAD 6085/1998 (Minnie Edith van Leeuwen and others v State of Western Australia) (**Harris Family**).

23. The sole person who comprises the registered native title claimant in the Harris Family claim has executed the South West Boojarah ILUA.

24. Seven people jointly comprise the South West Boojarah #2 registered native title claimant:

(a) five of those people have executed that agreement;

(b) two of those people, which includes the Culbong Applicant, have not signed and have not agreed to become parties to that agreement.

1. At the time of the hearing of these proceedings, the ILUAs remained to be registered.

# ISSUES

1. The key issue raised by these proceedings is whether an ILUA can be registered if not all individuals who jointly comprise the relevant registered native title claimant or claimants have signed the ILUA.
2. A sub-issue of the key issue concerns whether the fact that one of those individuals was deceased at material times affects the answer to this question.
3. There is also the further issue whether an ILUA can be registered in circumstances where one of those individuals only signed it after the application to register was made.
4. Each proceeding was initially commenced in the High Court of Australia.
5. On 17 February 2016, the High Court remitted the proceedings to this Court.
6. On 8 June 2016, North J made an order pursuant to s 25(6) of the *Federal Court of Australia Act 1976* (Cth), that the case and questions set out in the agreed special case prepared by the parties pursuant to R 38.01 of the *Federal Court* ***Rules*** *2011* (Cth), be stated for the consideration of a Full Court of this Court. As it transpires, the questions are less special questions under the Rules, and more questions designed to identify the main issues requiring resolution on the final hearing of the proceedings. The hearing proceeded on that understanding.
7. The four questions reserved for the consideration of the Court in WAD137/2016 and WAD140/2016 (concerning the Wagyl Kaip and Southern Noongar ILUA and the South West Boojarah #2 ILUA, respectively) are effectively as follows:
8. Does the fact that the applicant has not signed, or agreed to become a party, to the respective ILUA have the consequence that the ILUA is not an agreement that complies with the requirements in s 24CD(1) and (2)(a) of the NTA?
9. If the answer to question 1 is yes, what relief should be granted to the applicant?
10. If the answer to question 1 is no, what relief should be granted to the respondents?
11. Who should pay the costs of the special case?
12. The five questions reserved for the consideration of the Court in WAD138/2016 (concerning the Ballardong People ILUA) are as follows:
13. Does the fact that (because he passed away before the Ballardong People ILUA was agreed) D Nelson was not named as a party to, and could not sign, the Ballardong People ILUA have the consequence that the Ballardong People ILUA is not an agreement that complies with the requirements in s 24CD(1) and (2)(a) of the NTA?
14. Does the fact that Allan Jones and Reg Hayden have not signed, or agreed to become parties to, the Ballardong People ILUA have the consequence that the Ballardong People ILUA is not an agreement that complies with the requirements in s 24CD(1) and (2)(a) of the NTA?
15. If the answer to either question 1 or question 2 is yes, what relief should be granted to the applicant?
16. If the answer to either question 1 or question 2 is no, what relief should be granted to the respondents?
17. Who should pay the costs of the special case?
18. The five questions reserved for the consideration of the Court in WAD139/2016 (concerning the Whadjuk People ILUA) are as follows:
19. Does the fact that Mr Davis did not sign the Whadjuk People ILUA prior to the making of the registration application on 29 June 2015, and now cannot sign the Whadjuk People ILUA (because he passed away after the registration application was made), have the consequence that the Whadjuk People ILUA is not an agreement that complies with the requirements in s 24CD(1) and (2)(a) of the NTA?
20. Does the fact that Mr Morich had not signed the Whadjuk People ILUA when the registration application was made on 29 June 2015 have the consequence that the Whadjuk People ILUA is not an agreement that complies with the requirements in s 24CD(1) and (2)(a) of the NTA, notwithstanding that Mr Morich subsequently signed the Whadjuk People ILUA on 24 February 2016?
21. If the answer to either question 1 or question 2 is yes, what relief should be granted to the applicant?
22. If the answer to either question 1 or question 2 is no, what relief should be granted to the respondents?
23. Who should pay the costs of the special case?

# APPLICANTS’ SUBMISSIONS

## Introduction

1. The applicants contend that each of the four ILUAs at issue in these proceedings are not indigenous land use agreements within the meaning of s 24CA of the Act.
2. The applicants say their case is straightforward: in order to be an indigenous land use agreement within the meaning of s 24CA, the agreement must, among other things, meet the requirements in s 24CD, which requires that “[a]ll persons in the native title group” be a party to the agreement. They say the native title group relevantly includes the registered native title claimants in relation to the relevant area, which is defined in s 253 to mean a person or persons whose name or names appear in an entry on the Register as the applicant in relation to a claim to hold native title in relation to the land or waters.
3. In relation to the four ILUAs the subject of these proceedings, the applicants say that at least one person whose name appears as the applicant in the entry on the Register for the relevant claim was not a party to the agreement.
4. The applicants say that the operation of s 24CA and s 24CD in these matters also needs to take account of the provisions in the ILUAs that provide the agreements are to be ‘Executed as a deed’ and set out the manner in which that execution was to occur. The applicants note that in each case, the registered native title claimants have not signed or otherwise agreed to be a party to the agreement as a deed or otherwise. In this regard, they cite the requirement in s 9 of the *Property Law Act 1969* (WA), that a deed must be signed. Thus, the applicants say, the deed cannot take effect as such until executed and delivered (which has not occurred) by all of the persons who are intended to be parties to the ILUAs.
5. Accordingly, the applicants submit that the ILUAs are incomplete and can have no legal effect as indigenous land use agreements under s 24CA, s 24CD or elsewhere in Div 3 of Pt 2. The applicants further submit that the agreements are not indigenous land use agreements within the meaning of s 24CA, and so the Registrar has no jurisdiction to register, or otherwise deal with, those agreements under ss 24CG to 24CK.
6. The applicants say that a further reason why that is so, is cl 6.3 of each agreement, which provides for the applicant in each native title claimant application to consent to a determination that native title does not exist in respect of the relevant claim areas.
7. In this regard, the applicants note s 66B of the NTA, which deals with the replacement or removal of a person or persons who comprise the applicant in a claimant application.
8. The applicants say that by reason of this provision, and the “invariable practice of the Court not to make a consent order binding on a party without that party’s consent”, such an order cannot be made or consented or agreed to without the consent and agreement of all the registered native title claimants, which has not occurred.

## Principles of statutory construction

1. The applicants say the principles of statutory construction that bear on the key issue are well‑established.
2. By reference to the High Court’s decision in *Military Rehabilitation and Compensation Commission v May* (2016) 331 ALR 369; [2016] HCA 19, they say the High Court has consistently held that the meaning of statutory provisions is to be derived from the text, purpose and context of the legislation.
3. The applicants also say that the other important principle of construction engaged in these proceedings is the principle of legality – because the provisions purport to interfere with property rights, they must be interpreted consistently with the well-established presumption against legislative interference absent a clearly stated intention to the contrary. The “practical effect” of this presumption, as explained by French CJ in *R & R* ***Fazzolari*** *Pty Limited v Parramatta City Council* (2009) 237 CLR 603 at [40]-[45]; [2009] HCA 12, is that “where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights”. They say this approach to statutory interpretation is a manifestation of the principle of legality and the rule of law.
4. The applicants state that two categories of property rights are involved in the present context:
5. the making and registration of an indigenous land use agreement under Subdiv C will involve (as is the case here), or is likely to involve, the extinguishment of native title rights and interests and their surrender to the State; and
6. the making and registration of an indigenous land use agreement under Subdiv C will involve (as in this case), or is likely to involve, the giving up of the right to claim a determination of native title, which is a property right in the form of a chose in action. In this regard, the applicants cite *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303-304 (Mason CJ, Deane and Gaudron JJ), 312 (Brennan J), 318-320 (Toohey J) and 325 (McHugh J); [1994] HCA 6; *The Commonwealth of Australia v Mewett* (1997) 191 CLR 471; [1997] HCA 29; and *Lehman Brothers Holdings Inc. v City of Swan and Others* (2010) 240 CLR 509 at [59] (Heydon J); [2010] HCA 11.
7. In this respect, the applicants say it is also important to note that native title rights and interests recognised and protected by the NTA comprise not only communal and group rights, but also individual property rights. See s 223 of the NTA; *Yanner v Eaton* (1999) 201 CLR 351 at [75] (Gummow J); [1999] HCA 53; and *Bodney and Others v Bennell and Others* (2008) 167 FCR 84at [144]-[147]; [2008] FCAFC 63, citing *De Rose and Others v South Australia and Others (No 2)* (2005) 145 FCR 290 at [57]; [2005] FCAFC 110. They say that the claims at issue in these proceedings claim communal, group and individual rights and these are the rights that the ILUAs seek to surrender and extinguish by a formal determination by the Court that those rights do not exist.
8. The applicants also draw the Court’s attention to the observations of McHugh J in *The Commonwealth of Australia v Yarmirr and Others* (2001) 206 CLR 1; [2001] HCA 56, regarding the proper approach to the construction of the NTA. His Honour explained, at [124], as follows:

It is also necessary to keep in mind that, in the Second Reading Speech on the Native Title Bill 1993, the then Prime Minister, Mr Keating, saw *Mabo [No 2]* as giving Australians the opportunity to rectify the consequences of past injustices [footnote omitted]. *The Act should therefore be read as having a legislative purpose of wiping away or at all events ameliorating the ‘national legacy of unutterable shame’* [footnote omitted] *that in the eyes of many has haunted the nation for decades. Where the Act is capable of a construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.*

(Emphasis in applicants’ submissions.)

1. In accordance with these observations, the applicants say that courts should reject a construction that removes the clearly expressed statutory intent that native title is not to be extinguished by an indigenous land use agreement without all of the protective mechanisms – of which s 24CA and s 24CD are one – set in place in the NTA, being given their ordinary and natural meaning and operation.

## Statutory framework

1. The applicants say that, as a result of area agreements being able to extinguish native title rights or interests, there are a number of “safeguards” built into the statutory requirements and processes that apply to the making and registration of these ILUAs.
2. First, if native title is to be extinguished, an express statement to this effect is required to be included in the indigenous land use agreement: s 24EB(1)(d).
3. Second, all persons in the “native title group”, as defined in s 24CD(2) and (3), in relation to the agreement area must be parties to the indigenous land use agreement: s 24CD(1). If there is one or more registered native title claimants or registered native title bodies corporate (***RNTBCs***) in relation to the agreement area, s 24CD(2) provides that they must all be parties to the agreement. If the agreement area includes an area for which there is no registered native title claimant and no RNTBC, any person who claims to hold native title in relation to that agreement area must also be a party: s 24CD(3).
4. Third, the making of the indigenous land use agreement must be the subject of the statutory authorisation process, which provides for the statutory authorisation of the making of the agreement under s 251A by the persons who hold native title in relation to the agreement area. This authorisation process is indirectly provided for by s 24CG(3), which provides that an application to register an indigenous land use agreement involving a representative body (in this case, SWALSC) must have been certified by that body in performing its functions under s 203BE(1)(b). In this regard, s 203BE(5) provides that such a body must not certify an application for registration of an agreement under subs (1)(b) unless it is of the opinion that:
5. all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the agreement area have been identified; and
6. all of the persons so identified have authorised the making of the agreement.
7. The applicants then note, what they say, are four important matters about the statutory framework the subject of these proceedings.
8. First, the requirement in s 24CD concerning who must be a party to the indigenous land use agreement is separate from the statutory requirements concerning authorisation under s 251A. The applicants say that the requirement in s 24CD performs a different function and occurs at a different stage in the indigenous land use agreement making process to the authorisation process under s 251A. As a structural matter, the statutory scheme separates the making of the agreement from its registration; both steps, which they say are protective of the rights of the native title holding group, are needed for an agreement to take effect under the NTA. The requirements in s 24CD relate to whether or not there is a valid agreement within the meaning of s 24CA. In contrast, the authorisation process ultimately relates only to whether an indigenous land use agreement must or must not be registered: see s 24CK.
9. The applicants submit that, as explained further below, it is a mistake to conflate these two aspects of the scheme, or to interpret the authorisation process as somehow being capable of modifying the statutory requirements for a valid indigenous land use agreement as set out in ss 24CA-24CE, or as modifying the appointment and replacement process for a native title claimant applicant provided for in ss 61, 66B and 251B. In this regard, the applicants say it is important to note that registered native title claimants become an applicant for a registered native title claim by reason of s 61 and s 251B, and then exercise their functions as set out, amongst other things, in s 62A.
10. Second, the applicants note that the applicant for a registered native title claim will often have two related roles in relation to an indigenous land use agreement:
11. As a party to the agreement under s 24CD, the applicant for a registered native title claim is required to agree to the agreement terms. See s 24CE, referring to conditions and consideration “agreed by the parties”. Those terms will often involve the extinguishment of native title and its surrender to the State, as well as the terms and conditions on which this will occur. Similarly, the applicant, in its capacity as a party to the agreement, is also required to agree to the agreement being submitted for registration: s 24CG(1). This is important given that the agreement cannot take effect under the statute (including validating future acts or extinguishing native title) until it is registered. In his or her capacity as a party to the agreement – that is, in agreeing to the terms of the indigenous land use agreement and agreeing to seek its registration – the applicant acts as registered native title claimants that resulted from the authorisation given under s 251B.
12. In addition, in so far as the agreement purports to settle the native title claim to which the native title claimant applicant is a party (or requires any steps to be taken in relation to that claim), it is the applicant, acting jointly, that must agree to those steps consistent with s 62A. This is demonstrated by the subject indigenous land use agreements, which involve the applicants consenting to orders that provide for the Federal Court to make a determination under s 87A(4) that native title does not exist in relation to each relevant claim area. A consent order by the parties can only be made with the consent of all of the parties – not with the consent of only some of the parties.
13. Third, the applicants say it is well-established that the persons comprising the applicant, in performing the applicant’s functions under s 62A in relation to a claim for native title, act “jointly”, which they say requires the persons authorised to be the applicant to act “collectively” or “unanimously”. In this regard, they note the statement of Kiefel J, as her Honour then was, in *Chapman and Others v Queensland and Others* (2007) 159 FCR 507; [2007] FCA 597 at [11], where her Honour states, “[t]he requirement of the NTA, that persons authorised act together, is not a term or condition of appointment, but a *statutory requirement* having as its purpose the efficient prosecution of claims” (emphasis in applicants’ submissions).
14. The applicants say that, accordingly, decisions in relation to a native title claim cannot be made by a majority of persons comprising the applicant, at least absent an authorisation under s 251B empowering the applicant to act by majority.
15. With regard to the latter point, namely whether s 251B permits the native title claim group to authorise the applicant to act by majority notwithstanding the s 61(2) requirement that the applicant act “jointly”, the applicants note that the authorities appear to be divided. They cite decisions not accepting this proposition: ***Tigan*** *and Others v Western Australia* (2010) 188 FCR 533 at [28]; [2010] FCA 993; and ***Gomeroi*** *People v Attorney-General of New South Wales* [2016] FCAFC 75 at [176]-[177] (Bromberg J), compared to decisions that have held that the authorising group can empower the applicant to act by majority: ***Anderson*** *and Others v Queensland and Others* (2011) 197 FCR 404 at [62]; [2011] FCA 1158; ***Far West Coast*** *Native Title Claim v South Australia and Others (No 2)* (2012) 204 FCR 542 at [50]‑[54]; [2012] FCA 733; and ***KK*** *and Others v Western Australia* (2013) 217 FCR 115; [2013] FCA 1234. The applicants say that even if an authorisation to act by majority could be effective, that possibility is not raised in these proceedings as there is no evidence that the s 251B authorisations of the applicants for each of the claims at issue in these proceedings included a provision for majority decision-making.
16. The applicants further say that the applicant is not subject to the direction or instruction of the native title claim group which has authorised the applicant under s 251B, citing *Tigan* at [11]-[12]; ***Weribone*** *and Others v Queensland and Others* (2011) 197 FCR 397 at [15] and [20]; [2011] FCA 1169; and *Roe and Another v Kimberley Land Council Aboriginal Corporation* (2010) 215 FCR 131 at [36]-[42]; [2010] FCA 809, in support of this proposition. By reference to *Weribone* at [22], they say this follows from the “deliberate dichotomy” established by the NTA between the claim group and the applicant, and that, as stated by Barker J in *Gomeroi* at [73], it is “beyond debate” that the applicant is “quite separate” from the claim group.
17. Fourth, the applicants note the mechanism provided by s 66B for replacing or removing an applicant (or a person or persons comprising the applicant) in circumstances where, among other things, the native title holders are unhappy with how the applicant is representing their interests or where the persons comprising the applicant “cannot agree among themselves” how to deal with the native title claim. See *KK* at [66], citing Mansfield J in *Far West Coast* at [54]. The applicants say the courts have confirmed that s 66B orders are the appropriate means to deal with “dissentient” applicants, including in circumstances where one or more of the persons authorised to be an applicant refuse to sign an agreement contemplated by the NTA. In this regard, they cite ***Daniel*** *and Others v Western Australia and Others* (2002) 194 ALR 278 at [14]; [2002] FCA 1147 and ***Holborow*** *v State of Western Australia* [2002] FCA 1428, which both concerned s 24MD agreements for compulsory acquisitions of land.
18. The applicants further submit that even though the terms of s 251B do not expressly cover the withdrawal of authorisation, it has been stated that this section defines the decision-making process by which authorisation may be withdrawn for the purpose of s 66B. See *Daniel* at [14].
19. Accordingly, they contend that s 66B should be regarded as a statutory code in respect of replacement of any of the registered native title claimants and therefore of the applicant for a native title claim, a conclusion which they say flows from the text, the statutory context outlined above and the apparent purpose of s 66B. Section 66B, the applicants contend, is a “complete and comprehensive statement of the circumstances in which” an applicant may be replaced or removed.

## The proper construction of s 24CD

1. Thus, the applicants say, the statutory text, context and purpose all show that s 24CD requires all persons named as the applicant for a registered native title claim to be a party to an indigenous land use agreement.
2. First, they say the text governs. An interpretation that *all* persons named as the applicant must be a party to the agreement follows from the plain language of s 24CD(1) and (2) – there is no reason to give the word “all” anything other than its plain and ordinary meaning.
3. Second, they submit that this interpretation is consistent with the purpose of s 24CD, which is to ensure that the registered native title claimant, as representative of the native title holders, agrees to the terms and condition of the indigenous land use agreement (under s 24CE) and agrees to its registration (under s 24CG).
4. In this regard, they say the statutory requirements as to which persons and entities must be parties to the different types of indigenous land use agreements, and in what circumstances, are carefully delineated, and that it is significant that the registered native title claimant is only required to be a party to an area agreement under Subdiv C of the NTA (which can extinguish native title rights or interests) and only then in circumstances where the agreement area includes the area that is the subject of the registered claim. In effect, they say, s 24CD ensures that where an indigenous land use agreement seeks to extinguish native title rights in relation to the area the subject of a registered native title claim, the registered native title claimant must consent to the extinguishment and the terms and conditions on which it occurs. It would undermine the protection provided by this section if consent could be given by just one or more, but not all, of the persons authorised as the applicant in relation to the registered claim.
5. Third, the applicants submit that s 24CD, to the extent it requires all persons authorised as the applicant to be a party to the agreement, is consistent with the other provisions of the NTA, in particular those provisions that require the persons authorised as the applicant to act “jointly” or “unanimously” in making and dealing with native title claims. They say it would be an incongruous result if the applicant had to act unanimously in dealing with the native title claim, including consenting to determinations of the Court in relation to the claim, but could act through one or more persons only in the face of disagreement from one or more of the other persons authorised to be the applicant in relation to the making of an indigenous land use agreement extinguishing native title the subject of the proceeding. This is especially so given that the terms of the agreement itself will often (as is the case here) involve the settlement of the native title claim to which the applicant is a party and therefore involve the applicant taking steps to deal with that claim within the meaning of s 62A.
6. Fourth, the applicants submit it is a mistake to approach the interpretation of s 24CD with a view to facilitating the making of agreements that may extinguish native title rights and interests, as that is not the purpose of the indigenous land use agreement provisions. They say the statutory regime has struck a careful balance between providing a mechanism for the making of agreements affecting native title as an alternative to the judicial resolution of native title claims while also ensuring that these agreements are consensual and voluntary. In the case of area agreements, the applicants say that the legislature has provided for protections at different stages of the agreement making and registration process, such as the requirement that all persons comprising the native title group be a party to the agreement (and that such persons include all registered native title claimants in relation to the agreement area). Another is the requirement of compliance with the authorisation process provided for in ss 24CG, 203BE(5) and 24CK, before the agreement can be registered in accordance with Subdiv E. They note that these protections are not present in the case of the other types of indigenous land use agreements, which either do not involve the extinguishment of native title or do not involve land or waters that are the subject of unresolved claims to native title. The protective function of these statutory provisions should not be lightly overridden.
7. In this regard, the applicants contend the principle of legality discussed above is especially relevant to area agreements that extinguish property rights. Consistent with the well‑established principle articulated by French CJ in *Fazzolari*, the applicants say that the construction which is protective of native title rights and interests in the sense that the construction makes it harder for such rights to be extinguished or surrendered in the absence of a clear intention to do so, should be preferred, especially given that the property rights at issue, which include individual rights, are to be given up on behalf of a large group of native title holders, whose agreement to the indigenous land use agreement, as opposed to the agreement of their authorised representatives, is not required.
8. Fifth, the applicants submit that it is important that there is a statutory mechanism available in s 66B to remove persons who are authorised as the applicant. Because this mechanism is available, they say there is no absurdity or impracticality in requiring all persons who are authorised as the applicant for a registered claim to be a party to the indigenous land use agreement, as, in the event that one or more of those persons does not agree to be a party to the agreement, the remaining persons comprising the applicant can apply to the Court for an order under s 66B to remove or replace that person. Any such application would be dealt with by the Federal Court in accordance with the principles that have been developed in relation to s 66B orders.
9. The applicants further submit that an interpretation of s 24CD that permits less than all of the persons who are authorised to be the applicant to act for all such authorised persons, would circumvent s 66B, which is the means by which the legislature has provided to deal with the replacement of the applicant. Section 66B sets out the specific conditions and requirements that must be met before an order for replacement or removal may be made, and the courts have repeatedly confirmed that this is the proper means of dealing with disagreement among named applicants. The applicants say that it is erroneous to sidestep s 66B and act “as if” an order removing recalcitrant or dissident applicants is both unnecessary and not subject to satisfaction of the conditions in s 66B.
10. In this respect, the applicants say it is notable that this Court has, from time to time, made orders to remove a “dissident” member of an applicant in cases where that person has refused to sign an agreement contemplated by the NTA. See *Daniel*,at [14], and *Holborow*. The applicants note that in these cases, the Court, in exercising its powers, carried out a careful analysis of the relevant facts and statutory conditions, and, importantly, made an order for removal where it was clear that the native title group had properly authorised the making of the relevant agreement (following a careful analysis of the facts, including being satisfied that the members of the group had reasonable notice and an opportunity to participate in the decision making process). However, the applicants say there is no suggestion in these cases that the authorisation itself made it unnecessary to obtain the consent of the dissident member or members of the applicant or made it unnecessary to comply with the s 66B removal process.
11. Finally, the applicants submit that the resolutions passed at the authorisation meetings for each ILUA the subject of these proceedings, which purport to “authorise and direct” all of the persons named as applicant for each of the relevant registered claims (among others) to sign the relevant ILUA; to “agree and acknowledge” that it is not necessary that all of those persons sign the ILUA; and to “agree and acknowledge” that the signatures of those who do sign will be sufficient “evidence” of the authorisation under s 251A, do not alter the position. They say that these resolutions are not effective to satisfy the requirements in s 24CA and s 24CD, nor do they overcome the deficiencies identified in relation to the requirement that each ILUA be executed as a deed.
12. In this regard, the applicants firstly say that employing the authorisation process provided for under s 251A cannot modify or alter the requirement in s 24CA and s 24CD that all persons in the native title group be a party to an indigenous land use agreement. The requirement is a separate and independent requirement; it cannot be conflated with the authorisation process for the purposes of s 24CG and s 24CK.
13. Secondly, they say that a direction that a person sign an agreement cannot be effective to make that person a party, absent the person’s agreement to be a party and to sign the agreement.
14. Thirdly, they say there is nothing in the terms of s 251A, or the statutory context in which it operates, that gives the native title holders attending the meeting the power or authority to direct the persons authorised as the applicant to become parties, or to otherwise “authorise” or “agree” that it is not necessary that all such persons be parties. The persons comprising the applicant act as the representative for the native title holders but the applicant is separate and independent from that group. The applicants say that, consistent with previous decisions of this Court, the native title holders do not have the power – whether pursuant to the authorisation process or otherwise – to direct or instruct the applicant for a registered claim how to exercise its functions under the statute. Indeed, they say that the applicant registration process under ss 61, 62A and 251B and the removal process under s 66B are inconsistent with any such power.
15. Hypothetically, the applicants posit that if valid resolutions were passed limiting the registered native title claimants’ authorisation to act as such under s 251B, that could be relevant to an application under s 66B to remove an applicant on the grounds set out in s 66B(1)(a)(iii) or (iv). They say that whether resolutions are relevant, and if so to what effect, is required to be the subject of a judicial determination under s 66B, but that has not occurred and the resolutions are not a valid substitute for making an application under s 66B and for the judicial determination of that application.

## The decision in *Bygrave*

1. The applicants note that in *QGC Pty Ltd v* ***Bygrave*** *and Others (No 2)* (2010) 189 FCR 412; [2010] FCA 1019, Reeves J held that the requirement in s 24CD was satisfied if at least one of the persons named as the applicant in the Register for the relevant claim was a party to the indigenous land use agreement.
2. The applicants contend that, in this respect, the decision should not be followed.
3. They note that Reeves J approached the statutory task, at [77], by first seeking to identify the purpose of the provisions and then asking “what construction of s 24CD serves to achieve [that] purpose”.
4. His Honour held, at [88], that the purpose of s 24CD is to enable the registered native title claimants to “be named as representative parties as a statutory mechanism or device to provide a means by which the native title contracting group can enter into an ILUA”. He reasoned, at [84] and [88], that the registered native title claimant has “no role to play” in the indigenous land use agreement process, other than to facilitate the “native title contracting group” becoming bound by the agreement. The applicants say that, in reaching this conclusion, his Honour relied, at [66], on the common law principle that applies to contracts made on behalf of unincorporated associations and the requirement that only legal persons may enter contracts.
5. In this regard, his Honour found, at [97]-[98], that there cannot be any “privity of contract” between the registered native title claimant and the other parties to an indigenous land use agreement; the only “privity of contract” is with the native title contracting group, being the group who authorised the making of the agreement under s 251A. Further, his Honour said that only the native title contracting group is required to assent to an indigenous land use agreement, which occurs through the authorisation of the agreement under s 251A: at [102]‑[103], [108]. His Honour said there is no requirement that any of the persons named as the registered claimants assent to or sign the agreement. The applicants say that, according to Reeves J, those persons were obligated to become parties to the agreement (whether or not they agreed to do so) by reason of the use of “must” in s 24CD(1): at [108].
6. The applicants say that it followed from this analysis of the purpose and operation of the requirement in s 24CD, that the proper construction of this provision was that only one person named as the applicant in the Register for the relevant claim needed to be a party to the indigenous land use agreement: at [84]. Accordingly, if a person who comprises the registered native title claimant does not consent to be a party to the agreement, that person’s name “can then be either removed or disregarded, without affecting the status of the agreement as an ILUA under the ILUA provisions of the Act”: at [123].
7. Reeves J went on to say that any other construction would lead to an absurd result as it would permit one member of the registered native title claimant to “veto” an indigenous land use agreement against the wishes of the authorising group: at [95]. His Honour found that s 66B did not provide a “solution” to this position: at [118]-[119]. The applicants say the reasoning on this latter point is unclear, noting that his Honour stated, at [118], that “using s 66B to alter the composition of the authorised applicant under s 251B, will [not] have any relevant effect on the authorisation of the making of an agreement under s 251A”, and that removing “dissident members” under s 66B is “otiose” because it is not necessary, as per his Honour’s earlier conclusion, that all persons comprising the registered native title claimant be parties to an indigenous land use agreement.
8. The applicants submit that this reasoning is erroneous for several related reasons.
9. First, it was an error not to begin with the statutory text and the plain meaning of the word “[a]ll” in the context of the language of s 24CD(1) and (2), and the definition of registered native title claimant in s 253.
10. Second, as explained above, the purpose of the requirement in s 24CD, that a registered native title claimant be a party to an indigenous land use agreement, cannot be reduced to a procedural mechanism to facilitate the authorising group to enter into the agreement pursuant to some sort of common law agency/principal type analysis. The provisions give to the registered native title claimant, in its capacity as a “party” to an indigenous land use agreement, a substantive and active role to play. The registered claimant must agree to the consideration and conditions provided for in the agreement and agree to apply to register the agreement; the registered native title claimant is not merely a ‘rubber stamp’ for the authorising group or a conduit through which the group can be bound by the agreement.
11. Third, Reeves J conflates the requirement in s 24CD, that the registered native title claimant be a party, with the procedural process in s 251A in relation to the native title holders’ authorisation of the agreement. Essentially, his Honour found that, provided there is the requisite authorisation under s 251A, this is sufficient to satisfy the requirement in s 24CD(1), which is evident from his conclusion that there is no need for any persons comprising the registered native title claimant to assent to an indigenous land use agreement. According to Reeves J, provided an indigenous land use agreement is authorised under s 251A, the persons named as the applicant on the Register are, in effect, automatically parties by reason of the requirement in s 24CA that they “must” be.
12. The applicants say that this construction deprives the requirement in s 24CD, which is a precondition for the existence of a valid indigenous land use agreement, of any operative effect. Further, they say that his Honour’s reasoning treats authorisation under s 251A as a statutory requirement but the requirement, as explained above, is that set out in ss 24CG(3), 205BE(1)(b) and 24CL.
13. Fourth, Reeves J’s holding that there is no privity of contract between the registered native title claimant and the other parties to the agreement, is erroneous. Likewise, his Honour’s discussion about whether or not the registered native title claimant is a legal person and his reliance on the law on when an agent may bind a principal in contract, is irrelevant to the statutory scheme under consideration. The NTA contains an express provision in s 24EA(1), that the parties (including the registered native title claimant) are bound and that the native title holders who are not parties are bound, and so plainly there is privity of contract between the relevant parties to the agreement, including the registered native title claimants. Section 24EA(1)(a) expressly provides that an indigenous land use agreement takes effect “as if it were a contract among the parties to the agreement”, and s 24EA(1)(b) states that the native title holders are bound in the same way as the RNTBC. There is no need to resort to common law principles of agency.
14. Fifth, Reeves J’s treatment of s 66B is not correct. His Honour’s reasoning – that there is no need to resort to s 66B because not all the persons comprising the applicant need to be parties – is circular. Again, his Honour appears to rely on an authorisation in s 251A as a substitute for compliance with the other statutory provisions in the NTA. The authorisation is but one part of the statutory scheme; it cannot be used to circumvent other statutory requirements.
15. Finally, the applicants submit that, even if some of these submissions are not accepted, the construction contended for in their submissions is to be preferred to that of Reeves J.

## The Whadjuk People ILUA

1. The applicants note that the proceeding in WAD139/2016, which concerns the Whadjuk People ILUA, raises an additional issue. One person named on the Register as the applicant for the Whadjuk claim, Mr Morich, agreed to become a party to the Whadjuk People ILUA on 24 February 2016, well after the ILUA was lodged for registration. Another person was incapacitated at the time the registration application was made and died after the ILUA was lodged for registration.
2. In relation to Mr Morich, the applicants’ case is that an indigenous land use agreement must meet the requirements in s 24CA at the time it is lodged for registration under s 24CG. The requirements in s 24CA are jurisdictional requirements. The “agreement” to be submitted for registration under s 24CK must be an agreement within the meaning of s 24CA. A failure to meet these statutory requirements cannot be cured after the event.
3. In relation to the second person, the applicants submit that it was not open to the respondents to simply ignore his incapacity; the appropriate course was to seek to remove him as an applicant under s 66B, which expressly provides for removal of a person who has become incapacitated. Although the fact of his incapacity may have been uncontroversial in this case, it may not be so in every case. The legislature has provided for and required a judicial determination for removal on the ground of incapacity. That had not occurred when the agreement was lodged for registration.

# SWALSC’S SUBMISSIONS

## Construction of the relevant provisions

1. The SWALSC respondents say it is well established that legislation must be construed as a whole and on the basis that its provisions give effect to harmonious goals. See ***Project Blue Sky*** *Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ); [1998] HCA 28. Consequently, it is necessary to construe s 24CD of the NTA in light of the statutory scheme as a whole.
2. They say that several aspects of the statutory scheme suggest that s 24CD does no more than require any registered native title claimant, understood as the persons who collectively comprise the applicant for a registered native title claim, to be party to an indigenous land use agreement in the manner authorised by all those who hold or may hold native title. Put differently, s 24CD does not give a veto over making an indigenous land use agreement to each individual member of the applicant.
3. First, contrary to the applicants’ submissions, the SWALSC respondents say that s 251A, which must be read with ss 24CG(3), 203BE(5) and 24CL(3), provides the only power for a registered native title claimant to make an indigenous land use agreement. The power is not derived from s 251B or s 62A: the former is relevantly concerned with authorising a person or persons to make a native title determination application and to deal with matters arising in relation to it; the latter gives the applicant power to deal with all matters arising under the NTA in relation to such an application. They say that if these provisions empowered the making of an indigenous land use agreement, s 251A (which sets out how the authorising group authorises the making of an agreement) would serve little purpose, and the terms of, and note to, s 62A would be difficult to explain. In this regard, they note, by reference to *Project Blue Sky* at [71], that it is a settled principle of statutory construction that a court must strive to give meaning to every word in a statute and should avoid making provisions otiose or insignificant.
4. The SWALSC respondents say that this understanding of how the NTA works is consistent with existing authority, noting that in *Gomeroi*, Barker J, Reeves J agreeing, stated,at [77]:

Section 62A … is intended to lay out the metes and bounds of the power of an applicant. It is not an unlimited power, however. It enables the applicant to ‘deal with all matters arising under this Act in relation to the application’. The relevant circumscribing expressions are ‘matters’, ‘arising under this Act’ and ‘in relation to the application’. As the note to s 62A states, the section deals only with claimant applications or compensation applications. This helps to give meaning to the expression ‘in relation to the application’. Thus, an applicant is not authorised to make an Indigenous Land Use Agreement … to which subdivs B to E of Div 3 of Pt 2 of the NTA apply.

1. They say that s 24CD likewise confers no power on the registered native title claimant to make an indigenous land use agreement – it simply identifies entities that may or must be parties to area agreements, and so the source of the power of those entities to make such agreements must be found elsewhere. By way of example, they say that, in the case of RNTBCs, the power to make the agreements comes from the fact that they hold native title on trust for, or as agents of, the holders of native title, and can bind the common law holders *but only*if they consult and obtain the consent of the holders of native title.
2. Second, the SWALSC respondents note that persons who authorise the making of an agreement under s 251A often will not be limited to the members of the native title claim group that authorised the applicant. Sections 24CG(3) and 203BE(5) of the NTA make it plain that the authorising group comprises all of the persons who hold or may hold the native title rights and interests in relation to an indigenous land use agreement area, and so the composition of the authorising group may be different from the native title claim group that authorised the applicant to make a native title determination application under s 251B. In this regard, they quote the following statement of Reeves J in *Bygrave* at [114], regarding rights and interests in relation to an agreement area:

[t]he claim group that provides the authorisation under s 251B is a different and narrower group of indigenous persons than the native title contracting group that authorises the making of an ILUA under s 251A. The former includes the particular group of indigenous persons who authorised the applicant to make the claim, whereas the latter may include other indigenous persons who were not included in the claim group, but yet still claim to hold native title in the area of land concerned.

1. The SWALSC respondents illustrate the point by reference to the Wagyl Kaip and Southern Noongar ILUA. They state that after the registration of the Wagyl Kaip and Southern Noongar claims, further anthropological and historical research conducted by SWALSC identified a number of new apical ancestors and their descendants for the area covered by the Wagyl Kaip and Southern Noongar ILUA. The authorising group that passed the resolutions authorising the making of that ILUA consisted of persons who belonged to the wider group that had been identified, and was not limited to members of the native title claim groups that authorised each claim.
2. Third, the SWALSC respondents state that s 251A enables the authorising group to determine how it wishes to indicate its assent to the agreement, including by providing who can sign an agreement on its behalf (if it is to be signed). The footnote in their submissions in support of this proposition states that no provision of the NTA requires an indigenous land use agreement to be signed. Where the authorising group authorises certain people to sign an indigenous land use agreement or otherwise act as its representatives, and they do so, it is submitted that the relationship of principal and agent will arise. The SWALSC respondents say that not only is there nothing in the NTA to prevent such a relationship arising, but that it has been recognised that authorisation under s 251A and s 251B give rise to fiduciary obligations. In this regard, they cite *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 at [61] and [63].
3. They say this conclusion flows from the principle that the conferral of a power or function — here, to authorise the making of the agreement — carries with it the power to do all things reasonably incidental to that function or power.
4. They further say that this conclusion is reinforced by the analogy between s 251A and s 251B, the terms of which are very similar. Section 251B permits authorisation on conditions. See *Gomeroi* at [81]-[82] (Barker J). Thus, they say, it enables the native title claim group to limit the authority given to the applicant to engage solicitors or to discontinue the proceedings. Some decisions have accepted that it also permits the claim group to authorise the applicant to act by a majority. See *Anderson* at [62]; *Far West Coast* at [50]‑[55].
5. By analogy, they say the authorisation under s 251A would extend to providing for certain persons to sign an agreement on behalf of the authorising group as its representatives, and to stipulating how many persons would need to sign any agreement.
6. Fourth, the SWALSC respondents submit that the decisions of this Court, such as ***Ankamuthi*** *People v State of Queensland and Others* (2002) 121 FCR 68 at [8]; [2002] FCA 897, *Tigan* at [11]-[12] and *Weribone* at [15], that hold that the native title claim group cannot direct the applicant how to exercise its functions in relation to an application for a determination of native title, do not apply. Nor do decisions that hold that the applicant must act jointly or unanimously, such as *Tigan* at [28] and *Weribone* at [20]-[22]. They say that those decisions, which are inconsistent with the cases cited above, depend on s 61(2) and s 62A of the NTA. Neither provision applies to the making of an indigenous land use agreement, which must be authorised under s 251A by an authorising group that will not necessarily mirror the s 61 native title claim group that authorised the applicant under s 251B to make the claim and to deal with matters arising in relation to it.
7. Fifth, the SWALSC respondents state that, as s 24EA(1) makes clear, it is only after registration of the area agreement that the parties to the agreement and the other persons who hold native title in relation to land or waters in the area covered by the agreement are deemed to be contractually bound to one another. It is, moreover, only after registration that any agreement about the doing of future acts, the validation of future acts, or anything else that departs from the effects of the future act regime in ss 24FA to 24NA can take effect. In these circumstances, they say it is difficult to see how there could be any binding legal agreement between individual members of the applicant and others about those matters before an application to register an agreement is made.
8. Sixth, and, they say, importantly, the “registered native title claimant” in the NTA does not refer to each individual acting separately and in their own interest; it refers instead to those people who collectively comprise the applicant for a registered claim and who act in a representative capacity. They say the terms of the definition of “registered native title claimant” in s 253, suggests that there is only one registered native title clamant, which reflects the fact that under s 61(2) of the NTA, there is only one applicant.
9. The SWALSC respondents say that construction of the term “registered native title claimant” accords with decisions of the National Native Title ***Tribunal*** in the context of the right to negotiate contained in Subdiv P of Div 3 of Pt 2 of the NTA. In simple terms, that regime operates as follows: before certain future acts (such as the creation of a right to mine) are done, the parties must negotiate in good faith with a view to reaching an agreement; and, if the parties do not reach agreement, any of the negotiation parties (after the minimum negotiation period) may apply instead to an arbitral body (usually the Tribunal) to make a determination about whether the act may be done. In this regard, see s 25(1)-(4) of the NTA. The parties who must negotiate in good faith include the “Government party” and “any native title party”, with this term being defined to include “any registered native title claimant” and “any person, who 4 months after the notification day, is a registered native title claimant”. See ss 29(2)(b)(i), 30(1)(a) and 253 of the NTA.
10. They say the Tribunal has consistently held that references to the registered native title claimant, and hence the native title party, are to the members of the applicant acting collectively in a representative capacity. See *Placer (Granny Smith) Pty Ltd and Granny Smith Mines Limited/Western Australia/Ron Harrington-Smith & Ors on behalf of the Wongatha people* [2000] NNTA 75 (24 February 2000) at 8-11; *Monkey Mia Dolphin Resort Pty Ltd v Western Australia* (2001) 164 FLR 361 at [19]-[20]; [2001] NNTTA 50; and *Victorian Gold Mines NL v Victoria and Others* (2002) 170 FLR 1 at [9]; [2002] NNTTA 30. The Tribunal does not refer to individuals acting separately and in their own interests. They say the Tribunal has based that conclusion on the provisions relating to the applicant, the communal nature of native title and the practical difficulties that the alternative view would pose.
11. They say that Barker J’s decision in *Gomeroi*, at [65]-[75], provides further support for the Tribunal’s conclusion. They note that, after considering the NTA as in force before and after the insertion of the term “applicant”, his Honour observed, at [76]:

The [*Native Title Amendment Act 1998* (Cth)], by the introduction of a formal ‘applicant’, who was ‘authorised’ under s 251B of the NTA, was calculated to make clear precisely who the applicant was both for the benefit of the claim group and for third parties. It was also calculated to guard against the possible abuse of the right to negotiate procedure by registered claimants in those cases where the claim was made on the basis the claimants held native title with others, but who were not specifically authorised by the others and failed to account to them for their actions. Section 31, after the 1998 Amendment Act, empowered the applicant, as the ‘registered native title claimant’, and so ‘native title party’, to be a ‘negotiation party’: see ss 29(2)(b)(i), 30A, 31, 253.

1. In this case, the SWALSC respondents submit, the authority of a registered native title claimant to make an area agreement is found in s 251A, not s 251B; however, that difference does not affect the conclusion that “registered native title claimant” refers to the persons who collectively comprise the applicant for a registered claim, but it does mean that they do so in a representative capacity for the authorising group rather than for the native title claim group.
2. Taken together, they say that these matters suggest the purpose of s 24CD is to provide a legal person or persons to act as the representative party for the authorising group in making an agreement. See *Bygrave* at [69]. Consistent with that purpose, when s 24CD(1) uses the phrase “[a]ll persons in the native title group”, it refers to all the bodies corporate, representative bodies, governments or other entities that comprise the relevant “native title group” for the particular area agreement. Thus, where the relevant “native title group” consists of a registered native title claimant, s 24CD(1) only requires that entity to be party to an indigenous land use agreement. Further, by providing that the native title group consists of “all registered native title claimants in relation to land or waters”, s 24CD(2)(a) ensures that, if there is more than one registered claim, the registered native title claimant for each claim must be a party to the agreement.
3. However, while s 24CD(1) and (2) require the registered native title claimant for each registered claim to be a party to an indigenous land use agreement, the SWALSC respondents say that the provisions leave it to the authorising group — the only group with the power to authorise making an indigenous land use agreement — to determine how that is to occur. The authorising group may, for example, determine that the signatures of a majority of persons who comprise the registered native title claimant for a claim will be sufficient to evidence the group’s assent to any written agreement; alternatively, it may determine that the signatures of all those who sign by a particular date are sufficient to manifest the authorising group’s assent. That is essentially what occurred with the resolutions for the impugned ILUAs. They note that the authorising group could also have authorised solicitors to sign an agreement, as is commonly done in the context of s 87A consent determination agreements: *Bygrave* at [113].
4. The SWALSC respondents submit that none of the applicants’ submissions to the contrary should be accepted.
5. They say there is no textual foundation for claiming that their construction of s 24CD(1) and (2) serves to protect against the extinguishment of native title rights and interests. In this regard, the SWALSC respondents say the NTA deals with indigenous land use agreements that surrender native title rights in two ways: it requires the relevant government to be a party to the agreement under s 24BD(2) and s 24CD(5); and it requires the agreement to include a statement to the effect that the surrender is intended to extinguish native title, under s 24EB(1)(d) and (3). It does not impose any other special requirements. Accordingly, they say, there is no basis for asserting that the general requirements of s 24CD, which apply irrespective of the subject matter of an area agreement, are intended to protect against the extinguishment of native title rights.
6. The SWALSC respondents say that these reasons also undercut the applicants’ reliance on the principle of legality. As Gageler and Keane JJ observed in *Lee and Another v New South Wales Crime Commission* (2013) 251 CLR 196 at [313]; [2013] HCA 39, that principle protects fundamental rights, freedoms and principles from inadvertent or collateral alteration; it does not exist to shield such rights, freedoms and principles from being specifically affected in the pursuit of clearly identified legislative objects by constitutional means. In this case, the SWALSC respondents say, Parliament has provided specifically for the extinguishment by surrender of native title rights if certain steps are followed, and so it is difficult to see why the principle of legality should mandate a construction of s 24CD that would hinder the making of indigenous land use agreements on a range of subjects that do not involve the extinguishment of native title rights.
7. In any event, the SWALSC respondents say, there is a further reason why the principle of legality does not assist the applicants. Namely, an indigenous land use agreement that extinguishes native title by surrender requires the authorisation of the authorising group, and the authorisation under s 251A functions like the consent given by the common law holders to a prescribed body corporate for a body corporate agreement. They say that the principle of legality does not prevent the holders of property rights or native title rights from voluntarily surrendering them in return for such consideration as they think appropriate, and that none of the authorities cited by the applicants supports such a proposition.
8. Further, the SWALSC respondents say that the applicants’ reliance on s 66B of the NTA is misplaced. While they say it is doubtful whether the section amounts to a “statutory code for replacement of any of the registered native title claimants and therefore of the applicant”, as contended for by the applicants, in any case, a member of a registered native title claimant who refuses to sign an indigenous land use agreement does not exceed or contravene the authority given by the claim group under s 251B, because the making of an indigenous land use agreement is authorised by s 251A (and is not a matter arising under the NTA in relation to the claim). They therefore say that s 66B does not supply an answer to the difficulties created by an individual member of the registered native title claimant refusing to sign an indigenous land use agreement that the authorising group has authorised under s 251A to be made.
9. The SWALSC respondents illustrate this point by considering how s 66B would apply where, as here, the authorising group is different from the claim group and has authorised the proposed agreement.
10. They say that, on the applicants’ construction of s 24CD, at any time before an agreement is lodged, a single member of a registered native title claimant can refuse to become a party to the agreement, regardless of whether the authorising group has authorised, for example, a simple majority of members of that applicant to become parties to an agreement by signing. The refusal would in turn prevent the agreement from being registered or otherwise dealt with, regardless of which of the permitted subject matters it covered.
11. In order to overcome the refusal, members of the native title claim group — a group that is different from the authorising group — would have to hold an authorisation meeting to remove the member. One or more of those claim group members (perhaps the remaining members of the current applicant) would then have to bring an application under s 66B(1)(a)(iii) that they, jointly, replace the current applicant on the ground that the current applicant, because it includes the person refusing to sign the agreement, was no longer authorised by the claim group to make their native title claim and deal with matters arising in relation to it.
12. Assuming that the Court decided to replace the applicant, it would be necessary for a new agreement to be made — and authorised — that included as (representative) parties all the persons who comprised the replacement applicant in the area covered by the proposed agreement. The process of applying to the Registrar and complying with the requirements of s 24CG would then recommence.
13. The SWALSC respondents say that the obvious delay, inconvenience and expense that would flow from having to hold at least three authorisation meetings involving different groups and having to reapply for registration, demonstrate that s 66B is not an adequate solution or, put another way, that Parliament could not have intended the results that follow from the applicants’ construction of s 24CD. In this regard, the SWALSC respondents say, by reference to *Cooper Brookes (Wollongong) Proprietary Limited v The Commissioner of Taxation of the Commonwealth of Australia* (1981) 147 CLR 297 at 320-321 (Mason and Wilson JJ); [1981] HCA 26; and *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); [1997] HCA 2, that it is well established that the consequences of adopting a particular construction are relevant to whether it is correct.
14. The SWALSC respondents contend that the applicants are also mistaken to rely on provisions of the impugned ILUAs providing that they are to be “Executed as a deed”. They note that, for each impugned ILUA, the authorising group authorised and directed the persons who comprised the registered native title claimant (and certain others who wished to become parties) to sign each proposed ILUA as “representative parties”, who then became the “Representative Parties” under cl 1.2 of each impugned ILUA.
15. However, the SWALSC respondents say, those persons did not all have to sign or otherwise agree to become parties, a conclusion which is apparent not only from the resolutions, but also from the terms of each ILUA, which treat the Representative Parties as collective representatives of the “Native Title Agreement Group” (***NTAG***) (that is, the authorising group). Under cl 5.1, the Representative Parties “jointly and severally” warranted that they were authorised by the NTAG to enter into and perform their obligations under the agreement. Under cl 5.2(a), the NTAG relevantly represented and warranted that it had authorised the Representative Parties “to enter into the Agreement” and to perform, on their behalf, the obligations of the NTAG under the agreement. The NTAG also represented and warranted that, in performing those functions, where the Representative Parties were unable to achieve unanimity with respect to the making of any decision or signing of any document, the Representative Parties could act by majority.
16. The SWALSC respondents say that such warranties are only explicable if the Representative Parties were intended to act collectively in entering into each ILUA, making decisions and signing documents. Accordingly, they say, the fact that each of the impugned ILUAs refers to execution as “a deed”, did not mean that all persons who comprised the registered native title claimant for each ILUA had to sign it.
17. In addition, the SWALSC respondents say that cl 6.3 of each impugned ILUA does not support the applicants’ claim that the impugned ILUAs are invalid. While they concede that the clause provides, in effect, that the applicant for each relevant native title claim authorises and instructs its lawyers to execute consent orders for a determination that native title does not exist, they say the existence of such a clause does not make each ILUA an agreement that deals with matters arising under the NTA in relation to a claim, such that the agreement could only be made by the applicant in accordance with s 62A. In this regard, they say that execution of the consent orders will not result in any claim being determined: the steps (for the purposes of s 62A) that could bring about this result would be execution of an appropriate agreement under s 87 or s 87A of the NTA and the making of an appropriate interlocutory application that attaches the s 87 or s 87A agreement, the consent orders and relevant affidavits. Clause 6.3(e) of each ILUA makes it clear that the parties are fully aware that, while the authorising group might decide to “authorise and instruct” the “Applicant’s Lawyer” to execute the consent orders, that decision will not necessarily enable determinations of native title to be made.

## Alternative submissions on the Whadjuk People ILUA

1. If the above submissions are accepted, then, the SWALSC respondents submit, all of the impugned ILUAs are valid. They say that is because the requirements of s 24CD were met: all the registered native title claimants became parties to the impugned ILUAs before the registration applications were made.
2. However, even if these submissions are not accepted, the SWALSC respondents say that the Court should nonetheless find that the Whadjuk People ILUA can be validly registered or dealt with.
3. The SWALSC respondents say that nothing in Subdiv C of Pt 2, Div 3 of the NTA mandates that the registered native title claimant who was incapacitated at the time of signing the agreement, had to be a party while he was incapacitated.
4. They say such an interpretation of s 24CD and the other provisions would be remarkable. It would mean that if one of, say, 12 persons who comprised the applicant suffered a stroke or a serious injury, and consequently could not sign an agreement, the signatures of the other 11 persons who comprised the applicant would be insufficient: the written agreement (regardless of whether it dealt solely with future acts or not) could not be registered or even considered for registration by the Registrar. There would then have to be an authorisation meeting of the native title claim group followed by a successful application under s 66B, a new authorisation of the agreement – with all that entails – and a fresh authorisation of (and direction to) the applicant to sign (and with the process then needing to recommence if a further member of the applicant were to become ill before signing). Only then could there be a valid application to register the agreement.
5. The SWALSC respondents submit that such results, which would inevitably entail very considerable expense and delay, are hardly likely to reflect Parliament’s intention.
6. They further submit that such an interpretation would be impossible to reconcile with a significant body of authority relating to the notion of the “applicant”. Several decisions of this Court stand for the proposition that the death or incapacity of one member of the applicant does not prevent the remaining members from taking action in relation to the application. For example, in ***Butchulla*** *People v Queensland and Others* (2006) 154 FCR 233; [2006] FCA 1063, Kiefel J stated, at [42]-[43]:

the authorisation referred to in the NTA is not of the persons authorised collectively making up the ‘applicant’, but of each of them personally. There being no express term concerning the authorisation as to the authority to the contrary, statutory or otherwise, the presumptions usually applied to personal appointments would operate. That is to say, their authorisation will continue until revoked and whilst they are willing and able to act in their representative capacity …

Once the authority given by the claim group is seen to be directed to each of the persons authorised and subject to those terms it follows that the inability of one to continue does not affect the authorisation of the others.

1. Similarly, in *Doolan and Others v Native Title Registrar and Others* (2007) 158 FCR 56; [2007] FCA 192, Spender J, at [57], stated as follows:

I think that an appointment of a group of persons jointly to be an ‘applicant’ by a meeting of a native title claim group is an authorisation for the named persons to act, or so many of them as remain willing and able to act. It is these persons who constitute the ‘applicant’. There is, in my opinion, an implication in an authorisation of a group to act collectively in a representative capacity that that authorisation has to be understood as recognising the vicissitudes that accompany joint action, particularly where (as is frequently the case) the persons authorised to make an application for a native title determination are elderly, and subject to the possible incidents of old age.

1. At [60], his Honour then added:

It is important to remember that the persons who are authorised by a native title claim group to make an application are not authorised merely to make the application, but also to ‘deal with matters arising in relation to’ the application. If one person comprising an ‘applicant’ were to die, it would be contrary to the purpose of the Act to require there to be a further authorisation meeting to authorise another group of persons (perhaps constituted by the remaining members of the ‘originally specified persons’) to be the ‘applicant’. Such a frustration of proceedings, perhaps proceedings well advanced, would be antithetical to the purpose of the Act. That is the paramount consideration, but the gross waste of time and resources also serves to indicate that an interpretation of ‘applicant’ which avoids all of these consequences is clearly to be preferred.

1. The SWALSC respondents submit it follows that if, as the applicants contend, the authority to make the agreement is found in s 251B and s 62A, there would have been no need to replace the incapacitated registered native title claimant by using the process under s 66B, as the other members of the applicant could have proceeded without him.
2. As for the individual registered native title claimant who signed the Whadjuk People ILUA after the specified date, the SWALSC respondents say that the question posed by the special case admits of only one answer: the Whadjuk People ILUA is an agreement that complies with the requirements in s 24CD(1) and (2)(a) of the NTA. The question posed is not directed to whether the Whadjuk People ILUA failed to comply with s 24CD(1) and (2)(a) of the NTA in the past, but whether it does so now, and, since every living person who comprises the applicant for the Whadjuk People claim has signed the agreement, it plainly complies with those provisions.
3. Even if the question in the special case can be construed differently, the SWALSC respondents say that the unexplained failure of this individual registered native title claimant to sign the ILUA until 24 February 2016, demonstrates that he was unwilling to act as the applicant in relation to making the ILUA. In accordance with the authorities mentioned above, they say it was not necessary to have him replaced, and so his refusal to sign could be disregarded.
4. In any event, it is submitted that relief should be refused as a matter of discretion.
5. The SWALSC respondents say, citing *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd.* (1949) 78 CLR 389 at 400 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ); [1949] HCA 33; and *Re Refugee Tribunal and Another; Ex parte Aala* (2000) 204 CLR 82 at [56] (Gaudron and Gummow JJ); [2000] HCA 57, that the remedies of prohibition and declaration can be refused if no useful result would ensue. Given that every living person who comprises the applicant for the Whadjuk People claim has now signed the agreement, granting the relief sought by the applicants would only result in delay. It would mean that there would have to be a new application to register the agreement, a new notice period and a further opportunity to make objections, but it would achieve little else.
6. In the result, the SWALSC respondents submit that the questions in the special cases should be answered as follows:
7. WAD137/2016
8. Answer to Question 1: No
9. Answer to Question 2: Not applicable
10. Answer to Question 3: The application should be dismissed
11. Answer to Question 4: The applicant
12. WAD138/2016
13. Answer to Question 1: No
14. Answer to Question 2: No
15. Answer to Question 3: Not applicable
16. Answer to Question 4: The application should be dismissed
17. Answer to Question 5: The applicant
18. WAD139/2016
19. Answer to Question 1: No
20. Answer to Question 2: No
21. Answer to Question 3: No relief should be granted to the applicant
22. Answer to Question 4: The application should be dismissed
23. Answer to Question 5: The applicant
24. WAD140/2016
25. Answer to Question 1: No
26. Answer to Question 2: Not applicable
27. Answer to Question 3: The application should be dismissed
28. Answer to Question 4: The applicant

# STATE’S SUBMISSIONS

## Principles of statutory construction

1. The State makes the following submissions in relation to the general approach to the applicants’ construction of the particular provisions of the NTA.
2. The parties are agreed as to the principles of statutory construction, which are well settled: namely, that the meaning of statutory provisions (the intention of the legislature) is to be derived from the text, purpose and context of the NTA. That meaning is to be determined “by reference to the language of the instrument viewed as a whole”. See *Project Blue Sky* at [69]‑[71] (McHugh, Gummow, Kirby and Hayne JJ).
3. It is the identification of the statutory purpose of the provisions of the NTA in relation to indigenous land use agreements, and in particular, the purpose of s 24CD, where the parties diverge.
4. In that regard, the State submits that the identification of the purpose of a provision is an objective exercise. At [23], the plurality made the following observation in *Thiess v Collector of Customs and Others* (2014) 250 CLR 664; [2014] HCA 12:

Objective discernment of statutory purpose is integral to contextual construction. The requirement of s 15AA of the *Acts Interpretation Act 1901* (Cth) that ‘the interpretation that would best achieve the purpose or object of [an] Act (whether or not that purpose or object is expressly stated …) is to be preferred to each other interpretation’ is in that respect a particular statutory reflection of a general systemic principle. For [footnote omitted]:

‘it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.’

1. The State says that there is a general theme in the applicants’ submissions to the effect that the provisions relating to indigenous land use agreements are to be narrowly construed so as to prevent the making of such agreements, or at least to make them more difficult to make. In support of this proposition, the State notes the following:
2. the applicants’ reliance on the “principle of legality” and the suggestion that the provisions “interfere with property rights”;
3. the applicants’ almost exclusive focus on one potential effect of an indigenous land use agreement (the surrender of native title), rather than their broad and varied uses; and
4. the applicants’ suggestion that a requirement of unanimity of the persons comprising the registered native title claimant in becoming a party to an indigenous land use agreement is a “protective” mechanism that should not be lightly overridden.
5. The State submits that the applicants’ submissions in this regard should be rejected, for the reasons that follow.
6. First, the provisions of the NTA relating to indigenous land use agreements do not “interfere with property rights” at all, whether those rights be native title rights or (as the applicants also submit) the right to claim a determination of native title. The provisions do not themselves bring about the extinguishment of native title or any curtailment of their enjoyment.
7. On the contrary, the State says, what the provisions do is enable and empower the holders of native title rights to deal with those native title rights and interests and to enter into binding agreements in relation to them. While the State acknowledges that one effect of an indigenous land use agreement, depending on its terms, may be extinguishment of native title which may exist in an area, an indigenous land use agreement does not have to involve extinguishment and may concern a wide range of matters, including: the relationship between native title and other interests; changing the effects of intermediate period acts; agreeing to the doing of future acts; and compensation. See s 24CB(a)-(g).
8. Indeed, if anything, the State says, the provisions relating to indigenous land use agreements *enhance* the enjoyment of native title rights by enabling native title holders to make agreements and determine for themselves how their rights and interests are to be dealt with. It notes that indigenous land use agreements are voluntary and that, in this respect, the provisions in relation to indigenous land use agreements may be contrasted with other provisions of the NTA, which contemplate acts that affect native title being undertaken without requiring the consent of the native title holders or notwithstanding their objection. In this regard, the State refers to ss 24CM, 32, 38 and 39.
9. In this respect, the State says that Reeves J’s identification of the purpose of the indigenous land use agreement provisions in *Bygrave* at [59] should be accepted, namely, a process to provide certainty for the broader Australian community, while, at the same time:

ensuring that those who hold, or claim to hold, native title in the land and waters affected by such future acts, agree to them being undertaken and, if they do, to obtain a corresponding benefit from so agreement. By this process, those who hold or claim native title in such land and waters should be able to share in the benefits that flow from the future use of their native title rights and interests in the land and waters.

1. The State says that, in this context, it is the interests of the native title holders themselves, and their right to determine *for themselves* how their interests are to be dealt with, that is the paramount consideration in discerning the purpose of the provisions. As in the case of a native title claim group, in relation to a native title claim, in the making of an indigenous land use agreement, the native title holders have “ultimate authority”.
2. As discussed further below, the State submits that the function of the registered native title claimant in becoming a party to an indigenous land use agreement is entirely mechanical or ministerial; there is nothing in the indigenous land use agreement provisions as a whole to suggest that the registered native title claimant retains a discretionary function to override the authority of the native title holders.
3. Accordingly, the State contends, the applicants’ suggestion that their construction, requiring as a precondition the signature and individual assent of each person comprising the registered native title claimant in order to make an indigenous land use agreement, fulfils a “protective” function, is misplaced. Ultimately, the “protective function” relied upon by the applicants could only be a function to protect the native title holders from themselves and from the effect of their own decisions. The State respectfully submits that such a function is not supported by the provisions as a whole and is, indeed, contrary to their purpose.
4. In this respect, the State highlights what it says is a contradiction at the heart of the applicants’ submissions as to statutory purpose.
5. On the one hand, the applicants’ submit that the capacity for a “dissident” member of a registered native title claimant to thwart or frustrate the making of an indigenous land use agreement by refusing to sign the indigenous land use agreement, contrary to the authority and directions of the native title holders, is reflective of a “protective function”; yet, on the other hand, the applicants appear to accept that the refusal of a “dissident” member of an applicant to sign an agreement authorised by the native title holders is a proper basis for the “dissident” member to be removed.
6. The State says that the applicants’ construction of the provisions therefore has the result that the actions of a “dissident member” of the registered native title claimant acting contrary to the authority and direction of the native title holders is *both* the exercise of a protective function contemplated by the NTA and grounds for that dissident member’s removal – a construction which the State submits would produce consequences that are absurd and, accordingly, is a construction which should be rejected. See *Bygrave* at [92]-[95].
7. The State then makes the following submissions as to the proper construction of s 24CD.

## The registered native title claimant is a single entity

1. The State says that the requirement in s 24CD(2)(a), which requires that “all registered native title claimants in relation to land or waters in the area” must be parties to the relevant agreement, is critical in the present proceedings.
2. The State further notes that, in this context, it is a fundamental premise of the applicants’ case that each person whose name appears on the Register in respect of a registered claim is, individually, a “registered native title claimant” who must sign the agreement. So, for example, in WAD137/2016, it is contended that the applicant herself (Mingli Wanjurri McGlade) is a “registered native title claimant” in her own right and that the other two persons who comprise the applicant in the Wagyl Kaip claim are, similarly, each individually “registered native title claimants”.
3. It submits that this construction of the NTA is wrong.
4. Rather, the State says that the starting point in construing s 24CD is to recognise that a “registered native title claimant” in relation to a native title claim is always, and can only ever be, a single entity. That is, there can only ever be one registered native title claimant for any registered claim, irrespective of how many people comprise that claimant. Put another way: the NTA does not contemplate that there may be “registered native title claimants” in relation to a single registered native title claim.
5. In support of this proposition, the State says the relationship between the terms “registered native title claimant” and “applicant” in the NTA is important.
6. In addition to the definition of “registered native title claimant” in s 253, as set out above, the State notes the definition of “applicant” in s 61(2), which relevantly provides:

(2)  In the case of:

(a)  a native title determination application made by a person or persons authorised to make the application by a native title claim group; or

(b)  a compensation application made by a person or persons authorised to make the application by a compensation claim group;

the following apply:

(c)  the person is, or the persons are jointly, the ***applicant***; and

(d)  none of the other members of the native title claim group or compensation claim group is the ***applicant***.

1. The State notes that the “applicant” for the purposes of a native title determination is one entity which may be comprised of multiple people jointly – those persons are “jointly” the “applicant” (singular). In other words, there can never be more than one applicant at any one time for a single native title determination application.
2. By reference to the definition of a “registered native title claimant”, the State says it can be seen that it means a person or persons whose name or names appear in an entry on the Register “as the applicant”; that is, as the single joint entity. The distinction between an “applicant” and a “registered native title claimant” does not relate to the identity of those persons who comprise those entities; it is concerned only with the status of the underlying native title claim as being registered or unregistered.
3. The State submits that the people who comprise the applicant and registered native title claimant are the same in each instance and will jointly comprise the applicant and registered native title claimant, respectively. In this regard, the State cites the explanatory memorandum for the *Native Title Amendment Bill 1997* (Cth), which inserted the current definition of registered native title claimant, at [25.17]:

An applicant has particular functions and responsibilities in relation to the application and other matters which may affect the native title of the group. For example, the definition of ***registered native title claimant*** makes it clear that if the claim for native title is registered, the applicant will be the registered native title claimant (see Schedule 2, item 99, section 253)

(Underlined emphasis in State’s submissions.)

1. The State says that it is against this background that the references, in the plural, to “persons” in s 24CD(1) and “registered native title claimants” in s 24CD(2)(a), are to be properly understood.
2. It says those references to “persons” or “registered native title claimants” in the plural are not references to a multiplicity of individual persons within a “registered native title claimant” in relation to a single native title claim (which is always a singularity), but, rather, a recognition that an area agreement may deal with an area covered by a number of separate native title claims (whether a claim(s) which has been determined, made and registered but not yet determined or not yet made by way of an application in the Federal Court) and, for that reason, requires a number of parties.
3. In that regard, the State says that s 24CD(2)(a), which requires that “all registered native title claimants” in the relevant area be a party to an agreement, is no different to s 24CD(2)(b), which requires that “all registered native title bodies corporate” in a relevant area be a party to an agreement. Those provisions contemplate that where there is more than one registered native title application (and therefore more than one registered native title claimant) or more than one determination of native title (where there is a RNTBC) in an agreement area, then each of those entities are required to be parties to the agreement.
4. By way of illustration in the present proceedings, for the purposes of the Wagyl Kaip and Southern Noongar ILUA (in issue in WAD137/2016), there are two (and two only) “registered native title claimants”; namely, the claimant in the Southern Noongar claim (which consists of five named individuals) and the claimant in the Wagyl Kaip claim (which consists of three named individuals). The State says it is those two “registered native title claimants” who must be parties to the Wagyl Kaip and Southern Noongar ILUA, not the eight individuals who comprise those entities.
5. Similarly, citing *Bygrave* at [81]-[82], the State says that the reference to “persons” in s 24CD(l), is a reference to the multiplicity of persons or entities described in s 24CD(2) and (3) who must be party to an area agreement. In that regard, they note that the NTA elsewhere describes, for example, at s 24CL(2)(a), “registered native title claimant” as a “person” notwithstanding that it may comprise a number of individuals.

## How does the registered native title claimant become a party to an ILUA?

1. The State says that, in light of the fact that it is the “registered native title claimant” as a single entity that must be a party to an indigenous land use agreement, the real issue raised by these proceedings is whether the NTA prescribes how, or in what manner, a “registered native title claimant” becomes a party to the proposed agreement.
2. The State submits that there are no express statutory requirements in the NTA in relation to how a registered native title claimant is to become a party to an indigenous land use agreement. There is, for example, no statutory requirement that the parties to an indigenous land use agreement sign it, as opposed to indicate their assent by other means; nor is there any express requirement that a registered native title claimant must act “unanimously” in order to fulfil the requirements of s 24CD(2)(a).
3. The State consequently submits that the manner in which the registered native title claimant (the single entity) becomes a party is not a matter that is circumscribed by the NTA; certainly not as some form of precondition. Rather, it is a matter which may depend upon the circumstances of the making of the particular agreement. Significantly, it is submitted, that is a matter that may be determined by the persons who authorise the making of an indigenous land use agreement and on whose behalf the registered native title claimant acts to make that agreement.
4. Consequently, the State says that, depending upon the authority given by the native title holders, there could well be a requirement that all persons who jointly comprise a registered native title claimant sign the agreement. Equally, it is submitted, some alternative mechanism may be authorised.
5. It is submitted that this conclusion follows from the respective roles of the registered native title claimants and the native title holding group, respectively.

## The role of the registered native title claimants

1. In the context of making an indigenous land use agreement, the State says that the role of the registered native title claimant can be described as administrative (or ministerial), in that a registered native title claimant is an entity which may enter into an indigenous land use agreement on behalf of a collective, large and changing group of persons who will be bound, and affected, by that agreement. The native title holding group could not practically ever enter into such an indigenous land use agreement other than by a legislatively constructed entity that enables such matters to be dealt with in a representative way.
2. Beyond that ministerial function, the State says, the indigenous land use agreement provisions of the NTA do not suggest any role for the registered native title claimant *apart* from carrying out the authorisation of the native title holding group to make the agreement.
3. The State submits that, importantly, the NTA expressly contemplates that the capacity for independent action is more limited in the case of the registered native title claimant’s role in relation to indigenous land use agreements than in its role as the “applicant” in a native title claimant application or a compensation application. In the latter case, by s 62A, the applicant is given express statutory authority to “deal with all matters arising under this Act” in relation to those applications. The note to s 62A expressly provides that that section applies only to such applications and not to the provisions dealing with indigenous land use agreements. See *Gomeroi* at [77] (Barker J).
4. The State says that this accords with the different processes involved in making an indigenous land use agreement and in conducting a claimant application or compensation application. It is to be expected, in the case of the latter, that the registered native title claimant, in conducting litigation, will be called upon to make independent judgements as to the course of the litigation and the steps to be taken in it. Even then the applicant does not have a wholly unfettered right to act in any way it so chooses: in exercising that judgement and making necessary decisions, the “applicant” must still act within the terms of the authority given to it by the native title claim group whom it represents. See *Far West Coast* at [50]-[59].
5. So much is recognised, the State says, by the exclusivity of the authority of the “applicant” to conduct those proceedings. See *Ankamuthi* at [8]. In that regard, the authority conferred upon the “applicant” pursuant to s 251B, must be one to make the application “and to deal with matters arising in relation to it”.
6. By contrast, the State says there is a single action required of the “registered native title claimant” in relation to an indigenous land use agreement, namely, to make the agreement so authorised. Unlike the conduct of litigation, no independent judgement is called for or required.

## The role of the identified native title holding group

1. The State says that it is clear from the indigenous land use agreement provisions of the NTA that the role of the native title holders is paramount and that they have “ultimate authority”. See *Far West Coast* at [59]; *Daniel* at [16].
2. It says this can be seen in the requirement for registration of an indigenous land use agreement, that the native title holders authorise the agreement (within the meaning of s 251A) and that it is the existence of the native title holders’ authority to make the agreement that is the critical matter. See ss 24CK(2)(c), 24CL(3) and 203BE(5).
3. Further, the State says that, contrary to the applicants’ submission, both an area agreement and a body corporate agreement require the consent of the native title holding group before such indigenous land use agreements can be validly made. As already noted above, this requirement is contained in s 24CG and s 251A of the NTA. In the case of a body corporate agreement, it is contained in R 8(1)-(4), (6) and (7) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth). Just as a RNTBC would require the consent of the common law holders before entering into a body corporate agreement, it would also require the consent of the common law holders before entering into an area agreement. The State says that obligation arises whether or not the RNTBC holds the native title on trust or as agent, and irrespective of whether the proposed agreement will surrender native title rights and interests.
4. Indeed, the State submits, it is the requirement for the authority of the native title holders that provides the true “protective mechanism” in relation to the indigenous land use agreement provisions.
5. This, it says, can be seen, similarly, in relation to the requirements for the other mandatory parties for an indigenous land use agreement.
6. In this regard, it notes that s 24DC(2)(c) provides that if, for any part of an agreement area there is not a registered native title claimant or RNTBC, then one or other of the following must be a party to that agreement:
7. any person who claims to hold native title in relation to land or waters in the non‑claimed/determined part of the agreement area; or
8. any representative body for the non‑claimed/determined part of the agreement area.
9. The State says that the reference to “any person” in s 24CD(2)(c)(i) is not a reference to any and every such person; what is required is that at least one such person is a party to the indigenous land use agreement. See ***Murray*** *v Registrar of the National Native Title Tribunal and Others* (2003) 132 FCR 402 at [18]; [2003] FCAFC 220. In so finding, the Full Court in *Murray* observed, at [21]‑[23], that such a conclusion does not lead to the result that a person who holds native title in relation to land or waters in the area may be significantly disadvantaged by such an agreement. This was because in order to bind a person not a party to the agreement, the agreement must be registered and that, in order to achieve registration, it was necessary to provide information about the fact of authorisation of that agreement.
10. The Full Court further found, at [22], that, in the case of s 24CG(3)(a) of the NTA, a certifying body is a “body concerning which the Commonwealth Minister is satisfied, amongst other things, that it will satisfactorily represent persons who hold or may hold native title in the area”.
11. At [23], the Full Court further observed that the requirements regarding authorisation, namely, s 24CG(3)(a) and (b) and s 24CK:

are calculated to ensure that all persons who hold, or may hold, native title in the area have been identified and notified of the agreement and have either authorised the making of the agreement or successfully taken steps to formalise their claim to hold native title in relation to land or waters in the area covered by the agreement.

1. In the result, the State submits that, in the context of s 24CD(2) of the NTA, neither subs (a) or subs (c) require the persons who may comprise the directors of a RNTBC, or all of the persons who may claim to hold native title in a non-claimed/determined area, to be a party to an indigenous land use agreement. They say this is the position both as a matter of the ordinary meaning of the provisions and the fact that there are special measures, including the requirements of authorisation, to ensure that persons who hold native title rights and interests are not disadvantaged by an agreement.

## The native title holding group may direct and decide how the registered native title claimant is to become a party to the agreement

1. Consistent with the asserted primacy of the native title holding group in relation to the making of an indigenous land use agreement, the State submits that, in authorising the making of the indigenous land use agreement, it is open to the native title holders to identify the manner in which the registered native title claimants are to become parties to the agreement.
2. The State says that, depending upon the nature of the authority given, that may well enable the registered native title claimant to become a party to the agreement without each of the persons comprising the registered native title claimant assenting to, or signing, the agreement.
3. In this regard, it is submitted that the fact that s 61(2) of the NTA provides that more than one person “are jointly” an applicant, is not determinative of the question raised by these proceedings. This, the State says, is for a number of reasons.
4. First, there is a significant difference between persons who “are jointly” of a particular nature and a requirement that they “act jointly”. The State says that to appoint persons “jointly” may require all of those persons to join in the exercise of the power, unless there is a stipulation that a specified number shall form a quorum, in which case the quorum may act; it is not to require that in each and every instance of making a decision or undertaking an act that there be concurrence between those persons appointed to act jointly. See *Kendle and Another v Melsom and Another* (1998) 193 CLR 46 at [4] and [10]; [1998] HCA 13. The State says that, in each, much will depend upon the terms of the appointment.
5. Similarly, the State says, unless the facts dictate otherwise, in circumstances where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole.
6. The State submits that the fact that the NTA provides that an applicant (and, by extension, the registered native title claimant) is comprised jointly of one or more people, does nothing more than to confirm those people are not severally the applicant. That provision does not, of itself, mean the applicant must act unanimously.
7. The States concedes that, as observed by the applicants, there are decisions of this court in the context of actions taken in native title claimant applications, to the effect that an applicant comprised of a number of people is required to act unanimously. See *Tigan* at [28] and *Weribone* at [20]-[22]. The State says those decisions all arose in the context where the authority given to the applicant by the native title claim group did not provide otherwise, and notes that more recent decisions recognise that, where it is consistent with the terms of the authorisation of the native title claim group under s 251B of the NTA, the applicant may be authorised to act by a majority of those persons. See *Anderson* at [62], which was cited with approval in *Far West Coast* at [50]-[54]; *KK* at [87]-[89]. The State says this approach is in turn consistent with observations made by the Full Court in *Gomeroi*, to the effect that in authorising the applicant under s 251B, the claim group may place conditions and limits on the authority. See Barker J at [80]-[81], [114], with Reeves J agreeing at [1].
8. The State says that the applicants’ contention that “the applicant is not subject to the direction or instruction of the native title claim group that has authorised the applicant under s 251B” is not supported by the authorities cited by the applicants and is inconsistent with other authorities, such as *Far West Coast* at [50]-[59]. Noting they are concerned with the authorisation of the applicant and not a registered native title claimant in the context of an indigenous land use agreement, the State says the authorities cited by the applicants are to the effect that the applicant is the only entity authorised to act in a native title proceeding or matters relating to it; they are not to the effect that, in so acting, the applicant is not limited or fettered by the terms of authorisation given.
9. In any event, the State says that this issue is not necessary to resolve in the present case. It is clear that the functions of a registered native title claimant in relation to an indigenous land use agreement are distinct from the role of the applicant in court proceedings. See, for example, *Gomeroi* at [77] (Barker J). It says that the native title holders have the ultimate authority to determine the manner and exercise of those functions, for the reasons given, applies with even greater force.
10. Absent any other express requirement to that effect, the State submits, unanimity between the persons comprising the registered native title claimant cannot be said to be a mandatory requirement of the NTA in order for a registered native title claimant to become a party to an indigenous land use agreement. It will be a question of fact in any given instance as to how a registered native title claimant is able to exercise those functions and whether it has done so in accordance with that process.

## Section 66B of the NTA

1. The State says that the applicants’ contention that s 66B of the NTA effectively provides the only mechanism by which a failure of a “dissident” member of a registered native title claimant to comply with the authority and direction of the native title holders is to be addressed, relies upon it being first accepted that there is an absolute requirement for the registered native title claimant to act unanimously. Consequently, the State says, s 66B does not confirm that such a requirement exists; it merely provides the process by which a registered native title claimant (or, properly, an applicant) may be removed and replaced.
2. In this regard, the State says that the grounds identified in s 66B for removing an applicant are exhaustive and are confined to matters concerning an applicant’s authority to make and maintain a native title determination application. It says that s 66B is concerned with the authority in relation to an application and matters arising in relation to it; not with the making of an indigenous land use agreement. While the making of an indigenous land use agreement and maintaining a claimant application both deal with subject matter concerning native title, the former is not an incident or aspect of the latter: each may exist independently of the other and is to be separately authorised. The State says that the distinction between a claimant application and those provisions concerning the making of an indigenous land use agreement (and the certification of an application for registration) for the purposes of s 62A, is confirmed by the note included below that provision, which provides that, “[t]his section deals only with claimant applications and compensation applications. For provisions dealing with indigenous land use agreements, see Subdivisions B to E of Division 3 of Part 2”.
3. The State submits that, as a matter of statutory construction and interpretation, s 66B does not represent a comprehensive procedure which “covers the field” in terms of the issue considered here, where a person (or persons) who comprises, with others, a registered native title claimant does not agree to being a party to an indigenous land use agreement.
4. For these reasons, the State submits that question 1 of the questions reserved for the consideration of the Court in each case should be “No”.

# CONSIDERATION

1. As noted above, the key issue in each proceeding is whether the only way in which a “registered native title claimant” can become a party to an indigenous land use agreement (area agreement) is where each person who, jointly with the others who comprise the registered native title claimant, has signed the agreement.
2. There is also the sub-issue of whether the answer to this key issue is materially affected by the fact that, at material times, one of those persons was deceased.
3. Finally, there is a question whether the fact that Mr Morich only signed the Whadjuk People ILUA after the application to register the ILUA was made, means that ILUA cannot be considered for registration under the NTA.
4. In discovering the answer to the key issue, it is necessary to regard the text of the NTA, and in particular of the provisions in Subdiv C of Div 3 of Pt 2 of the NTA.
5. Division 3 of Pt 2 of the NTA deals with “Future acts etc. and native title”. Relevantly, s 24AA(3) provides, by way of overview of Div 3, that:

A future act will be valid if the parties to certain agreements (called indigenous land use agreements–see Subdivisions B, C and D) consent to it being done and, at the time it is done, details of the agreement are on the Register of Indigenous Land Use Agreements. An indigenous land use agreement, details of which are on the Register, may also validate a future act (other than an intermediate period act) that has already been invalidly done.

1. Subdivision C deals with indigenous land use agreements (area agreements), the type here in issue.
2. The first provision of Subdiv C is s 24CA, which provides that:

An agreement meeting the requirements of sections 24CB to 24CE is an ***indigenous land use agreement***.

Note: Subdivisions B and D provide for other kinds of indigenous land use agreements.

1. Section 24CB deals with the coverage of an area agreement. No issue of coverage arises in these proceedings.
2. Section 24CC provides that an area agreement “must not be made” if there are RNTBCs in relation to *all* of the area. In these proceedings, none of the ILUAs offend this proscription as there are no such RNTBCs in respect of any of the areas concerned.
3. Section 24CD deals with parties to area agreements. This is the pivotal provision in relation to the present interpretation issue and should be set out in full:

**24CD Parties to area agreements**

*Native title group to be parties*

(1) All persons in the native title group (see subsection (2) or (3)) in relation to the area must be parties to the agreement.

*Native title group where registered claimant or body corporate*

(2) If there is a registered native title claimant, or a registered native title body corporate, in relation to any of the land or waters in the area, the ***native title group*** consists of:

(a) all registered native title claimants in relation to land or waters in the area; and

Note 1: Registered native title claimants are persons whose names appear on the Register of Native Title Claims as applicants in relation to claims to hold native title: see the definition of ***registered native title claimant*** in section 253.

Note 2: The agreement will bind all members of the native title claim group concerned: see paragraph 24EA(1)(b).

(b) all registered native title bodies corporate in relation to land or waters in the area; and

(c) if, for any part (the ***non-claimed/determined part***) of the land or waters in the area, there is neither a registered native title claimant nor a registered native title body corporate—one or more of the following:

(i) any person who claims to hold native title in relation to land or waters in the non‑claimed/determined part;

(ii) any representative Aboriginal/Torres Strait Islander body for the non‑claimed/determined part.

*Native title group where no registered claimant or body corporate*

(3) If subsection (2) does not apply, the ***native title group*** consists of one or more of the following:

(a) any person who claims to hold native title in relation to land or waters in the area;

(b) any representative Aboriginal/Torres Strait Islander body for the area.

*Other native title parties*

(4) If the native title group is covered by subsection (2), one or more of the following may also be parties to the agreement:

(a) any other person who claims to hold native title in relation to land or waters in the area;

(b) any representative Aboriginal/Torres Strait Islander body for the area.

*Government parties*

(5) If the agreement makes provision for the extinguishment of native title rights and interests by surrendering them to the Commonwealth, a State or Territory as mentioned in paragraph 24CB(e), the Commonwealth, State or Territory must be a party to the agreement. If the agreement does not make such provision, the Commonwealth, a State or a Territory may still be a party.

*Other parties*

(6) Any other person may be a party to the agreement.

*Procedure where no representative body party*

(7) If there are any representative Aboriginal/Torres Strait Islander bodies for any of the area and none of them is proposed to be a party to the agreement, a person in the native title group, before entering into the agreement:

(a) must inform at least one of the representative Aboriginal/Torres Islander bodies of its intention to enter into the agreement; and

(b) may consult any such representative Aboriginal/Torres Strait Islander bodies about the agreement.

Note: The registration of agreements that are certified by a representative Aboriginal/Torres Strait Islander body is facilitated under section 24CK.

1. Subsection (1) is the starting point, providing as it does that “All persons in the native title group (see subsection (2) or (3)) in relation to the area must be parties to the agreement”.
2. The emphases for present purposes are on the words *All persons* and *must*.
3. But first, it is necessary to identify exactly who or what the “native title group” is, in order to determine who “All persons in the native title group” are, who must be parties.
4. In the factual circumstances of these proceedings, this takes one to subs (2)(a), which states that the “native title group” consists of “all registered native title claimants in relation to land or waters in the area”.
5. Note 1 to this paragraph states that registered native title claimants (in the plural) are persons whose names appear on the Register as applicants in relation to claims to hold native title: see the definition of “registered native title claimant” (in the singular) in s 253.
6. The following definition of “registered native title claimant” appears in s 253:

***registered native title claimant***, in relation to land or waters, means a person or persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the land or waters.

1. The applicants in these proceedings contend that each of the persons whose names appear on the Register must individually be a party to the relevant ILUA, and as a result must sign it.
2. The State and SWALSC respondents contend this construction of s 24CD is wrong, on the basis of the relationship between the definition of the “registered native title claimant” in s 253 and the definition of the “applicant” in s 61(2), on which s 253 relies.
3. Section 61(2) provides:

(2)  In the case of:

(a)  a native title determination application made by a person or persons authorised to make the application by a native title claim group; or

(b)  a compensation application made by a person or persons authorised to make the application by a compensation claim group;

the following apply:

(c)  the person is, or the persons are jointly, the ***applicant***; and

(d)  none of the other members of the native title claim group or compensation claim group is the ***applicant***.

1. The State observes that the “applicant” for the purposes of a claimant application made under s 61, is a singular entity that may be comprised of multiple people jointly. In turn, it says, a “registered native title claimant” means a person or persons whose name or names appear in an entry on the Register “as the applicant”; that is, as a single joint entity. It says the distinction between an “applicant” and a “registered native title claimant” does not relate to the identity of those persons who individually comprise the entity; it is concerned only with the status of the underlying native title claim as being registered or unregistered.
2. Consequently, the State submits, the people who comprise the applicant and registered native title claimant are the same in each instance and will jointly comprise the applicant and registered native title claimant, respectively.
3. The State says it is against this background that references in the plural to “persons” in s 24CD(1) and “registered native title claimants” in s 24CD(2)(a) are properly to be understood.
4. It submits that these references in the plural are not references to a multiplicity of individual persons within a “registered native title claimant” in relation to a single native title claim, but, rather, a recognition that an area agreement may deal with an area covered by a number of separate native title claims and, for that reason, may require a number of parties.
5. In that regard, the State draws a parallel between the reference to “all registered native title bodies corporate” in s 24CD(2)(b) and to “all registered native title claimants” in s 24CD(2)(a). It says both contemplate that where there is more than one registered native title application (and therefore more than one registered native title claimant) or more than one determination of native title (and therefore more than one RNTBC) in an agreement area, then each of those entities is required to be a party to the agreement. Similarly, the State says, the reference to “persons” in s 24CD(1), is a reference to the multiplicity of persons or entities described in s 24CD(2) and (3) who must be a party to an indigenous land use agreement. It notes that a “registered native title claimant” is described as a “person” elsewhere in the NTA notwithstanding that it may comprise a number of individuals.
6. The SWALSC respondents make similar submissions.
7. Given the textual ambiguities identified in these various provisions, the primary object in construing s 24CD is to render it “consistent with the language and purpose of all the provisions” of the NTA: the NTA must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. See *Independent Commission Against Corruption v Cunneen and Others* (2015) 256 CLR 1 at [31] (French CJ, Hayne, Kiefel and Nettle JJ); [2015] HCA 14, citing *Project Blue Sky* at [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ).
8. The definition of a “registered native title claimant”, relying as it does on the definition of an “applicant” in s 61(2), contemplates a singular entity that may, in some circumstances, be comprised of multiple “persons” whose names appear on the Register “as the applicant”. In order to construe the provisions of the NTA in a harmonious manner, the reference to “all registered native title claimants” in s 24CD(2)(a) must refer to each “registered native title claimant”, if there is more than one, in the sense of the entity defined by s 253, in relation to an agreement area.
9. This conclusion is strengthened by the parallel such a construction would create between the work done by “all registered native title claimants” and “all registered native title body corporates” in s 24CD(2)(a) and (b) respectively.
10. The parallel is not weakened by Note 1 to s 24CD(2)(a), of which s 24CD(2)(b) has no equivalent, which provides as follows:

Note 1: Registered native title claimants are persons whose names appear on the Register of Native Title Claims as applicants in relation to claims to hold native title: see the definition of ***registered native title claimant*** in section 253.

1. The subtle differences in the drafting of Note 1 and the definition of a “registered native title claimant” in s 253 may be noted. A literal reading of Note 1, particularly the reference to “persons whose names appear”, may suggest that, for the purposes of s 24CD, the reference to “registered native title claimants” in the plural, means the individual persons comprising the “applicant”, rather than multiple “registered native title claimants” in the form of entities created by the NTA.
2. Nonetheless, in construing the NTA harmoniously, an interpretation of “registered native title claimant” consistent with s 253 and the use of that phrase in other provisions of the NTA, should be preferred over one possible interpretation of Note 1 to s 24CD(2)(a).
3. It does not follow, however, that the reference to “All persons” in s 24CD(1), is a reference to a multiplicity of entities created by the NTA and described in s 24CD(2).
4. In order for the references to “All persons” and “group” in s 24CD(1) to have work to do regarding area agreements involving only one registered native title claimant, for example, “All persons” must be construed as referring to all individual persons comprising the “native title group”, which is in turn comprised, for present purposes, of the entity that is the “registered native title claimant” as defined in s 253.
5. If there are two registered native title claimants for the area covered by the relevant indigenous land use agreement, then the persons whose names appear on the Register in relation to each claimant application will comprise “All persons in the native title group”.
6. Thus, by virtue of the text of s 24CD(1) and (2), the various persons who jointly comprise the registered native title claimant or claimants in relation to each of the ILUAs must be parties to each ILUA.
7. The consequence of being a party, unless a clear indication to the contrary can be found in the NTA, is that each party must sign the agreement indicating they are bound by it, if the agreement is proposed to be in writing – as it necessarily will be if it is to be registered. Nothing in Div 3 or Subdiv C suggests that an indigenous land use agreement is anything in nature but an agreement that would be recognised by the general law. Its execution is required. Section 24EA, discussed further below, is consistent with this view.
8. As a result, if, in relation to any proposed area agreement, one of the persons who, jointly with others, has been authorised by the claim group to be the applicant, refuses, fails or neglects, or is unable to sign a negotiated, proposed written indigenous land use agreement, for whatever reason, then the document will lack the quality of being an agreement recognised for the purposes of the NTA.
9. If a claim group is disaffected by the decision of a person, who jointly with others is authorised as the applicant, not to sign a proposed area agreement following its negotiation, and desires to see it signed, then it would be necessary for the claim group to remove or replace the person as one of those who jointly comprise the applicant.
10. Section 24CD(1) of the NTA provides that all persons in the native title group “must” be parties to an indigenous land use agreement. This implies not only that those persons be recorded as parties, but also indicate their intention to be bound by the agreement. In the case of a proposed written agreement, this is achieved by signing the document. The use of the expression “must”, in the circumstances, cannot be read as a permissive requirement that can be ignored without affecting the validity of the purported agreement.
11. Nothing in Subdiv C or Div 3 suggests it is sufficient if only some or even a majority of persons comprising the registered native title claimant sign the agreement.
12. Not only do the terms of Subdiv C suggest that the various members of the registered native title claimant or claimants must sign the agreement, but so do the terms of s 24EA in Subdiv E.
13. Section 24EA provides that:

**24EA Contractual effect of registered agreement**

(1) While details of an agreement are entered on the Register of Indigenous Land Use Agreements, the agreement has effect, in addition to any effect that it may have apart from this subsection, as if:

(a) it were a contract among the parties to the agreement; and

(b) all persons holding native title in relation to any of the land or waters in the area covered by the agreement, who are not already parties to the agreement, were bound by the agreement in the same way as the registered native title bodies corporate, or the native title group, as the case may be.

Note: Section 199B specifies the details of the agreement that are required to be entered on the Register.

*Only certain persons bound by agreement*

(2) To avoid doubt, a person is not bound by the agreement unless the person is a party to the agreement or a person to whom paragraph (1)(b) applies.

*Legislation etc. to give effect to agreement not affected*

(3) If the Commonwealth, a State or a Territory is a party to an indigenous land use agreement whose details are entered in the Register of Indigenous Land Use Agreements, this Act does not prevent the Commonwealth, the State or the Territory doing any legislative or other act to give effect to any of its obligations under the agreement.

1. It is an unusual provision. It does not require an agreement to be registered to have effect. Rather it provides for the effect an agreement will have, “[w]hile details of an agreement are registered on the Register …”. This leaves open the possibility that an agreement may have contractual effect, or effect perhaps as a deed, if its details do not appear on the Register. This possibility is reinforced by the provision that “the agreement has effect, in addition to any effect that it may have apart from this subsection”.
2. The fact that an agreement may have effect if not registered, and apart from subs (1), is a strong indication: (1) that the agreement is not merely the sort of agreement that only has effect if registered under an Act; and (2) that the parties are not intended to be merely nominal parties whose assent and signature to a negotiated agreement, to be made in writing, is unnecessary.
3. Accordingly, the terms of s 24EA should also be construed as contemplating that the “parties” to an agreement are not fictional parties, but parties in their own, individual right. The expectation is that each of those parties will indicate their assent to the agreement, by signing it, if it is in writing.
4. In circumstances where it is anticipated, in the case of each of the ILUAs, that the agreement between the parties will be in writing – in order to achieve its registration and to obtain the statutory force and effect it will have under s 24EA(1) – it follows that the parties must also execute the agreement.
5. Thus, it is not open to argue that s 24EA is intended to convert any instrument called an indigenous land use agreement (area agreement) or that otherwise conforms with the requirements of Subdiv C, into a statutory contract even where it has not been signed by the necessary parties.
6. In those circumstances, it does not directly matter whether the agreement in question is to be made as a deed (as is proposed in the case of each ILUA the subject of these proceedings) or not. Either way any party to the agreement must sign it for it to qualify for registration.
7. It should also be observed that Div 3 does not provide any mechanism for removing a person who must be a party to an area agreement.
8. There is, however, a mechanism for replacing an “applicant” and it is to be found in another part of the NTA – Pt 3 Div 1, s 66B. It is useful to set out the terms of s 66B in full:

*Application to replace applicant in claimant application*

(1) One or more members of the native title claim group (the ***claim group***) in relation to a claimant application, or of the compensation claim group (also the ***claim group***) in relation to a compensation application, may apply to the Federal Court for an order that the member, or the members jointly, replace the current applicant for the application on the grounds that:

(a) one or more of the following applies to a person who is, either alone or jointly with one or more other persons, the current applicant:

(i) the person consents to his or her replacement or removal;

(ii) the person has died or become incapacitated;

(iii) the person is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it;

(iv) the person has exceeded the authority given to him or her by the claim group to make the application and to deal with matters arising in relation to it; and

(b) the member or members are authorised by the claim group to make the application and to deal with matters arising in relation to it.

Note: Section 251B states what it means for a person or persons to be authorised by all the persons in the claim group to deal with matters in relation to a claimant application or a compensation application.

*Court order*

(2) The Court may make the order if it is satisfied that the grounds are established.

*Federal Court Chief Executive Officer to notify Native Title Registrar*

(3) If the Court makes the order, the Federal Court Chief Executive Officer must, as soon as practicable, notify the Native Title Registrar of the name and address for service of the person who is, or persons who are, the new applicant.

*Register to be updated*

(4) If the claim contained in the application is on the Register of Native Title Claims, the Registrar must amend the Register to reflect the order.

1. The requirements of s 66B are well understood. See generally *Butchulla*. One or more members of the claim group may apply to the Federal Court for an order that the member or the members jointly replace the current applicant. The grounds for making the application are various and set out in subs (1)(a). In relation to the present circumstances, it might, for example, be said by the one or more members who might apply to be a replacement applicant, that by reference to para (iii), the person or persons who have not signed the ILUA, is or are no longer authorised by the claim group to make the claimant application and to deal with the matters arising in relation to it.
2. In relation to that ground, it would be necessary, of course, for the replacement applicant to satisfy the Court that the claim group no longer authorises that person or those persons to make the claimant application.
3. It would also be necessary for the replacement applicant to satisfy the requirement of subs (1)(b), and show that it, as applicant for the order, is authorised by the claim group to make the claimant application and to deal with matters arising in relation to it.
4. Similarly, it follows that while the authorisation of the claim group as a whole to the making of the agreement is critical, the claim group, outside the operation of s 66B, does not exercise any power of direction by which the requirements of Subdiv C can be modified. The claim group’s power to control the constitution of an applicant is derived only from its power under s 66B to authorise the replacement of the applicant. No such power derives from s 251A, which has to do with the process by which the claim group may be taken to have authorised the making of an indigenous land use agreement.
5. Thus, it follows the authorisation motions of claim groups passed in February and March 2015, purporting to authorise the ILUAs and their manner of execution, were ineffective in achieving the result contended for by the State and SWALSC respondents.
6. It should be observed in passing, however, that it is not contended in these proceedings that the relevant persons holding or who might hold native title in each respective area failed to authorise the making of the ILUAs in a manner that satisfies the requirements of s 251A of the NTA, or that the representative body did not properly certify the agreements having regard to the requirements of s 203BE(5).
7. If a policy justification for the conclusion we have reached were required, it is readily supplied. If the claim group have generally authorised a number of their group to act representatively as “applicant” for them on the claim, and they are also thereby identified by s 24CD as the persons who must be parties to an area agreement, then it may be concluded that they have a special responsibility under the NTA towards the claim group not only in dealing with the claimant application but also when it comes to agreement making under Subdiv C. Each person in the applicant/claim group must be a party to the agreement and must individually sign the written agreement in cases such as the present. Additionally, the claim group must authorise the agreement, in relation to which the representative body (in this case, SWALSC) bears the important function of certification.
8. As inconvenient as this outcome may be considered to be by some, especially in a case such as the present where a large number of persons jointly comprise the registered native title claimants; where some signatures may have been difficult to obtain; and where some persons are deceased, the textual requirements of the NTA in Subdiv C are as they are. While this may mean that any one of the persons who jointly comprise a registered native title claimant can effectively veto the implementation of a negotiated area agreement by withholding their signature to the agreement, that is what the NTA recognises as possible. Whether the NTA should provide for some mechanism, apart from s 66B or in addition thereto, for responding to the types of agreement making issues raised in these proceedings, is a policy issue for the Parliament to consider, not this Court.
9. It follows from these reasons that the question of the manner in which a registered native title claimant as a single entity may enter an indigenous land use agreement does not ultimately arise. A native title holding group cannot direct and decide how a registered native title claimant is to become a party to an area agreement, as this is foreclosed by s 24CD, which requires that each individual person comprising the registered native title claimant must be a party to and sign an area agreement that is to be registered.
10. It follows from this reasoning that the Court respectfully declines to follow *Bygrave*. While the claim group’s authority is unassailable when it comes to the authorisation of persons to lodge a claimant application and in deciding whether an applicant should be replaced, and in authorising an indigenous land use agreement for registration, the claim group does not have the power otherwise to alter the requirements of the NTA governing who should be parties to, and sign, an area agreement. While a person or persons are persons in the native title group, as defined, they must be parties to the agreement, and must sign the agreement if it is to be registered. If they are effectively removed from the persons jointly comprising the applicant by an order made under s 66B, however, their signatures will no longer be required.
11. It follows, in these circumstances, in relation to the key issue, that the applicant in each proceeding is entitled to the relief sought.
12. So far as the circumstances referred to in WAD138/2016 and WAD139/2016 are concerned, where one of the persons jointly comprising the registered native title claimant has passed away prior to signing the relevant ILUA, a question arises whether the Court, in its discretion, might decline to grant the relief sought. One of the grounds for replacing the applicant under s 66B is that the relevant person has died. While an application effectively to remove that person’s name from the list of names of persons comprising the applicant may sometimes be considered a formality, that will not always be the case. The claim group as a whole may wish to alter the composition of the applicant in a significant way as a result of the death of that person. There might be a particular reason the deceased person was authorised as a member of the applicant – for example, they may have been the representative of a particular family – and the claim group may wish to substitute them with another person in recognition of that continuing consideration. As a result, any discretion available to the Court not to grant relief in this case should not be exercised.
13. It should be added that, while authorities, such as *Butchulla*, support the proposition that an applicant may, in certain circumstances, make an effective decision in dealing with a claimant application even though one of the persons who comprises it has passed away, this is not relevant to the question of who must be parties to an area agreement as mandated by s 24CD.
14. In relation to WAD139/2016, where one of the persons comprising the registered native title claimant, Mr Morich, had not signed the ILUA at the time the registration application was made, but has done so since, it might be accepted that, at the time of the application for registration, the ILUA was an agreement that failed to meet the description of an indigenous land use agreement (area agreement) in s 24CA. However, because it has been signed at a time before registration has been completed, that impediment has been removed. In any event, as a matter of discretion, the Court should not grant the relief sought solely because Mr Morich had not earlier signed the ILUA. He has since plainly indicated, by signing the agreement, that he intends to make the agreement with the other parties. Although the relief sought in WAD139/2016 should be granted for the other reasons discussed above, it should not be granted on this basis.

# CONCLUSION AND ORDERS

1. For these reasons, the answers to the questions posed at [28] – [30] above are as follows.
2. In WAD 137/2016:
3. The answers to the questions reserved at [28] of the joint judgment of North and Barker JJ are answered as follows:

(1) yes;

(2) a declaratory order should be made. Because the Registrar is a public office holder who will comply with the law, it is not necessary for the court to cause the issue of a writ of prohibition;

(3) not applicable;

(4) unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

1. In these circumstances, the Court considers that the declaration to be made should be in the following terms:

THE COURT DECLARES THAT the Wagyl Kaip and Southern Noongar ILUA is not an indigenous land use agreement within the meaning of s 24CA of the NTA and the Native Title Registrar has no jurisdiction under Div 3 of Pt 2 of the NTA to register it.

1. The Court should also order that unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.
2. In WAD 138/2016:
3. The answers to the questions reserved at [29] of the joint judgment of North and Barker JJ are answered as follows:

(1) yes;

(2) yes;

(3) a declaratory order should be made. Because the Registrar is a public office holder who will comply with the law, it is not necessary for the court to cause the issue of a writ of prohibition;

(4) not applicable;

(5) unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

1. In these circumstances, the Court considers that the declaration to be made should be in the following terms:

THE COURT DECLARES THAT the Ballardong People ILUA is not an indigenous land use agreement within the meaning of s 24CA of the NTA and the Native Title Registrar has no jurisdiction under Div 3 of Pt 2 of the NTA to register it.

1. The Court should also order that unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.
2. In WAD 139/2016:
3. The answers to the questions reserved at [30] of the joint judgment of North and Barker JJ are answered as follows:

(1) yes;

(2) no;

(3) a declaratory order should be made. Because the Registrar is a public office holder who will comply with the law, it is not necessary for the court to cause the issue of a writ of prohibition;

(4) not applicable;

(5) unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

1. In these circumstances, the Court considers that the declaration to be made should be in the following terms:

THE COURT DECLARES THAT the Whadjuk People ILUA is not an indigenous land use agreement within the meaning of s 24CA of the NTA and the Native Title Registrar has no jurisdiction under Div 3 of Pt 2 of the NTA to register it.

1. The Court should also order that unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.
2. In WAD 140/2016:
3. The answers to the questions reserved at [28] of the joint judgment of North and Barker JJ are answered as follows:

(1) yes;

(2) a declaratory order should be made. Because the Registrar is a public office holder who will comply with the law, it is not necessary for the court to cause the issue of a writ of prohibition;

(3) not applicable;

(4) unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

1. In these circumstances, the Court considers that the declaration to be made should be in the following terms:

THE COURT DECLARES THAT the South West Boojarah #2 ILUA is not an indigenous land use agreement within the meaning of s 24CA of the NTA and the Native Title Registrar has no jurisdiction under Div 3 of Pt 2 of the NTA to register it.

1. The Court should also order that unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.
2. Because the declarations in each proceeding should be granted against the Registrar, it is also appropriate that the court should order in each proceeding that the name of the First Respondent be changed to the Native Title Registrar, which is the public office created by s 95 of the NTA, and not the National Native Title Tribunal.

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| --- |
| I certify that the preceding two hundred and seventy-seven (277) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices North and Barker. |

Associate:

Dated: 2 February 2017

REASONS FOR JUDGMENT

MORTIMER J:

# INTRODUCTION

1. Attempts by the Noongar People to secure recognition of their native title rights and interests have a long and fraught history, of which these proceedings are the latest chapter.
2. These four proceedings were heard by a bench of three judges constituted by the Chief Justice pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth), following a remitter to this Court from the High Court by order of Nettle J on 17 February 2016. The proceedings were commenced in the High Court in response to applications by the State of Western Australia to register four agreements as Indigenous Land Use Agreements (ILUAs) on the Register of Indigenous Land Use Agreements under s 24CG of the *Native Title Act 1993* (Cth) (NT Act). Those registration applications were the culmination of a long and complex negotiation process known as the South West Native Title Settlement. The South West Native Title Settlement comprises a total of six agreements sought to be registered as ILUAs. These proceedings concern four of those agreements, which are described at [319]-[322] below. For convenience, I refer to those agreements as “ILUAs” in these reasons, as the parties did in argument, but it should be borne in mind that the ultimate question for determination is whether the four agreements are in fact “ILUAs” as defined in the NT Act.
3. Relief by way of prohibition issued to the first respondent in each proceeding (the Native Title Registrar) is sought preventing the Registrar from taking any further steps in relation to the applications for registration. Declaratory relief is also sought, to the effect that the agreements are not ILUAs within the meaning of s 24CA of the NT Act and accordingly the Registrar has no jurisdiction under Pt 2 Div 3 of the NT Act to register the agreements.
4. For the reasons which follow, I accept the applicants’ principal contention that the four agreements are not ILUAs within the meaning of s 24CA of the NT Act. Declaratory relief giving effect to that conclusion should be granted. It is not necessary for prohibition to issue against the Registrar if declaratory relief is granted.

# BACKGROUND

1. The Noongar People have made claims over the south-west of Western Australia and over metropolitan Perth for more than two decades. The process began with an application in November 1994, with further applications and interlocutory proceedings, until in 2003 what was described as the “Single Noongar application” was made (WAD 6006 of 2003), with 80 named applicants “on behalf of all Noongar people”. The complex history of the claims is traced by Wilcox J in *Bennell v Western Australia* [2006] FCA 1243; 153 FCR 120, a decision on a separate question in the Single Noongar application. Although five overlapping claims in relation to native title brought by Mr Christopher Robert (Corrie) Bodney were dismissed by Wilcox J (see [877]), on the Single Noongar application his Honour found (in summary) that but for any question of extinguishment of native title by inconsistent legislative or executive acts, native title existed in relation to the whole of the land and waters in the claim area, and the persons who held the common or group rights and interests comprising the native title were the Noongar people, as identified in Sch A of the application for determination filed on 10 September 2003 in matter WAD 6006 of 2003 (see [878]).
2. Wilcox J’s decision was overturned on appeal, on grounds that are not presently relevant. However, the Full Court was prepared to assume, without deciding, that his Honour’s finding about the existence of the pre-1829 single Noongar community was correct: see *Bodney v Bennell* [2008] FCAFC 63; 167 FCR 84 at [43]. Some seven years later, the six ILUAs which the State sought to register arose out of the claims in those proceedings, as well as certain other claims for native title in relation to parts of the land covered by the Single Noongar application.
3. The written submissions of the third respondent (the South West Aboriginal Land & Sea Council Aboriginal Corporation, whose submissions were also made on behalf of various individuals sued on their own behalves and as representing persons named as “Representative Parties” in the four ILUAs at issue) described the content of the settlement in the following terms, which I do not understand to be controversial:

In simple terms, the State would give a package of benefits (with an estimated value of $1.3 billion, including land, and financial contributions in excess of $600 million) in return for the Noongar people surrendering all native title rights and interests in relation to land and waters in the Settlement Area, consenting to determinations that native title does not exist, and validating potentially invalid acts that have been carried out by the State in that area.

1. The benefits are set out in the “Background” section of each ILUA. Taking the Wagyl Kaip and Southern Noongar ILUA (the one opposed by Ms McGlade) as an example, the benefits are described in the following terms:

(a) the introduction of the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill* into the Western Australian Parliament;

(b) the establishment of a “Noongar Boodja Trust” to receive, hold and apply (for the benefit of Noongar people generally) the benefits to be provided to the Noongar people under the Settlement;

(c) financial contributions to the Noongar Boodja Trust “Future Fund” to establish a perpetual fund for Noongar social, cultural and economic development;

(d) financial contributions to the Noongar Boodja Trust “Operations Fund” for the establishment and operation of a Central Services Corporation and up to 6 Regional Corporations;

(e) the establishment of:

(i) the Noongar Land Estate;

(ii) co-operative and joint management arrangements with the Department of Parks and Wildlife;

(iii) a State-administered Noongar Land Fund to assist in implementing the Settlement as it relates to land;

(iv) a uniform Aboriginal cultural heritage management regime that will assist in the protection of Noongar cultural heritage;

(v) land access arrangements for unallocated Crown land and unmanaged reserves for Noongar people and their children;

(vi) modified water catchment area by-laws to allow Noongar people to undertake certain activities in those sensitive areas;

(f) the transfer of housing properties to the Trust with funding for the refurbishment or demolition of existing housing stock;

(g) the implementation of a Community Development Framework in partnership with the State;

(h) the implementation of a Noongar Economic Participation Framework to increase commercial participation by Noongar people in South West development through increased communication about government opportunities;

(i) the delivery of a capital works program that includes the provision of funding for Noongar corporation offices and seed funding for a Noongar Cultural Centre.

1. The ILUAs themselves describe the settlement as “unprecedented in Australia”. That attribute does not relieve them of the requirement to comply with the NT Act.
2. Although the facts differ slightly between each of the four proceedings, the common issue is that, as at the date of the State’s application to register each ILUA, each of them had not been signed by at least one of the persons who constituted a registered native title claimant for a claim within the ILUA area. There were a variety of reasons for non-signature including, in Ms McGlade’s case, opposition to the ILUA. In other cases, a person had died or was incapacitated.
3. The question before the Court is whether or not this non-execution has the consequence that each ILUA is not an agreement that complies with the requirements in ss 24CD(1) and (2)(a) of the NT Act.

# THE STATUTORY CONTEXT

1. I set out the critical provisions of the NT Act in this section, and refer to such other provisions as necessary in explaining why I have reached the conclusions I have.
2. The parties’ submissions addressed the nature of an “applicant” in a native title determination application, and a “registered native title claimant” in relation to a registered claim. Section 253 provides that “applicant” has a meaning affected by s 61(2). Section 61(2) must be read with that part of s 61(1) which sets out how a native title determination application is to be made:

**61 Native title and compensation applications**

*Applications that may be made*

(1) The following table sets out applications that may be made under this Division to the Federal Court and the persons who may make each of those applications:

|  |  |  |
| --- | --- | --- |
| **Applications** |  |  |
| **Kind of application** | **Application** | **Persons who may make application** |
| Native title determination application | Application, as mentioned in subsection 13(1), for a determination of native title in relation to an area for which there is no approved determination of native title. | (1) A person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group; or  Note 1: The person or persons will be the applicant: see subsection (2) of this section.  Note 2: Section 251B states what it means for a person or persons to be ***authorised*** by all the persons in the native title claim group.  (2) A person who holds a non-native title interest in relation to the whole of the area in relation to which the determination is sought; or  (3) The Commonwealth Minister; or  (4) The State Minister or the Territory Minister, if the determination is sought in relation to an area within the jurisdictional limits of the State or Territory concerned. |

1. Section 61(2) then provides:

*Applicant in case of applications authorised by claim groups*

(2) In the case of:

(a) a native title determination application made by a person or persons authorised to make the application by a native title claim group; or

(b) a compensation application made by a person or persons authorised to make the application by a compensation claim group;

the following apply:

(c) the person is, or the persons are jointly, the ***applicant***; and

(d) none of the other members of the native title claim group or compensation claim group is the ***applicant***.

1. Section 62A sets out the authority of the person or persons who constitute an applicant:

**62A Power of applicants where application authorised by group**

In the case of:

(a) a claimant application; or

(b) a compensation application whose making was authorised by a compensation claim group;

the applicant may deal with all matters arising under this Act in relation to the application.

Note: This section deals only with claimant applications and compensation applications. For provisions dealing with indigenous land use agreements, see Subdivisions B to E of Division 3 of Part 2.

1. Section 190A requires the Registrar to accept a claim for registration on the Register of Native Title Claims if certain conditions are satisfied. Broadly, those conditions relate to the merits of the claim (see s 190B) and to procedural matters (see s 190C), including authorisation under s 251B of the NT Act or certification under Pt 11 of the NT Act (see s 190C(4)). Upon registration, there will be a “registered native title claimant” for the claim area. That phrase is defined in s 253:

***registered native title claimant***, in relation to land or waters, means a person or persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the land or waters.

1. The applicants rely on the process set out in s 66B as providing exhaustively for the resolution of disagreements between persons who comprise a registered native title claimant, or an applicant; or between such persons and members of the claim group. Section 66B provides:

**66B Replacing the applicant**

*Application to replace applicant in claimant application*

(1) One or more members of the native title claim group (the ***claim group***) in relation to a claimant application, or of the compensation claim group (also the ***claim group***) in relation to a compensation application, may apply to the Federal Court for an order that the member, or the members jointly, replace the current applicant for the application on the grounds that:

(a) one or more of the following applies to a person who is, either alone or jointly with one or more other persons, the current applicant:

(i) the person consents to his or her replacement or removal;

(ii) the person has died or become incapacitated;

(iii) the person is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it;

(iv) the person has exceeded the authority given to him or her by the claim group to make the application and to deal with matters arising in relation to it; and

(b) the member or members are authorised by the claim group to make the application and to deal with matters arising in relation to it.

Note: Section 251B states what it means for a person or persons to be authorised by all the persons in the claim group to deal with matters in relation to a claimant application or a compensation application.

*Court order*

(2) The Court may make the order if it is satisfied that the grounds are established.

*Federal Court Chief Executive Officer to notify Native Title Registrar*

(3) If the Court makes the order, the Federal Court Chief Executive Officer must, as soon as practicable, notify the Native Title Registrar of the name and address for service of the person who is, or persons who are, the new applicant.

*Register to be updated*

(4) If the claim contained in the application is on the Register of Native Title Claims, the Registrar must amend the Register to reflect the order.

1. Finally, in relation to the general provisions of the NT Act which may affect the construction of the provisions in Pt 2 Div 3, reference should be made to s 87A. By that provision, the Court is empowered to make consent orders giving effect to a determination which has been agreed between the relevant parties. Some of the language of the provision is redolent of the language of Pt 2 Div 3 Subdiv C and should be set out:

**87A Power of Federal Court to make determination for part of an area**

*Application*

(1) This section applies if:

(a) there is a proceeding in relation to an application for a determination of native title; and

(b) at any stage of the proceeding after the end of the period specified in the notice given under section 66, agreement is reached on a proposed determination of native title in relation to an area (the determination area) included in the area covered by the application; and

(c) all of the following persons are parties to the agreement:

(i) the applicant;

(ii) each registered native title claimant in relation to any part of the determination area who is a party to the proceeding at the time the agreement is made;

(iv) each representative Aboriginal/Torres Strait Islander body for any part of the determination area who is a party to the proceeding at the time the agreement is made;

(v) each person who holds an interest in relation to land or waters in any part of the determination area at the time the agreement is made, and who is a party to the proceeding at the time the agreement is made;

(vi) each person who claims to hold native title in relation to land or waters in the determination area and who is a party to the proceeding at the time the agreement is made;

(vii) the Commonwealth Minister, if the Commonwealth Minister is a party to the proceeding at the time the agreement is made or has intervened in the proceeding at any time before the agreement is made;

(viii) if any part of the determination area is within the jurisdictional limits of a State or Territory, the State or Territory Minister for the State or Territory if the State or Territory Minister is a party to the proceeding at the time the agreement is made;

(ix) any local government body for any part of the determination area who is a party to the proceeding at the time the agreement is made; and

(d) the terms of the proposed determination are in writing and signed by or on behalf of each of those parties.

*Proposed determination may be filed with the Court*

(2) A party to the agreement may file a copy of the terms of the proposed determination of native title with the Federal Court.

*Certain parties to the proceeding to be given notice*

(3) The Federal Court Chief Executive Officer must give notice to the other parties to the proceeding that the proposed determination of native title has been filed with the Court.

*Orders may be made*

(4) The Court may make an order in, or consistent with, the terms of the proposed determination of native title without holding a hearing, or if a hearing has started, without completing the hearing, if the Court considers that:

(a) an order in, or consistent with, the terms of the proposed determination would be within its power; and

(b) it would be appropriate to do so.

Note: As the Court’s order involves making a determination of native title, the order needs to comply with section 94A (which deals with the requirements of native title determination orders).

(5) Without limiting subsection (4), if the Court makes an order under that subsection, the Court may also make an order under this subsection that gives effect to terms of the agreement that involve matters other than native title if the Court considers that:

(a) the order would be within its power; and

(b) it would be appropriate to do so.

…

1. Part 2 Div 3 of the NT Act deals with the validity of future acts. The phrase “future act” is defined in s 233. It is not necessary for the purposes of the issues in these proceedings to set out that definition.
2. Part 2 Div 3 commences with s 24AA, which is headed “Overview” and featured in all of the parties’ submissions. It relevantly provides:

**24AA Overview**

*Future acts*

(1) This Division deals mainly with future acts, which are defined in section 233. Acts that do not affect native title are not future acts; therefore this Division does not deal with them (see section 227 for the meaning of acts that affect native title).

*Validity of future acts*

(2) Basically, this Division provides that, to the extent that a future act affects native title, it will be valid if covered by certain provisions of the Division, and invalid if not.

*Validity under indigenous land use agreements*

(3) A future act will be valid if the parties to certain agreements (called indigenous land use agreements—see Subdivisions B, C and D) consent to it being done and, at the time it is done, details of the agreement are on the Register of Indigenous Land Use Agreements. An indigenous land use agreement, details of which are on the Register, may also validate a future act (other than an intermediate period act) that has already been invalidly done.

*Other bases for validity*

(4) A future act will also be valid to the extent covered by any of the following:

(a) section 24FA (future acts where procedures indicate absence of native title);

(b) section 24GB (acts permitting primary production on non-exclusive agricultural or pastoral leases);

(c) section 24GD (acts permitting off-farm activities directly connected to primary production activities);

(d) section 24GE (granting rights to third parties etc. on non-exclusive agricultural or pastoral leases);

(e) section 24HA (management of water and airspace);

(f) section 24IA (acts involving renewals and extensions etc. of acts);

(fa) section 24JAA (public housing etc.);

(g) section 24JA (acts involving reservations, leases etc.);

(h) section 24KA (acts involving facilities for services to the public);

(i) section 24LA (low impact future acts);

(j) section 24MD (acts that pass the freehold test—but see subsection (5));

(k) section 24NA (acts affecting offshore places).

*Right to negotiate*

(5) In the case of certain acts covered by section 24IC (permissible lease etc. renewals) or section 24MD (acts that pass the freehold test), for the acts to be valid it is also necessary to satisfy the requirements of Subdivision P (which provides a “right to negotiate”).

…

1. The role of ILUAs is given priority, in terms of the order in which the various provisions of Div 3 are to be applied. Section 24AB(1) provides:

**24AB Order of application of provisions**

*Indigenous land use agreement provisions*

(1) To the extent that a future act is covered by section 24EB (which deals with the effect of indigenous land use agreements on future acts), it is not covered by any of the sections listed in paragraphs 24AA(4)(a) to (k).

1. Division 3 then sets out the three kinds of ILUAs: body corporate agreements (Subdiv B), area agreements (Subdiv C) and alternative procedure agreements (Subdiv D). There are some commonalities in language used in Subdivs B and D which assist in the construction of the provisions in issue in Subdiv C, but it is unnecessary to set them out here. Where appropriate, I refer to their language in explaining the construction I have adopted.
2. Section 24CA is the first provision in Subdiv C. It provides:

**24CA Indigenous land use agreements (area agreements)**

An agreement meeting the requirements of sections 24CB to 24CE is an ***indigenous land use agreement***.

Note: Subdivisions B and D provide for other kinds of indigenous land use agreements.

1. Section 24CB describes the subject matter of an area agreement. It uses mandatory language: the agreement “must be about” one or more of the matters set out in s 24CB. They include, obviously, the doing of future acts, but they also include as a subject matter the extinguishment of native title rights and interests in relation to lands and waters by the surrender of those rights and interests to the Commonwealth, a state or a territory. That is what is proposed to occur in each of these ILUAs: in return for the suite of benefits set out in each ILUA the members of each native title claim group will surrender their native title rights and interests to the State of Western Australia.
2. The difference between Subdiv B and Subdiv C is made plain by the terms of s 24CC, which provides:

**24CC Requirement that no bodies corporate for whole of area**

The agreement must not be made if there are registered native title bodies corporate in relation to all of the area.

Note: If there are registered native title bodies corporate for all of the area, an agreement under Subdivision B may be made.

1. In other words, the field of operation for Subdiv C must include applications for the determination of native title that have not yet been decided.
2. Section 24CD – headed “Parties to area agreements” – is a key provision and should be set out in full:

**24CD Parties to area agreements**

*Native title group to be parties*

(1) All persons in the native title group (see subsection (2) or (3)) in relation to the area must be parties to the agreement.

*Native title group where registered claimant or body corporate*

(2) If there is a registered native title claimant, or a registered native title body corporate, in relation to any of the land or waters in the area, the ***native title group*** consists of:

(a) all registered native title claimants in relation to land or waters in the area; and

Note 1: Registered native title claimants are persons whose names appear on the Register of Native Title Claims as applicants in relation to claims to hold native title: see the definition of ***registered native title claimant*** in section 253.

Note 2: The agreement will bind all members of the native title claim group concerned: see paragraph 24EA(1)(b).

(b) all registered native title bodies corporate in relation to land or waters in the area; and

(c) if, for any part (the ***non-claimed/determined part***) of the land or waters in the area, there is neither a registered native title claimant nor a registered native title body corporate—one or more of the following:

(i) any person who claims to hold native title in relation to land or waters in the non-claimed/determined part;

(ii) any representative Aboriginal/Torres Strait Islander body for the non-claimed/determined part.

*Native title group where no registered claimant or body corporate*

(3) If subsection (2) does not apply, the ***native title group*** consists of one or more of the following:

(a) any person who claims to hold native title in relation to land or waters in the area;

(b) any representative Aboriginal/Torres Strait Islander body for the area.

*Other native title parties*

(4) If the native title group is covered by subsection (2), one or more of the following may also be parties to the agreement:

(a) any other person who claims to hold native title in relation to land or waters in the area;

(b) any representative Aboriginal/Torres Strait Islander body for the area.

*Government parties*

(5) If the agreement makes provision for the extinguishment of native title rights and interests by surrendering them to the Commonwealth, a State or Territory as mentioned in paragraph 24CB(e), the Commonwealth, State or Territory must be a party to the agreement. If the agreement does not make such provision, the Commonwealth, a State or a Territory may still be a party.

*Other parties*

(6) Any other person may be a party to the agreement.

*Procedure where no representative body party*

(7) If there are any representative Aboriginal/Torres Strait Islander bodies for any of the area and none of them is proposed to be a party to the agreement, a person in the native title group, before entering into the agreement:

(a) must inform at least one of the representative Aboriginal/Torres Islander bodies of its intention to enter into the agreement; and

(b) may consult any such representative Aboriginal/Torres Strait Islander bodies about the agreement.

Note: The registration of agreements that are certified by a representative Aboriginal/Torres Strait Islander body is facilitated under section 24CK.

1. Section 24CE was also relied upon to advance the applicants’ construction, and was said by the respondents to have a different effect. It provides:

**24CE Consideration and conditions**

(1) The agreement may be given for any consideration, and subject to any conditions, agreed by the parties (other than consideration or conditions that contravene any law).

*Consideration may be freehold grant or other interests*

(2) Without limiting subsection (1), the consideration may be the grant of a freehold estate in any land, or any other interests in relation to land whether statutory or otherwise.

1. Section 24CF deals with assistance from the National Native Title Tribunal to persons wishing to make an area agreement. Other than its use of the language “to make an area agreement”, which might be said to inform the construction of s 24CG(3)(b) and s 251A, it does not assist in resolving the construction questions in these proceedings.
2. Section 24CG is another key provision:

**24CG Application for registration of area agreements**

*Application*

(1) Any party to the agreement may, if all of the other parties agree, apply in writing to the Registrar for the agreement to be registered on the Register of Indigenous Land Use Agreements.

*Things accompanying application*

(2) The application must be accompanied by a copy of the agreement and any other prescribed documents or information.

*Certificate or statement to accompany application in certain cases*

(3) Also, the application must either:

(a) have been certified by all representative Aboriginal/Torres Strait Islander bodies for the area in performing their functions under paragraph 203BE(1)(b) in relation to the area; or

(b) include a statement to the effect that the following requirements have been met:

(i) all reasonable efforts have been made (including by consulting all representative Aboriginal/Torres Strait Islander bodies for the area) to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified;

(ii) all of the persons so identified have authorised the making of the agreement;

Note: The word ***authorise*** is defined in section 251A.

together with a further statement briefly setting out the grounds on which the Registrar should be satisfied that the requirements are met.

1. As the Note to s 24CG(3)(b)(ii) states, the word “authorise” (and, therefore, all tenses of that verb) is a defined term. Section 253 relevantly provides:

***authorise***:

(a) in relation to the making of indigenous land area agreements—has the meaning given by section 251A; and

(b) in relation to the making of native title determination applications or compensation applications, and dealing with matters arising in relation to such applications—has the meaning given by section 251B.

1. Section 251A provides:

**251A Authorising the making of indigenous land use agreements**

For the purposes of this Act, persons holding native title in relation to land or waters in the area covered by an indigenous land use agreement ***authorise*** the making of the agreement if:

(a) where there is a process of decision-making that, under the traditional laws and customs of the persons who hold or may hold the common or group rights comprising the native title, must be complied with in relation to authorising things of that kind—the persons authorise the making of the agreement in accordance with that process; or

(b) where there is no such process—the persons authorise the making of the agreement in accordance with a process of decision-making agreed to and adopted, by the persons who hold or may hold the common or group rights comprising the native title, in relation to authorising the making of the agreement or of things of that kind.

1. Section 251B provides:

**251B Authorising the making of applications**

For the purposes of this Act, all the persons in a native title claim group or compensation claim group ***authorise*** a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:

(a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

(b) where there is no such process—the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

1. The nature and meaning of these two provisions, and their relationship with ss 61, 62A and 66B, is critical to the resolution of the issues in these proceedings.
2. Once lodged, notice of an area agreement must then be given by the Registrar to the persons set out in s 24CH. Objections can be made by any person claiming to hold native title in relation to land or waters covered by the agreement if the registration application was certified by a representative Aboriginal/Torres Strait Islander body (see s 24CG(3)(a)) rather than directly authorised under s 251A. That would appear to be because such certification is dependent on an opinion formed by the representative body (see s 203BE(5)(a) and (b)) that there has been an authorisation in accordance with s 251A, and the process in s 24CI enables persons claiming to hold native title in relation to any of the land or waters in the area covered by the agreement to challenge the opinion formed by the representative body if they consider it to be incorrect. The Registrar is required, within a specified period of time, to make a decision about registration (s 24CJ) and, subject to a number of express statutory conditions, if the registration application is certified by a representative body, it must be registered: see s 24CK(1). Conversely, if the express statutory conditions are not met, the Registrar is required not to register the area ILUA.
3. Where an area agreement is lodged for registration without certification from a representative body (based instead on a statement about authorisation, under s 24CG(3)(b)), then s 24CL provides that (as with s 24CK) subject to certain conditions being satisfied the Registrar must register the area agreement, or not, as the case may be. Both conditions in s 24CL continue the emphasis on an area agreement having the necessary parties, and on authorisation in accordance with s 251A having occurred. Section 24CL(2) repeats in substance the requirement in s 24CD(1) and (2): namely that the registered native title claimant must be a party to the agreement. Section 24CL(3) requires the Registrar herself or himself to form an opinion that the identification of native title holders and authorisation by them have occurred in accordance with s 24CG(3)(b).
4. Subdivision E of Pt 2 Div 3 deals with the effects of registration of an agreement as an ILUA. It applies to all three kinds of agreements in Subdivs B, C and D. Section 24EA is a critical provision, and is headed “Contractual effect of registered agreement”:

**24EA Contractual effect of registered agreement**

(1) While details of an agreement are entered on the Register of Indigenous Land Use Agreements, the agreement has effect, in addition to any effect that it may have apart from this subsection, as if:

(a) it were a contract among the parties to the agreement; and

(b) all persons holding native title in relation to any of the land or waters in the area covered by the agreement, who are not already parties to the agreement, were bound by the agreement in the same way as the registered native title bodies corporate, or the native title group, as the case may be.

Note: Section 199B specifies the details of the agreement that are required to be entered on the Register.

*Only certain persons bound by agreement*

(2) To avoid doubt, a person is not bound by the agreement unless the person is a party to the agreement or a person to whom paragraph (1)(b) applies.

*Legislation etc. to give effect to agreement not affected*

(3) If the Commonwealth, a State or a Territory is a party to an indigenous land use agreement whose details are entered in the Register of Indigenous Land Use Agreements, this Act does not prevent the Commonwealth, the State or the Territory doing any legislative or other act to give effect to any of its obligations under the agreement.

1. The conceptually and statutorily separate effect of a registered ILUA on future acts is dealt with in s 24EB. In substance, s 24EB provides that a future act done pursuant to a registered ILUA is valid to the extent it affects native title rights and interests in land or waters covered by the ILUA; and no compensation is payable other than the compensation which the registered ILUA provides is payable to any native title holder entitled to benefits under the registered ILUA, or any native title holder who authorised the making of the ILUA.
2. The remainder of Pt 2 Div 3 contains other provisions dealing with future acts and is not relevant to the issues in these proceedings.

# FACTUAL CIRCUMSTANCES

1. The parties have agreed the material facts they submit are necessary to determine the questions in the cases stated, and my findings are based on those facts as agreed.
2. The relevant ILUAs and their respective proceedings are as follows.
3. The Wagyl Kaip and Southern Noongar ILUA (the *McGlade* proceeding) relates to land and waters the subject of the registered native title applications in WAD 6286 of 1998 (known as the Wagyl Kaip Claim) and WAD 6134 of 1998 (known as the Southern Noongar Claim). The applicant, Ms McGlade, and the fourth and fifth respondents in the *McGlade* proceeding (Mr Colbung and Ms Brown) are, collectively, the registered native title claimant in the Wagyl Kaip Claim. Mr Colbung is also one of the five persons who are, collectively, the registered native title claimant in the Southern Noongar Claim. Mr Colbung and Ms Brown have signed the Wagyl Kaip and Southern Noongar ILUA, as have the other four persons apart from Mr Colbung who make up the registered native title claimant in the Southern Noongar Claim. Ms McGlade has not signed the agreement.
4. The Ballardong People ILUA (the *Eades* proceeding) relates to land and waters the subject of the registered native title application in WAD 6181 of 1998 (known as the Ballardong Claim). The fourth respondent in the *Eades* proceeding (Reg Yarran) is one of the 11 persons (the other 10 being Murray Yarran, Fay Slater, Carol Holmes, Reg Hayden, Allan Jones, Winnie McHenry, Ricky Nelson, Tim Riley and Dianne Taylor, and another man who has since died, Doug Nelson) who are, collectively, the registered native title claimant in the Ballardong Claim. The applicant in the *Eades* proceeding, Mr Eades, is not one of the persons who are, collectively, the registered native title claimant in the Ballardong Claim. However, he asserts that he holds native title rights and interests in relation to the area covered by the Ballardong Claim and he voted against resolutions passed on 14 March 2015 which purported to authorise the making of the Ballardong People ILUA for the purposes of s 251A of the NT Act.
5. The Whadjuk People ILUA (the *Smith* proceeding) relates to land and waters the subject of the registered native title application in WAD 242 of 2011 (known as the Whadjuk Claim). The fourth respondent in the *Smith* proceeding (Nigel Wilkes) is one of the five persons (the other four being Clive Davis, Noel Morich, Trevor Nettle and Dianne Wynne) who are, collectively, the registered native title claimant in the Whadjuk Claim. Like Mr Eades in the *Eades* proceeding, the applicant in the *Smith* proceeding, Ms Smith, is not one of the persons who are, collectively, the registered native title claimant in the Whadjuk Claim, but she asserts that she holds native title rights and interests in relation to the area covered by the Whadjuk Claim and she voted against resolutions passed on 28 March 2015 which purported to authorise the making of the Whadjuk People ILUA.
6. The South West Boojarah #2 ILUA (the *Culbong* proceeding) relates to land and waters the subject of the registered native title applications in WAD 253 of 2006 (known as the South West Boojarah #2 Claim) and WAD 6085 of 1998 (known as the Harris Family Claim). The applicant (Ms Culbong) and the fourth respondent in the *Culbong* proceeding (Donald Hayward) are two of the seven persons (the other five being William Webb, Bertram Williams, William Thompson, Barbara Corbett-Councillor Stammner and Wendy Williams) who are, collectively, the registered native title claimant in the South West Boojarah # 2 Claim. Minnie Edith Van Leeuwen is the sole person comprising the registered native title claimant in the Harris Family Claim. It is unclear why Ms Van Leeuwen is not a party to this proceeding, given she signed the South West Boojarah #2 ILUA in that capacity. Ms Culbong did not attend a meeting held on 14 February 2015 at which resolutions were passed purporting to authorise the making of the South West Boojarah #2 ILUA and she has not signed the agreement.
7. Thus, in the *McGlade* and *Culbong* proceedings, the ILUAs comprise agreements covering two distinct claim areas, with two different groups of people who claim to be the holders of native title rights and interests in each claim area.
8. A map showing the area covered by each of the six ILUAs is Annexure A to these reasons for judgment. This map is also an Annexure to each ILUA.
9. The parties to each ILUA are named on page six of each ILUA. Relevantly to these proceedings, the persons described above as comprising the registered native title claimant in relation to each of the native title determination applications are also named, with one exception, as “Representative Parties” in the corresponding ILUA. For cultural reasons, the name of Mr Nelson, who had died before the execution of the Ballardong ILUA, was omitted. I note, however, that the names of both Mr Nelson and Mr Davis were used in the special cases agreed by the parties and that no party requested their names be omitted from Court documents. Accordingly, I have used their names in these reasons.
10. Each ILUA provided for it to be “executed as a deed”. The characterisation of each ILUA as a deed assumed some significance in the applicant’s alternative arguments.
11. Each ILUA has been signed by some, but not all of those specified to be parties to it. As I have noted, the Wagyl Kaip and Southern Noongar ILUA has been signed by the fourth and fifth respondents in the *McGlade* proceeding, being two out of the three persons comprising the registered native title claimant in the Wagyl Kaip Claim. Ms McGlade has not signed, and has refused to do so. I do not understand it to be disputed that her refusal is based on her disagreement on the merits of the South West Native Title Settlement.
12. All of the persons comprising the registered native title claimant in the Southern Noongar Claim have signed the Wagyl Kaip and Southern Noongar ILUA.
13. The Ballardong ILUA has been signed by eight of the 11 persons comprising the registered native title claimant in the Ballardong Claim, including Reg Yarran, the fourth respondent in the *Eades* proceeding. Allan Jones and Reg Hayden have not signed, on the basis that they have not agreed to become parties to the ILUA. As I have noted, Doug Nelson passed away before the ILUA was agreed.
14. The Whadjuk ILUA has been signed by four of the five persons comprising the registered native title claimant in the Whadjuk Claim, including Nigel Wilkes, the fourth respondent in the *Smith* proceeding. The person who did not sign was Clive Davis. Mr Davis did not sign the ILUA because he was “incapacitated”. On 8 August 2015, he passed away without having signed the ILUA.
15. The South West Boojarah #2 ILUA has been signed by five of the seven persons comprising the registered native title claimant in the South West Boojarah #2 Claim. Ms Culbong has not signed the ILUA, nor has Mr William Webb. Both oppose the ILUA. The South West Boojarah #2 ILUA has also been signed by Ms Van Leeuwen, the sole person comprising the registered native title claimant in the Harris Family Claim.
16. On 29 June 2015, the State applied under s 24CG of the NT Act to the Native Title Registrar to register each of the four ILUAs, together with the other two ILUAs not the subject of these proceedings. The Register of Indigenous Land Use Agreements is established and kept by the Registrar under s 199A of the NT Act.
17. The State’s registration application in respect of each ILUA was certified by the South West Aboriginal Land & Sea Council Aboriginal Corporation (SWALSC) under s 24CG(3)(a) of the NT Act in the performance of its functions as the representative Aboriginal/Torres Strait Island body for the relevant area (see s 203BE(1)(b)). That certification required SWALSC to form the opinion that all reasonable efforts had been made to ensure that all persons who hold or may hold native title in relation to land or waters covered by the agreement had been identified prior to registration (s 203BE(5)(a)); and that all the persons so identified had authorised the making of the agreement (s 203BE(5)(b)). There is no dispute between the parties that the requirement under s 203BE(5)(a) was met in respect of each ILUA.
18. In forming its opinion regarding the requirement in s 203BE(5)(b) of the NT Act, SWALSC relied on a number of meetings held during February and March 2015 attended by the persons identified as holding native title per the requirement in s 203BE(5)(a) (Authorisation Meetings). At each Authorisation Meeting, a resolution authorising each ILUA was passed by a majority of attendees. The relevant Authorisation Meetings for each ILUA were held:
19. on 21 February 2015, in respect of the Wagyl Kaip and Southern Noongar ILUA;
20. on 14 March 2015, in respect of the Ballardong ILUA;
21. on 28 March 2015, in respect of the Whadjuk ILUA; and
22. on 14 February 2015, in respect of the South West Boojarah #2 ILUA.
23. Taking the Wagyl Kaip and Southern Noongar Authorisation Meeting as an example, two resolutions were passed on the same day. The first resolution was directed at the choice to be made under s 251A(a) and (b) between a decision-making process according to traditional law and custom and a decision-making process otherwise determined by the group. That resolution noted there was no traditional decision-making process and resolved:

(e) in the absence of any such process, acknowledge that the process of decision-making that has been agreed to and adopted, by the people who hold or may hold the common or group rights comprising the native title, in relation to authorising the making of the proposed Settlement ILUA (or of things of that kind) is by majority decision by secret ballot of all of the people present at today’s ILUA Authorisation Meeting;

(f) agree and acknowledge that a decision made in accordance with the process of decision-making described at paragraph (e) above will be taken to be a decision of all of the people who hold or may hold native title in relation to land or waters in the Agreement Area, and no person will have a right to challenge or veto a decision made in accordance with such process.

1. The second resolution contained the substantive decisions about the ILUA, and the process of making the ILUA. It is necessary to set out this resolution in full:

In accordance with the process of decision-making that has been agreed to and adopted at today’s ILUA Authorisation Meeting in relation to authorising the making of the proposed Settlement ILUA, the people who hold or may hold native title in relation to land or waters in the area covered by the proposed Settlement ILUA (**Agreement Area**):

(a) **authorise** the making of the proposed Settlement ILUA, as tabled and presented at today’s ILUA Authorisation Meeting;

(b) **authorise and direct** the following people to be named as Parties to, and to sign, the proposed Settlement ILUA as Representative Parties for all of the people who hold or may hold native title in relation to land or waters in the Agreement Area:

(i) the people comprising the Applicant for *Alan Bolton, Hazel Brown & Ors -v- the State of Western Australia & Ors (Wagyl Kaip)* (WAD6286/1998; WC1998/070) (**Wagyl Kaip Claim**);

(ii) the people comprising the Applicant for *Dallas Coyne & Ors and State of Western Australia & Ors (Southern Noongar)* (WAD6134/1998; WC1996/109) (**Southern Noongar Claim**);

(iii) any of the people comprising the Applicant for *Gerald Williams & Ors and State of Western Australia (Wagyl Kaip - Dillon Bay People)* (WAD33/2007; WC2007/001) (**Wagyl Kaip - Dillon Bay People Claim**) who wish to be named as Representative Parties;

(iv) any of the people comprising the Applicant for *Anthony Bennell & Ors v State of Western Australia (Single Noongar Claim (Area 1))* (WAD6006/2003; WC2003/006) (**Single Noongar Claim (Area 1)**) who wish to be named as Representative Parties;

(v) any other members of the “Native Title Agreement Group”, as that group is described in the proposed Settlement ILUA, who wish to be named as Representative Parties;

(c) **agree and acknowledge** that it is not necessary for all of the people mentioned at paragraph (b) above to sign the proposed Settlement ILUA, and that the signatures of those of such people who have signed by **3 April 2015** (**Settlement ILUA Signatories**) will be sufficient evidence of the decision of all of the people who may hold native title in relation to land or waters in the Agreement Area to authorise the making of the proposed Settlement ILUA;

(d) **agree to, and will do all things necessary to support,** the State making an application to have the proposed Settlement ILUA registered on the Register of Indigenous Land Use Agreements in accordance with the *Native Title Act 1993* (Cth), and thereafter taking all steps as are usual and necessary to have the proposed Settlement ILUA so registered;

(e) **authorise and direct** the Settlement ILUA Signatories to approve and sign, after this meeting, any further technical, typographical or other minor amendment to the proposed Settlement ILUA that they consider to be appropriate and necessary to ensure the registration of the proposed Settlement ILUA, without the need for another ILUA Authorisation Meeting; and

(f) **acknowledge, and confirm their understanding,** that in exchange for the Settlement Package, the registration of the proposed Settlement ILUA is intended ultimately to result in:

(i) the surrender to the State of all native title rights and interests that might exist in relation to land and waters in the Agreement Area; and

(ii) the Applicant for each of the Wagyl Kaip Claim, the Southern Noongar Claim, the Wagyl Kaip/Dillon Bay Claim and the Single Noongar Claim (Area 1) executing such consent orders (and otherwise doing such things) as are appropriate and necessary to ensure the making, by the Federal Court, of one or more determinations that native title does not exist in relation to the area within the external boundaries of their respective Claims.

1. It is clear from the terms of the resolution (especially the use of “any” in subparas (b)(iii) and (iv) and the terms of para (c)) that those responsible for drafting the resolution contemplated, or anticipated, that some of the individuals constituting the applicant/registered native title claimant for the claim areas covered by the ILUAs might choose to oppose the making of the ILUAs, or might not sign the ILUAs for reasons other than opposition.
2. The applicants challenged a number of aspects of this resolution, in particular para (c), which they submitted was contrary to the terms of the NT Act and could have no effect. It will be apparent from my reasons that I consider that submission is correct. The applicants also submitted that the direction purportedly given by the claim group in subparas (b)(i) and (ii) in particular is inconsistent with the terms of para (c). The alleged inconsistency is less material. It will be apparent from my reasons that, whether or not it is not a matter for direction by the claim group, the terms of the authorisation in subparas (b)(i) and (ii) accurately reflect the operation of Pt 2 Div 3 Subdiv C of the NT Act: all the persons named as the applicant/registered native title claimant must be named and must sign any agreement, or otherwise indicate their consent to the agreement.
3. Each of Ms McGlade, Mr Eades and Ms Smith voted against the resolutions. Ms Culbong did not attend the South West Boojarah #2 ILUA Authorisation Meeting.
4. Subject to the applicants’ contention concerning the additional resolutions, the parties in each proceeding agree that the resolutions passed at each Authorisation Meeting were passed in accordance with a process of decision-making agreed to and adopted by those who may hold the common or group rights comprising the native title (see s 251A(b) of the NT Act). It was agreed there was no traditional decision-making process which needed to be complied with for the purposes of s 251A(a) of the NT Act.

# THE COMPETING CONTENTIONS

1. The Native Title Registrar is the first respondent to each of the four proceedings and has filed submitting appearances. The State is the second respondent to each proceeding and made submissions accordingly. The third and fourth respondents to each proceeding (and in the *McGlade* proceeding, the fifth respondent) also took an active part in the proceedings. Unless it is necessary to differentiate between them, I shall refer to the State and the other respondents to each proceeding, apart from the Registrar, as ‘the respondents’. Similarly, although Ms McGlade is the only applicant in the *McGlade* proceeding, the submissions made on her behalf were also made on behalf of the applicants in the other three proceedings. For that reason I shall refer to ‘the applicants’, in the plural.
2. The applicants’ contend the ILUA provisions of the NT Act strike a careful balance between providing a mechanism for the making of agreements affecting native title as an alternative to the judicial resolution of native title claims, and ensuring that these agreements are consensual and voluntary. A critical part of the balance is that all persons authorised as the applicant are required to be a party to the ILUA, which is consistent with those aspects of the NT Act that require the persons authorised as the applicant to act ‘jointly’ or ‘unanimously’ in making and dealing with native title claims. The applicants’ contentions place considerable weight on the connection in the NT Act between an applicant and a registered native title claimant, and in particular the representative character and function of both statutory entities. In drawing that connection, the applicants also emphasise the role of s 66B as a code in respect of the replacement of any person constituting an applicant and/or a registered native title claimant. The absence of the consent of all persons constituting the registered native title claimant, evidenced by their signatures on each ILUA, is, the applicants contend, fatal to the ILUAs satisfying the requirements of ss 24CA-24CE of the NT Act. The resolutions passed at the authorisation meetings (such as those I have extracted at [335]-[336] above) cannot cure those defects. At most, those resolutions may be relevant, the applicants accept, in any s 66B application. These contentions lead the applicants to submit that the Court’s reasoning in *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019; 189 FCR 412 is incorrect. The applicants’ approach gives more work to the terms of Subdiv C of Pt 2 Div 3 of the NT Act, and less work to ss 251A and 251B.
3. The applicants put forward an alternative argument based on the execution of the impugned ILUAs as deeds, and the accompanying fact that each agreement set out the manner in which that execution was to occur. Where not all individuals constituting the registered native title claimants have signed or otherwise agreed to be a party to the agreement, the deeds cannot take effect as such until executed and delivered (which has not occurred) by all those individuals. The applicants rely, amongst other matters, on s 9 of *Property Law Act 1969* (WA) which requires a deed to be signed. Given the conclusion I have reached on the proper construction of ss 24CA-24CE, I do not need to determine the applicants’ alternative argument.
4. The State submits that ss 24CA-24CE have a different effect. It submits they simply require a registered native title claimant, being a single entity for the purposes of the NT Act, to be a party to the agreement. How, and in what manner, that single entity becomes a party is a matter that may be determined by the persons who authorise the making of an ILUA, and on whose behalf the registered native title claimant acts to make that agreement. The State contends the terms of the NT Act are more flexible than the applicants suggest, and leave room for the native title claim group itself to decide how its representative – the registered native title claimant – becomes a party to an ILUA. Their submissions emphasise that the NT Act’s provisions in relation to ILUAs should been seen as separate from those relating to the progress and determination of a native title application (such as ss 61, 62A and 66B).
5. The third, fourth and fifth respondents also emphasise that a registered native title claimant is a single entity (even though not a legal entity) and it is this single entity which s 24CD requires to be a party to an ILUA. By s 251A, all those who are identified as persons who hold or who may hold native title must authorise the making of an ILUA. It should be noted that no party submitted that literally *all* persons – as in each and every person – in the native title claim group must authorise the making of an ILUA. I agree that s 251A does not require unanimity of that kind.
6. The third, fourth and fifth respondents submit that, in authorising the making of an ILUA, the members of the authorising group can determine *how* the registered native title claimant becomes a party to the ILUA for the purpose of s 24CD(1) and (2)(a), and that is what each group had in fact done. Each group had determined that it was unnecessary for all the members of the respective registered native title claimants to sign the agreements and that the signatures of such people who provided their signatures by a set date would be sufficient. Section 251A permitted authorisations of this kind and therefore the impugned ILUAs complied with the requirements of ss 24CA and 24CD of the NT Act.
7. The respondents’ submissions give more work to the terms of ss 251A and 251B and less work to Subdiv C of the Pt 2 Div 3, as well as less work to ss 61, 62A and 66B.

# RESOLUTION

1. Aside from one issue concerning the Whadjuk ILUA, the parties agreed, and argument proceeded on the basis, that the *McGlade* proceeding could be used as representative of issues which arise in the other proceedings. Accordingly, although I use the term ‘the applicants’ in these reasons, my reasoning proceeds on the facts of the *McGlade* proceeding as the chosen example.
2. It should be recalled that the NT Act deals with novel legal and factual problems, in the context of a specific objective. In *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2; 185 CLR 595, the plurality (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) said (at 613-615):

It was inevitable that the recognition of native title by the common law and its protection by the *Racial Discrimination Act* would generate novel legal problems relating to the title to land claimed by Aborigines in accordance with traditional laws and customs. The [NT] Act addressed some of these problems.

…

Unless the Act is read with an understanding of the novel legal and administrative problems involved in the statutory recognition of native title, its terms may be misconstrued.

1. In setting out the framework for its construction arguments, the State relies on passages from the reasons of the High Court in *Thiess v Collector of Customs* [2014] HCA 12; 250 CLR 664 at [23] where the plurality (French CJ, Hayne, Kiefel, Gageler and Keane JJ) referred to a passage in the Court’s earlier judgment in *Residual Assco Group Ltd v Spalvins* [2000] HCA 33; 202 CLR 629 in which Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said (at [27]):

The purpose of s 11(3)(b) is a strong indicator that the purpose of s 11 is to enable a party to proceedings in a federal court relating to a State matter to bring new proceedings in the Supreme Court whenever the federal court has disposed of its proceedings on the basis that it had no jurisdiction to deal with them. That being so, the textual points upon which the defendants rely cannot prevail. In construing a statutory provision, we should always keep in mind what Judge Learned Hand said in *Cabell v Markham* [(1945) 148 F 2d 737 at 739]:

“Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”

(Footnotes omitted.)

1. Observations of this kind are themselves context dependent. I do not read these observations in either *Thiess* or *Residual Assco* as intended to apply in any automatic way to a legislative scheme with purposes and objectives which may at times conflict. The NT Act reflects a series of political compromises, worked out sometimes in a highly reactive way, to judicial and political developments. Those compromises and reactions have resulted in a textually dense and prescriptive legislative scheme. In its detailed parts (which are numerous), it is not a scheme intended, I think, to be susceptible to “sympathetic and imaginative discovery”. Nor do I read the remarks in *Theiss* as intended to diminish the caution expressed by the High Court in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at [51] (Hayne, Heydon, Crennan and Kiefel JJ) that fixing upon a general legislative purpose can carry with it the danger that the text does not receive the attention it deserves. As Gleeson CJ observed in *Carr v Western Australia* [2007] HCA 47; 232 CLR 138 at [5], in comments that were cited with approval by a unanimous Court in *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36; 248 CLR 619 at [40]:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. … That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.

1. In a legislative scheme which contains such compromises, it is inevitable that constructional choices may be difficult. The Court’s surest guide remains the language Parliament has chosen to use, and the structure of the legislative scheme in which that language is found: *Alcan* at [47]. The purpose of particular provisions in, or parts of, a legislative scheme should be derived from the language chosen and the context as revealed by the structure of the statute, not from matters external to the Act: *Lacey v Attorney-General (Qld)* [2011] HCA 102; 42 CLR 573 at [43]-[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; 248 CLR 378 at [24]-[25] (French CJ and Hayne J). The Act is the will of the legislature, as it is expressed, and constructional choices must be made on that basis.
2. The applicants placed some emphasis on the Preamble to the NT Act, and on s 10 of the Act, which provides:

Native title is recognised, and protected, in accordance with this Act.

1. I accept that the terms of s 10 of the NT Act are important, and the applicants are correct to emphasise that s 10 discloses the NT Act has as one of its purposes the protection of native title. Of course, the protection which is afforded is, as s 10 states, protection “in accordance with” the NT Act, not despite it, or inconsistently with it. This engages the myriad of compromises which are found in various parts of the legislative scheme, where Parliament has addressed the competing interests affected by the recognition of native title. In my opinion, one aspect of ‘protection’ of native title is the relatively prescriptive set of provisions dealing with the constitution and identification of an applicant/registered native title claimant, and the mechanisms to change the constitution of those entities. These provisions ensure the NT Act’s emphasis on representation through express authorisation is maintained, and no overriding of minority, sectional or special interests occurs unless the whole of the native title claim group authorises such an approach in accordance with the processes in s 251B.
2. In the following sections of my reasons, I set out the features of the legislative scheme which in my opinion support the constructional choice I have made about the meaning and operation of ss 24CA-24CE of the NT Act.

## The nature of native title rights and interests

1. In this section I repeat a series of propositions which are now well-established about the nature of native title rights and interests. I do so because the constructional choices presented in these proceedings are informed by an understanding of the nature of those interests, and by the overarching requirements for the existence of a body of traditional law and custom and a claim group who are united in and by their acknowledgment and observance of that body of traditional law and custom.
2. In *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1itself, being – ­save in one important respect – the “obvious inspiration” for s 223(1)(a) and (b) of the NT Act (see *Bodney v Bennell* [2008] FCAFC 63; 167 FCR 84 at [133]), Brennan J provided the three-pronged description for the kind of native title rights and interests which may exist (at 57, the sentence being in parentheses in the original):

The term “native title” conveniently describes the interests and rights of indigenous inhabitants in land, *whether communal, group or individual*, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.

(Emphasis added.)

1. A little later in his Honour’s judgment (at 61-62), Brennan J returned to the issue of communal title:

where an indigenous people (including a clan or group), as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. Those rights and interests are, so to speak, carved out of the communal native title. A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title. A communal native title enures for the benefit of the community as a whole and for the sub-groups and individuals within it who have particular rights and interests in the community’s lands.

(Footnote omitted.)

1. The Full Court’s decision in *Bodney* is not only the location for important statements of principle about the nature of native title, but also the location for the application of those principles to the very claims which sit behind the ILUAs at issue in these proceedings. One of the grounds of appeal in *Bodney* concerned Wilcox J’s finding, and form of determination, that the proprietary interest held was a “community title” or “communal title”. The Full Court rejected this ground of appeal, although it is fair to say the Court expressed some difficulties with the proposition that it was a “fundamental principle” that ordinarily native title is communal. It is important to understand the Court’s reasoning on this matter. At [148]-[152] the Full Court said:

In a given matter the existence, character and extent of native title rights and interests, whether communal, group, or individual, depend upon the traditional laws and customs of the community in question. With all depending upon the content of those laws and customs: *Wongatha* 238 ALR 1 at [536]; there is in our respectful view reason for pause in the too ready embrace of a priori generalisations both as to the ordinary character and locus of native title rights and interests and as to the nature of the interconnectedness of communal rights and interests on the one hand and group or individual rights on the other. While we acknowledge that such generalisations have been made in High Court decisions and, notably, in *Mabo (No 2)* 175 CLR 1, we are conscious that they may lead in a given case to assumptions being made about that which, in fact, is required to be demonstrated under the NTA: cf *Ward HC* 213 CLR 1 at [84].

A claim by a community to all of the native title in a particular area can properly be described as a communal claim. But is it for that reason properly to be characterised as a claim for communal rights and interests (ie communal native title) irrespective of whether group or individual rights are held under that community’s traditional laws and customs? Or is to describe it as a communal claim to do no more than state that, as between themselves, the members of the claimant community hold all of the rights in the claim area albeit they may hold them differentially, ie “there is no other proprietor”, so that (absent dispute over those rights) it is superfluous and unnecessary to differentiate them?

It is clear that in *Mabo (No 2)* 175 CLR 1, Brennan J (at 62), as also Deane and Gaudron JJ (at 109-110), characterised native title “as communal title” that enured for the benefit of the community as a whole and for the groups and individuals within it who have particular rights and interests in the land. While the text and structure of s 223(1), with its typology of “native titles”, would not necessarily suggest that the NTA regime reflected such a characterisation, recent decisions of this Court at trial and appellate level have construed s 223(1) under the shadow of *Mabo (No 2)* 175 CLR 1. As French J observed in *Sampi* [2005] FCA 777 (at [955]):

Given [the] terminology of paras (a) and (b) of the definition of “native title rights and interests[”] in s 223 is taken from *Mabo (No 2)* it could hardly have been intended to undercut the fundamental principle of their communal character.

See *Alyawarr FC* 145 FCR 442 at [69]-[71]; on taking account of *Mabo (No 2)* 175 CLR 1 in interpreting the NTA see *Ward HC* 213 CLR 1 at [7] and *De Rose FC (No 2)* 145 FCR 290 at [29]-[30]. Communal native title claims, we would note, have been made with some regularity: see eg *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 at 601-602 (*Yarmirr TJ*); *Gumana v Northern Territory* (2007) 158 FCR 349 at [144]-[161] (*Gumana FC*).

This Court, though, has refrained from turning the “fundamental principle” of *Mabo (No 2)* 175 CLR 1 into an inveterate rule, acknowledging in this that each case will depend on its own facts. As was said by the Full Court in *Alyawarr FC* (at [79]-[80]):

The determinations which may be made under s 225 cover a range of possibilities which depend upon the nature of the society said to be the repository of the traditional laws and customs that give rise to the native title rights and interests claimed. In some cases the members of the community identified as the relevant society may enjoy communal ownership of the native title rights and interests, albeit they are allocated intramurally to particular families and clans. This was the case in *Sampi v Western Australia* [2005] FCA 777 ... *The traditional laws and customs, as explained in the evidence, supported a principle of communal ownership*.

If, on the other hand, the society identified as the repository of the traditional laws and customs is a cultural bloc whose members are dispersed in groups over a large arid or semi-arid area *an inference of communal ownership of native title rights and interests derived from its laws and customs* may be difficult if not impossible to draw.

(Emphasis added.)

1. Whether or not the characterisation of communal title as “fundamental” is appropriate, it is beyond doubt that, as the Full Court noted, the claim made under the Act is a communal claim, and the native title rights and interests which then arise in accordance with the traditional law and custom acknowledged and observed by that claim group may be identified as communal, group or individual, in accordance with s 223(1).
2. That being the nature of a claim to native title, the legislative scheme then provides a mechanism for the representation of that group, in the statutory concept of an applicant (and, post-registration, a registered native title claimant). In doing so it allows for all the variations in the nature of native title rights and interests that may be held within a group in accordance with traditional law and custom, which may need to be represented in any decision-making processes about rights to country. However, those individuals nominated to constitute the applicant do so within the conceptual structure I have just outlined: that is, as representatives of a collection of people with a communal claim, but whose precise native title rights and interests may not be, in accordance with traditional law and custom, communally held. As Kiefel J (as her Honour then was) recognised in *Butchulla People v Queensland* [2006] FCA 1063; 154 FCR 233 at [38], it is not always the case that simply because they hold rights to the same country, a group of people share the same views about how to proceed in a claim for native title, nor about what should be negotiated and what should not. Native title claim groups are no different to any community: there will exist within them a variety of opinion, different and sometimes conflicting priorities, a spectrum of strength of views, flexibility and intransigence. It is hardly surprising in those circumstances that Parliament chose a representative model for the performance of functions under the NT Act. In doing so, Parliament recognised the strength and authority of the claim group members themselves through the enactment of provisions such as ss 62A and 251B, but in my opinion Parliament has also been clear in expressing its intention regarding how that authority is to be exercised and the statutory constraints placed upon it.

## An applicant and a registered native title claimant are a single statutory representative

1. Although these proceedings concern ILUAs, and a “registered native title claimant” as a necessary party to each ILUA, in order to understand the role of the registered native title claimant, and then to understand the requirement that the registered native title claimant be a party to any area ILUA, it is necessary to begin with the antecedent steps in the NT Act to the existence of a “registered native title claimant”, and it is necessary to appreciate the particular character of that entity and its predecessor, an “applicant”.
2. An application for a determination of native title must be made by a native title claim group, as that phrase is defined in s 253, read with s 61(1). Where an application is made by a person who is, or persons who are, on the evidence, only a subset or subgroup of a claim group, such an application will not comply with s 61(1) and will be struck out: see *Laing v State of South Australia (No 2)* [2012] FCA 980at [18] (Mansfield J), referring also to the decision of Besanko J in *Brown v State of South* *Australia* [2009] FCA 206. This proposition emerges not only from the nature of native title rights and interests as I have set them out above, but also from the express terms of s 61(1) which speak of a person or persons authorised by “all the persons (the native title claim group) who … hold the common or group rights and interests comprising the particular native title claimed”. It is also consistent with the requirement in the NT Act that there be only one approved determination of native title over any given area of land and waters: see ss 61A(1) and 68.
3. The first occasion in the process of a determination of native title where the need for evidence of authorisation exists is at this point: the making of an application by a native title claim group. That group, as a collection of individuals, is not entitled to make the application itself. It is not difficult to understand why Parliament has chosen not to allow a group of individuals, whose membership is constantly changing, to bring individual proceedings for the determination of native title. Such a process would be unwieldy, unworkable and doomed to fail.
4. Only one mechanism is prescribed by the NT Act: namely, the mechanism of having a subset of the native title claim group, the “applicant”, bring the application. To be included in this subset, a person (or persons) must meet two critical preconditions set out in s 61(1). First, she or he must be, herself or himself, a member of the native title claim group. Second, she or he must be authorised by the native title claim group to bring the application. The first precondition is important to the resolution of the construction questions raised on this appeal, and has a particular interaction with s 24EA of the NT Act, to which I return below.
5. The second of those two preconditions brings me to s 251B, which I discuss in detail later in these reasons. For present purposes, it is sufficient to observe that, in making the composition of an applicant turn on the authorisation process in s 251B, Parliament has recognised the authority of the native title claim group as the group of people in whom native title rights and interests are claimed to reside, but has also circumscribed the manner in which the advancement of those native title rights and interests can be achieved under the Act.
6. It will be recalled that in *Mabo (No 2)* Brennan J adverted to the possibility of a claim for native title being a representative proceeding, and in *Roe v Kimberley Land Council Aboriginal Corporation* [2010] FCA 809; 215 FCR 131at [36] that is how Gilmour J characterised an application for a native title determination made under the NT Act. Drummond J employed the same characterisation in *Ankamuthi People v Queensland* [2002] FCA 897; 121 FCR 68 at [7]. See also *Johnson on behalf of the Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2003] FCA 981 at [8] (Stone J) and *Butchulla* at [38] (Kiefel J). In *Ankamuthi*, Drummond J described (at [8]) the other members of the native title claim group as having “no authority to take any step in the proceedings”.
7. In *Butchulla* at [38], Kiefel J described the purpose of s 61(1) and (2) in the following way:

The evident purposes of s 61 are to provide for representation of the claim group, to limit the number of persons who may act as “the applicant” in the proceedings and, when more than one person is authorised, to require them to act in concert with each other. It may be assumed that since the persons authorised have a common interest in the subject matter of the claim acting jointly should not present a difficulty. Regrettably this is not always the case. In any event the section seeks a workable and efficient method of prosecuting claims for native title determination, one which limits the potential for dispute which might stifle the progress of claims.

1. Indeed, the terms of s 61(2) make the statutory representative a collective representative: that is the purpose of the text of s 61(2) using the singular tense for “applicant”, a usage which is maintained throughout the NT Act. Whether there is one, five or 15 individuals authorised under s 251B, there is only one “applicant”. It is a collective noun. Its composition is determined only by the terms of s 61, read with s 251B. Those terms are both inclusionary (s 61(2)(c)) and exclusionary (s 61(2)(d)).
2. These attributes are reinforced in the text of s 61(2)(c) by the use of the word “jointly” to describe the way in which the authorised individual or individuals constitute the applicant. The adverb “jointly” is carefully placed. The provision does not say the individuals who constitute the applicant are to “*act* jointly”. It says that those people, “jointly”, *are* the applicant. There is no applicant, for the purposes of s 61(2), other than an applicant which meets the two preconditions in s 61(1).
3. Section 61(2)(d) makes the representative, and singular, nature of an applicant even clearer by providing that no other members of a native title claim group can ‘be’ the applicant.
4. It has been said that the applicant within the terms of s 61(2) is not a legal person or entity: see *Bygrave* at [76] and the cases there referred to. Compare post-determination prescribed body corporates: see ss 55-59 of the NT Act and reg 4 of the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth). No party advanced submissions to the effect that an applicant should be seen as having separate legal personality from the individuals who are chosen to constitute it.
5. As Reeves J observed in *Bygrave* at [72], *Chaff and Hay Acquisition Committee v JA Hemphill & Sons Pty Ltd* [1947] HCA 20; 74 CLR 375 is the leading authority for the proposition that the legislature can create a legal person that is not a corporation and that such an entity may act through “agents” (i.e. the persons who compose the entity, whether or not they are actually its agents in law). Subsequent cases do not appear to have explained in more detail how decisions of such an entity might be made.
6. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11; 256 CLR 171 concerned whether Queensland Rail was a constitutional corporation, despite its enabling legislation providing that it was “not a body corporate”. French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ said at [32]:

The issue in *Chaff and Hay Acquisition Committee* was whether the committee, a statutory body created under South Australian legislation, was a legal entity which the courts of New South Wales should recognise as competent to sue or be sued in its own name. This Court held that the committee had an independent legal existence which should be recognised. It rejected arguments that recognition should not be given to the committee because it was “to operate as a Crown agent” or that it had but a temporary existence. As the Full Court of the Supreme Court of New South Wales did, this Court noted that the statute constituting the committee had not used express words of incorporation and that the committee was not “created a corporation according to the requirements of English law in force in South Australia”. But neither of those observations was treated as determinative of the issue that was before the Court: could the committee sue and be sued in its own name? Understood in the light of that issue, what was said in *Chaff and Hay Acquisition Committee* gives no direct assistance in deciding this case. In particular, and contrary to the tenor of the Authority’s submissions, *Chaff and Hay Acquisition Committee* does not support drawing a distinction between corporations of the kind or kinds referred to in s 51(xx) and other forms of artificial legal entity that are not bodies politic.

(Footnotes omitted.)

1. In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* [1983] HCA 29; 158 CLR 535 the question was whether the Coal Industry Tribunal was validly constituted. The Court unanimously held that it was. In reaching that conclusion, Deane J said at 587:

Neither Act, in terms or by implication, confers corporate personality upon the Tribunal. In my view however, both Acts recognize that the Tribunal, whether it be described as a tribunal or an office, has an existence that transcends the tenure of office of any incumbent. It is competent for the legislature to constitute or to authorize the constitution of an entity of a type unknown to the common law (see *Taff Vale Railway v. Amalgamated Society of Railway Servants*; *Chaff and Hay Acquisition Committee v. J.A. Hemphill and Sons Pty. Ltd*.). This the Acts have, in their concurrent operation, done in the case of the Tribunal. It is unnecessary to attempt to define with precision the nature of the statutory entity which has been established. It suffices to say that the Tribunal has a continuing existence and that it is the Tribunal itself which is the recipient of the powers which both Acts confer. Those powers will lie dormant if, at any time, there is no individual appointed either to constitute the Tribunal or to act as the person constituting the Tribunal during the absence, through illness or otherwise, of the person so appointed (see Act, s. 30(3); State Act, s. 36(3)).

(Footnotes omitted.)

1. As these cases illustrate, the authorities following *Chaff and Hay* (and *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] UKHL 1; [1901] AC 426 before it) tend to focus on whether an unincorporated body is a legal person, not how its decision making processes might operate. The most that might be said, especially from *Duncan*, is that how an entity created by Parliament is to perform its functions will need to be discerned from the constituting statute itself. However, like the Tribunal described by Deane J in *Duncan*, an applicant under s 61 of the NT Act (and, subsequently, a registered native title claimant) has an existence which “transcends the tenure” of any individual constituting the applicant. That is the Parliamentary intention revealed by s 66B, and one of the purposes of that provision.
2. Accepting, as the authorities to date have done, and as the parties submitted, that an applicant under the NT Act does not have separate legal capacity, that proposition does not alter the representative nature of an applicant as constituted. However, it does affect the determination of how an applicant can perform functions assigned to it under the NT Act.
3. To say that the individuals who “jointly” constitute an applicant must *act collectively* (as the parties’ submissions described it) obscures two critical issues arising in these proceedings. First, does “*acting* *collectively*” mean acting unanimously? And second (although perhaps no more than another way putting the first question), does “*acting collectively*” mean individuals who constitute an applicant can be required, or compelled, to perform particular functions or engage in particular conduct, whether or not they agree with it?
4. There are judicial views tending in both directions on the question whether individuals who constitute an applicant can be authorised, in the terms of an authorisation given under s 251B, to act and make decisions by majority (see [435]-[439] below). There is certainly nothing in the text, context or purpose of s 61 which would suggest that would be the case, and the representative and singular nature of an applicant would in my view suggest the contrary. The view that the individuals who constitute an applicant may be able to act or decide by majority comes from a broad reading of the authorisation provision in s 251B, which I deal with later in these reasons. For present purposes, the important point is that s 61 identifies a collective, but singular, body comprising individuals who are claim group members and have been authorised to act under s 251B. The collective character, and singularity, of the applicant suggests the Act does not contemplate acts or decisions by only some of the individuals who constitute an applicant. That does not mean there cannot be debate and disagreement between individuals who comprise an applicant; nor does it preclude some individuals from holding different or dissenting views and remaining as members of the applicant. However, it does mean that when those individuals who comprise the applicant or registered native title claimant are required to act (as in making a decision about the course of a native title application or signing an ILUA), they must act collectively.
5. The collective character and singularity of “the applicant” carries through to the second statutory concept or entity created by the Act, the registered native title claimant. Unlike the applicant, which s 253 of the Act states (somewhat unhelpfully in my opinion) has a “meaning affected” by s 61, “registered native title claimant” is defined exhaustively in s 253. The definition unambiguously aligns the persons who constitute the “registered native title claimant” with the persons who constitute the applicant under s 61. It does so by reference to the individual names of each person and the entry of those names on the Register of Native Title Claimants. Section 186(1)(d) expressly requires the Register to contain the name and address for service of the applicant: that is, the name and address for service of each individual who constitutes the applicant. The definition of “registered native title claimant” picks up on the requirement for entry of names in the Register as the method by which the individuals who constitute the entity can be ascertained.
6. The Native Title Registrar is not permitted by the scheme to register a claim (and, amongst other things, enter the names of the persons constituting the applicant into the Register of Native Title Claims) unless she or he is satisfied of one of the two matters set out in s 190C(4) of the NT Act. Both relate to the authorisation under s 251B of persons to constitute the applicant. Either the Registrar must be directly satisfied of such an authorisation (s 190C(4)(b)) or she or he must be satisfied of these matters on the basis of a certification from each representative Aboriginal/Torres Strait Islander body (s 190C(4)(a)), with any such body in turn having had to form its own opinion about the appropriate authorisation having been given (see s 203BE).
7. The legislative scheme’s objective of symmetry between those claim group members authorised under s 251B to be the applicant, and the state of the Register of Native Title Claims, is incorporated into the operation of s 66B, to which I return below. The Native Title Registrar must be notified of any orders made under s 66B to change the persons who are the applicant (s 66B(3)) and, on notification, the Register of Native Title Claims must be amended to reflect the order (s 66B(4)). These provisions support a view of the scheme as one intending that the individuals who constitute an applicant/registered native title claimant are a collective and singular representative entity; and any person needing or wanting to deal with land or waters covered by the particular claim knows reliably with whom they need to deal as representatives of those claiming to hold native title rights and interests. As individuals, they have no role and no status under the Act, beyond the role and status they share in common with every other member of the native title claim group.
8. The phrase “registered native title claimant” is a defined phrase. In s 253 it is defined to mean “a person or persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title …”.
9. In other words, the person or persons who are “the applicant” as defined in s 61(2) are, once the native title claim has been registered under s 190A, also the registered native title claimant for s 24CD(2). The persons who constitute the “applicant” are individual claim group members that the native title claim group has chosen, and authorised, to speak and act on their behalf (see s 190C(4)(b), requiring that the Registrar must be satisfied the applicant is properly authorised) and to do what needs to be done under the Act in relation to an application on their behalf.
10. The State submitted:

By way of illustration in the present proceedings, for the purposes of the Wagyl Kaip and Southern Noongar ILUA (in issue in the McGlade proceeding), there are two (and two only) “registered native title claimants”; namely, the claimant in the Southern Noongar claim (which consists of five named individuals) and the claimant in the Wagyl Kaip claim (which consists of three named individuals). It is those two “registered native title claimants” who must be parties to the Wagyl Kaip and Southern Noongar ILUA, not the eight individuals who comprise those entities.

1. I do not accept this submission. As the analysis of the statutory concepts of “applicant” and “registered native title claimant” demonstrates, no division is possible between the individuals who constitute the applicant or registered native title claimant, and those statutory entities themselves. To do so is to treat them as if they were separate legal entities with separate capacity. That is not the scheme the NT Act has established. The individuals, jointly, are the entity, which itself has no legal capacity. The Act operates on a structure of individual claim group members being representatives of the whole group, and having been properly authorised to perform that role. Where there are five named individuals, only those five named individuals, and not two, three or four of them, constitute an applicant/registered native title claimant.

## Future acts and ILUAs generally

1. In this section of my reasons I set out the features of the future act regime under the NT Act, and of ILUAs, which support the view I take that ss 24CA-24CE should be construed as requiring all individuals constituting a registered native title claimant to consent to an ILUA and to do so, in ordinary circumstances, by signing the ILUA. Whether consent might also be signified in other ways, for example by the signature of an agent or proxy, is not at issue in this proceeding., rather than providing support for it I see those submissions of the State as defensive and aimed at explaining the reference t
2. At the outset, I should identify one feature of Pt 2 Div 3 of the NT Act that has been critical to my reasoning. The area ILUAs for which Subdiv C of Div 3 provides are capable of covering more than one claim area. Indeed that is the case for the Wagyl Kaip and Southern Noongar ILUA and the South West Boojarah #2 ILUA (see [319] and [322] above). In the case of each ILUA, two claim groups, each with connection to country in accordance with their own traditional law and custom, whose members each derive their rights and interests in the claim area from the traditional law and custom of their own claim group, are brought together in one area ILUA. The scheme contemplates this can occur. There may, in any given situation, be disparities in size and influence between two or more claim groups who are brought together in an area ILUA. If only one, or some, of the individuals who constitute each registered native title claimant need agree to, and sign, an area ILUA in these circumstances, the potential for outcomes antithetical to the NT Act is plain. An example serves to illustrate the problem. For a proposed area ILUA covering land and waters the subject of registered claims by two different claim groups, a single named individual representing Claim Group A could, by executing an ILUA on behalf of the registered native title claimant, bind Claim Group A to an area ILUA to which its other named representatives object. Claim Group A’s native title could be extinguished under such an ILUA. That is because, if such an individual had the support of (for example) a majority of the members of Claim Group B, and the members of Claim Group B could secure (for example) a simple majority of votes at a s 251A authorisation meeting, the area ILUA could be endorsed and the native title of Claim Group A extinguished, together with that of Claim Group B. That is because s 251A only requires, and contemplates, a single authorisation meeting for each area ILUA, no matter whether there are two, three or seven registered native title claimants whose claim groups claim native title rights and interests over the area. Unlike s 251B, the terms of s 251A are based on the ILUA concluded, rather than on a single claim group. I do not consider the NT Act intends that the merging of the native title rights and interests of more than one native title claim group into a single area ILUA, and the possible extinguishment of those rights and interests, should occur other than in circumstances where all those individuals constituting the registered native title claimants for all the claim groups involved have agreed to such a course.
3. The objective of Pt 2 Div 3 is to provide for the circumstances in which a future act that affects native title will be valid and the circumstances in which it will not, and to do so in a “substantially more comprehensive” way than previous versions of the Act: see s 24AA(1) and (2); and [6.1]-[6.5] of the Explanatory Memorandum for the Native Title Amendment Bill 1997 (Cth). As a voluntary mechanism for validating future acts (see s 24AA(3) and [6.7] of the Explanatory Memorandum) ILUAs are a key component of the scheme enacted by Pt 2 Div 3. Their function is confirmed by the terms of s 24AA(3), which identifies a principal function of an ILUA as recording the “consent” of, relevantly, the native title claim group or the native title holders, to the doing of the future act, or the validating of a previously invalid future act. Although s 24AA(3) speaks of the “consent” of the “parties” to the agreement, for the reasons I have outlined concerning the singular and representative nature of a registered native title claimant, the consent of the registered native title claimant as a party is intended to be the consent of the members of the native title claim group. That is especially so taking into account the effect of s 24EA(1), which is that an agreement registered as an ILUA binds all persons holding native title in relation to any of the land or waters in the area covered by the agreement “as if” it were a contract to which all of those persons were parties.
4. When this is understood, combined with the contractual language in Pt 2 Div 3, and the contractual effect given to an ILUA on registration (s 24EA(1)), in my opinion it is clear that the legislative scheme in Pt 2 Div 3 contemplates there will be a written agreement. So much is clear from the use of the term “party” throughout Div 3. It is also clear from the requirement in s 24CG(2) that an application for registration of an ILUA be “accompanied by a copy of the agreement”.
5. In my opinion, this part of the legislative scheme also proceeds on the assumption, drawn from the general law, that signature will be evidence of the voluntary assumption of the rights and obligations in the agreement.
6. The significance of signature in the context of both contractual and non-contractual documents concerning property rights was emphasised by the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165. In reiterating (at [40]) the principle of objectivity in determining the rights and liabilities of parties to a contract, the Court (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) said:

What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

(Footnotes omitted.)

1. The Court then continued (at [42]) regarding the importance of signature:

Consistent with this objective approach to the determination of the rights and liabilities of contracting parties is the significance which the law attaches to the signature (or execution) of a contractual document. In *Parker v South Eastern Railway Co*, Mellish LJ drew a significant distinction as follows:

“In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it.”

(Footnote omitted.)

1. Signature, as the Court developed in this part of their Honours’ reasons for judgment, is the act which conveys, or represents, due notice of the terms of the contract and a willingness to accept them. That is what distinguishes cases of signed documents from categories of contracts such as tickets. The Court continued (at [55]):

In *L’Estrange v Graucob*, Scrutton LJ said that the problem in that case was different from what he described as “the railway passenger and cloak-room ticket cases, such as *Richardson, Spence & Co v Rowntree*”, where “there is no signature to the contractual document, the document being simply handed by the one party to the other”. His Lordship said:

“In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed.”

(Footnotes omitted.)

1. It is also important to note what the Court said (at [47]) regarding the importance and effect of signature not being confined to contractual documents, but to any legal document concerning, at least, property rights. An ILUA is of course such a document, even before it is given contractual effect by s 24EA. The Court said:

The importance which, for a very long time, the common law has assigned to the act of signing is not limited to contractual documents. *Wilton v Farnworth* was not a contract case. The passage from the judgment of Latham CJ quoted above is preceded by a general statement that, where a man signs a document knowing that it is a legal document relating to an interest in property, he is in general bound by the act of signature. Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution. It is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief.

(Footnotes omitted.)

1. Where a registered native title claimant “makes” an ILUA, in my opinion it is clear that act is done by signing a final form of the agreement, which reflects the bargain struck between the parties. Signature is, as the High Court has explained, a critical and necessary step in a document that affects proprietary interests, whether or not at the time of signature the ILUA is properly described as a contract. In the present case, of course, the agreements were concluded as deeds and there is no doubt they were intended to have contractual effect from the time they were signed.
2. In the case of an ILUA, the signature which is required is the signature of the registered native title claimant. That entity is the mandatory party for the purposes of s 24CD. For the reasons I have explained above about the collective but singular character of that entity (as with an applicant), the only signature which can constitute the signature of the registered native title claimant is the signature of each and every individual who constitutes that entity. That is, as the definition in s 253 provides, the person or persons whose names are entered on the Register as the applicant. In my opinion, the will, or intention, of an entity such as a registered native title claimant is a collective will or intention, representing as it does the earlier expression of the will of the native title claim group. The disagreement of one individual constituting the registered native title claimant may represent the disagreement of a significant proportion of the native title claim group. If all individuals comprising the registered native title claimant sign the document then it can be said objectively that act represents the act of the native title claim group. Section 251A then requires the will of the whole group to confirm what its representatives have done, or propose to do, before the whole group will be bound.
3. ILUAs are capable of, and intended to be capable of, doing much more than consenting to or validating future acts, as the terms of ss 24BB, 24CB and 24DB illustrate. One of the matters which the NT Act contemplates, by s 24CB, is that an area ILUA may deal with the extinguishment of native title rights and interests by their surrender to the Commonwealth, a state or a territory. The ILUAs in these proceedings deal with that subject matter. ILUAs may also include subject matter that requires conduct by a relevant registered native title claimant, as the applicant in an application under Pt 3 Div 1 of the NT Act. For example, s 24CB(b) contemplates an ILUA may be “about” “withdrawing, amending, or varying” a claimant application. That requires performance of the functions conferred by s 62A on the individuals who constitute the applicant/registered native title claimant. So does the inevitable consequence of the surrender of native title rights and interests so as to achieve their extinguishment (s 24CB(e)), which is (as in each of these proceedings) an application for a consent determination under s 87, read with s 94A, to the effect that native title does not exist in the claim area.
4. Broadly, the terms of each of Subdivs B, C and D of Pt 2 Div 3, follow a similar pattern, with similar content. Each set of provisions uses the language of “parties”, “agreement”, “consideration” and “conditions”. Each imposes an inviolable requirement that all those representing native title holders or claimants over the land and waters covered by an ILUA be parties to the ILUA.
5. Where native title rights and interests are to be extinguished by surrender, the polity to which the rights are surrendered must be a party: see ss 24BD(2) and 24CD(5). In the case of alternative procedure agreements (which cannot extinguish native title: see s 24DC), a “relevant government” (see s 24DE(1) and (3)) is required to be a party, but a registered native title claimant is not: see s 24DE(4). It is for this reason (the ability to conclude ILUAs without participation by all persons claiming to hold native title over the area) that an alternative procedure ILUA cannot provide for the extinguishment of native title. It is not difficult to contemplate that persons claiming native title over an area who were left out of an alternative procedure ILUA would pursue the objection process set out in ss 24DJ-24DL.
6. It is instructive to consider the provisions in relation to body corporate ILUAs before turning to Subdiv C. Body corporate agreements only operate on areas of land and waters over which there has been a native title determination: s 24BC. Either a registered body corporate will hold the native title on trust for the native title holders, or it will act as an agent or representative of the native title holders in respect of matters relating to native title: see ss 56, 57 and 58. Plainly, a body corporate is a legal person, with legal capacity. As I have noted, s 24BD(1) requires all of the registered native title bodies corporate to be parties to the ILUA. I do not consider that requirement should be construed as somehow authorising or requiring a body corporate to become a party against its (corporate) will. ILUAs are, as I have noted and the NT Act makes clear, voluntary arrangements. The same principle of voluntariness applies to provisions such as s 24BD(2), in relation to government parties. Provisions such as s 24BD(1) set minimum requirements for an ILUA to possess the necessary characteristics for registration: they do not purport to compel any entity or person to become a party.
7. The question, therefore, is what voluntariness entails for a registered native title claimant in an area ILUA under Subdiv C, given this is the only Subdivision where a registered native title claimant is a necessary party for validity.
8. Section 24CE (which I have extracted at [305] above) is in the same terms as ss 24BE and 24DE. All three provisions turn on the contractual notions of agreement, consideration and conditions, illustrating in my opinion how these provisions are intended to reflect, with modifications thought appropriate by Parliament, the approach of the general law of contract to the voluntary assumption of rights and obligations: see, generally, *Australian Woollen Mills Pty Ltd v Commonwealth* [1954] HCA 20; 92 CLR 424 at 457 (the Court). One such modification is contained in ss 24BE, 24CE and 24DE themselves, because each section states that an ILUA “may be given for any consideration”. It is not necessary to decide for the purpose of these proceedings whether this language means an ILUA can be made without consideration, or whether it means instead that any kind of consideration can be given. Whichever meaning it bears, the critical point for present purposes is the use of concepts drawn from the general law of contract, which in turn signifies at the least the voluntary assumption of rights and obligations.
9. Section 24CF (which has its parallels in ss 24BF and 24DG) empowers the National Native Title Tribunal or a “recognised State/Territory body” to provide assistance “in negotiating” an ILUA. That assistance is available to persons who wish “to make” an ILUA. The use of the verb “make” in that context gives some support to the construction I adopt of the words “authorise the making” of an ILUA in s 251A: the words refer to entry into an ILUA, and the step of negotiation is a separate one.
10. The next provision, s 24CG, deals with registration of an ILUA. Sections 24BG and 24DH have aspects of their respective registration provisions which are similar. I return to the terms of s 24CG, as the applicable registration provision in the current proceedings, in more detail below. However, for the purposes of understanding the ILUA scheme as a whole, it should be noted that in each of the three Subdivisions, an ILUA may be lodged by one party to it for registration, *if all of the other parties agree*. Again, the consensual nature of the scheme is evident.
11. Subject to certain conditions, the Registrar is obliged to register an ILUA once submitted: see ss 24CK(1), 24CL(1), 24BI(1) and 24DL(1). These provisions impose a correlative obligation on the Registrar not to register an ILUA in various circumstances. The four provisions conferring registration functions on the Registrar do so in differing terms. For example, s 24DL provides that the Registrar must register an alternative procedure agreement if there is no existing objection to registration, or if there is an objection but the National Native Title Tribunal or a recognised state or territory body has decided it would nevertheless be fair and reasonable to register the agreement. The Registrar must not register the agreement if those conditions are not met. In contrast, s 24BI(2) prohibits registration if any of the parties indicate to the Registrar within one month after the notification day specified under s 24BH that they do not wish the ILUA to be registered. A provision such as s 24BI(2) indicates that the scheme intends that the finality of an ILUA for the purposes of the NT Act is to come from registration, rather than what might happen before registration as a matter of private law. Likewise, s 24BI(3) prohibits registration if a representative body has not been given the requisite notice under s 24BD(4)(a). I consider s 24CK in more detail below.
12. There is no authorisation requirement in Subdiv B of Pt 2 Div 3, in relation to body corporate ILUAs. Rather, the way that native title holders authorise the making of an ILUA comes through the *Native Title (Prescribed Bodies Corporate) Regulations*, which require a registered body corporate to have consulted with and obtained the consent of the common law native title holders before entering into a body corporate agreement. As with ss 251A and 251B, that consent can occur either through a decision-making process in accordance with traditional law and custom or one that has been agreed by the native title holders for that purpose.
13. Subdivision D deals with alternative procedure agreements. Neither in the explanatory material, nor in the NT Act itself, is there any clear explanation of why these agreements are described as “alternative procedure” agreements. It can be inferred they are seen as alternatives to either body corporate agreements, or area agreements, but otherwise their role must be pieced together from the terms of Subdiv D.
14. The key difference between alternative procedure agreements and those contained in Subdivs B and C is that alternative procedure agreements cannot extinguish native title. That is because it is not a mandatory requirement that native title holders be parties to alternative procedure agreements. These agreements are not intended to cover land and waters over the whole of which there has been a determination of native title: see s 24DD(1). Such areas should be dealt with under Subdiv B, by a registered body corporate ILUA. However, Subdiv D can be used where part of the land and waters to be covered is subject to a determination of native title: see ss 24DD(2) and 24DE(2). If there is no determination in effect for any of the land and waters covered by a Subdiv D ILUA, there must be at least one representative Aboriginal/Torres Strait Islander body for the area: see ss 24DD(2) and 24DE(2(b). In other words, for Subdiv D ILUAs, it was seen as essential that there be at least one body regulated in the performance of its representative functions (whether by the Act itself or by the *Regulations*) which would be a party to this kind of ILUA, and not simply a group (or groups) who were claiming native title. It would appear that these kinds of ILUAs were intended to operate on areas of land and waters where there is a mixture of land subject to native title determination and land which is not, and perhaps also a mixture of native title holders or claimants who are represented by corporations or representative bodies and those who are not. If there are registered native title claimants for the land and waters covered by this kind of ILUA, they may be parties, as may individuals claiming to hold native title, and as may “any other person”: see s 24DE(4).
15. However, as with the other two kinds of ILUA, alternative procedure agreements can be registered and thereby secure the finality and enforceability of benefits which accompany registration, as well as the protection given to future acts. There is an objection process for the registration of alternative procedure ILUAs, as there is with area ILUAs. This reflects the fact that at least part of the land and waters covered by such agreements will not have been the subject of any determination of native title by this Court.

## The centrality of ILUA registration and its objectives of finality and certainty

1. Clause 7.2 of the Explanatory Memorandum to the 1997 amendments to the NT Act implementing the Ten Point Plan, and introducing Pt 2 Div 3 into the Act, stated:

Section 21 of the NTA currently provides for agreements. It does so, however, in very general terms. It does not accommodate the fact that, over most of mainland Australia, governments and others seeking to use land do not know if native title exists, and if it does, who holds it. It is difficult in such circumstances to have agreements which provide the necessary level of legal certainty. These provisions are designed to give security for agreements with native title holders, whether there has been an approved determination of native title or not, provided certain requirements are met.

1. Registration is the vital statutory step in the ILUA process. It is what gives the security to which the Explanatory Memorandum refers. With registration comes statutory enforceability, including a significant departure from general law principles of privity, so that all those with native title rights and interests (actual or claimed) in an area covered by an ILUA will be bound by the outcome of the ILUA process: see s 24EA(1)(b). The attributes of finality, certainty, and enforceability intended to flow from registration are critical to stable, long-term realignment of proprietary and other interests affected by an ILUA. The constructional choices made between the parties’ contentions must recognise the centrality and effect of registration. In my opinion, the respondents’ contention that there is no minimum number of individuals constituting the registered native title claimant who must agree to, and sign, an ILUA does not promote the certainty and finality which registration is designed to achieve and, indeed, tends to frustrate the process of registration because it relies on matters extraneous to the NT Act to determine whether there are sufficient signatures on an ILUA for the registered native title claimant to be considered a party to the ILUA.

## The language used in Pt 2 Div 3 of the NT Act

1. In setting out what constitutes an ILUA amenable to registration, Pt 2 Div 3 employs language and concepts familiar from the general law: parties, agreement, consideration and conditions. I have already observed that to be a party to an agreement involves the voluntary assumption of rights and obligations and I see nothing in the text of Div 3 to suggest the legislature intended otherwise with respect to ILUAs. Being a party to an agreement means assuming responsibility to consider and agree (or not, as the case may be) on terms and processes relating to the agreement. Division 3 reflects this responsibility – agreeing to consideration and conditions (s 24CE), and agreeing to one party applying for registration (s 24CG). The Full Court recognised the contractual nature of these provisions in *Murray v Registrar of the National Native Title Tribunal* [2003] FCAFC 220; 132 FCR 402 at [17] (Spender, Branson and North JJ):

Division 3 discloses an intention that indigenous land use agreements should have contractual effect at common law (see particularly ss 24BE, 24CE, 24DF and 24EA(2)) and, when registered, a wider statutory contractual effect (see Subdiv E of Div 3 of Pt 2 of the Act). It seems likely that it was the capacity of an indigenous land use agreement to have effect as a contract among the parties to the agreement that was thought to require that all persons in the native title group in relation to the Subdiv C agreement should be parties to the agreement.

1. The respondents accepted that s 24CA defines the scope of what is, and is not, an area ILUA for the purposes of Div 3. They accepted, correctly, that the only agreement which can be registered under s 24CK is an agreement within the terms of s 24CA.
2. Section 24CD introduces yet another statutory concept – the “native title group”. This is also a defined term: see s 24CD(2) and (3). Subsection (2) applies where any part of the land or waters to be covered by the area ILUA is the subject of a claimant application under s 61 which has been accepted for registration, or successfully determined. The remainder of subs (2) then attempts to capture any other person or body with native title rights and interests (recognised under the NT Act, or claimed) so that all persons with similar interests are captured under the statutory umbrella of the “native title group” and required to be parties to the area ILUA. Subsection (3) applies where there is no registered native title claimant or registered native title body corporate over any area of the land and waters covered by the ILUA, and once again the provisions attempt to capture those claiming, or representing those who claim, native title rights and interests. The comprehensiveness is important, because it indicates Parliament does not intend an area ILUA can be made unless all those holding, or claiming to hold, native title rights and interests in the area covered by the ILUA agree: either directly, or through the processes their representatives are required to follow.
3. Section 24CD(3) contemplates that if there is no registered native title claimant, then the *individuals* who claim native title will be parties to the ILUA, unless (see s 24CD(3)(b)) their representative Aboriginal/Torres Strait Islander body becomes a party instead. Without the voluntary agreement of all these people, or representatives (acting after consultation and in the interests of the native title holders or claimants: see s 203BH), there cannot be an ILUA within the meaning of s 24CA. Section 24CD(3)(a) does not contemplate only some of the persons who claim native title will be parties, or a majority of them. It contemplates all such persons must all be parties: that is, they must all voluntarily assume the rights and obligations entailed in making an area ILUA.
4. Section 24CD(1) is expressed in mandatory language and there was no dispute that compliance with subs (1) was an inviolable condition for “meeting the requirements” of s 24CD, for the purposes of s 24CA. One debate between the parties centred on what was meant in subs 24CD(1) by the terms “*All persons* in the native title group”. The applicants contended that because a registered native title claimant was part of the native title claim group, subs (1) meant, in effect, that all persons who constitute the registered native title claimant must be parties (that is, on the applicants’ contention, sign and agree to) the ILUA.
5. While, for reasons I have explained elsewhere, I have reached the conclusion that contention is correct, it is not because of the terms of s 24CD(1). I do not consider the applicants’ construction of subs (1) is correct. Rather, the “all” in subs (1) refers to all of the categories in subss (2)(a)-(c), and means that all “persons” described in each category must be parties. For this purpose, I consider that s 24CD uses “person” in a broad sense to include the statutory entity of a registered native title claimant, the statutory entity of a registered native title body corporate, and the statutory entity of a representative Aboriginal/Torres Strait Islander body. It is only when subs (2) is describing individuals because there is no statutory entity (see s 24CD(2)(c)(i)) that the word “person” should be construed as referring to individuals. Support for this approach can be derived, as the State’s submissions pointed out, from the use of the plural “registered native title claimants” in s 24CD(2)(a) and “registered native title bodies corporate” in s 24CD(2)(b). The use of the plural in both subs (1) and subs (2) serves to confirm that all such entities having, or representing those who have, native title rights in the land and waters covered by the ILUA must be parties, not only some of them. To take a simple example: if, in relation to a particular proposed ILUA area there are three registered native title claimants, and two registered native title bodies corporate, the effect of s 24CD(1) is that all five “persons” must be parties to the ILUA. If one registered native title body corporate refuses to be a party, the ILUA cannot be made over the area for which that registered native title body corporate has responsibility. Thus, there is a rationale for the use of the plural “persons” in subs (1) that does not necessitate that word referring only to individuals or legal persons.
6. Section 24CD(1) does not provide the answer, in my opinion, to the question raised in these proceedings about whether each individual constituting a registered native title claimant must agree (and sign any necessary documents) before it can be said that the registered native title claimant is a “party” to the ILUA. However, as I have observed, there are several features of this provision which are consistent with my view that these provisions are intended to operate on a voluntary, and comprehensive, assumption of obligations by all those whose native title rights and interests are affected.
7. Although it is true that, by reason of s 24CG, the requirement of the NT Act for authorisation arises only at the point of registration, that fact does not advance the construction issues one way or the other. While the terms of s 24CG(3) make either certification as to authorisation, or evidence of authorisation, a precondition to the acceptance of an application for lodgement, when read with s 251A the scheme cannot be said to require that authorisation necessarily be given prior to the “making of the ILUA”. I see no reason in the text, context or purpose of s 251A and Pt 2 Div 3 to narrow the point in time at which an authorisation meeting could occur for the purposes of s 251A. In my opinion, it could occur after an area ILUA has been, relevantly, negotiated, concluded and signed by the individuals constituting the registered native title claimant, or it could occur prior to the conclusion of the ILUA. In various factual circumstances, one time might be preferable to another. Either way, the requirement of the legislative scheme is that the making of the ILUA be authorised by the native title claim group prior to registration, that is all.
8. This approach is consistent with the approach I take to the role of the individuals who constitute the applicant: in my opinion, they are able to negotiate and conclude an agreement prior to the s 251A process because of the representative capacity in which they are operating. Again, in any given circumstance there may be good reason why the parties would wish that to occur, although there may be real questions of enforceability prior to registration. Those issues need not be explored in relation to these proceedings. The point is that the scheme of the NT Act is concerned with providing certainty and, if necessary, enforceability, in relation to the effects of future acts on native title rights and interests. That certainty and enforceability is achieved through registration, not through the mere conclusion of an agreement. The scheme therefore ties authorisation under s 251A to registration.

## Sections 251A and 251B of the NT Act

1. There are several matters to consider in relation to these two provisions. What are their respective functions in the scheme of the NT Act? What, if anything, are the differences between them? What is their scope? That is, can the provisions be seen as impliedly conferring a suite of powers or functions on the native title claim group?
2. The answer to the question of the function of these two provisions seems deceptively simple. Each of s 251A and s 251B is a definitional provision. Each time the NT Act uses the verb “authorise” (in any form), s 253 provides that it has one of two meanings, depending on whether the context relates to the making of ILUAs or the making of native title determination or compensation applications, and dealing with matters arising in relation to those applications. If the former, it has the meaning given by s 251A; if the latter, it has the meaning given by s 251B.
3. Although each of s 251A and s 251B is a definitional provision, the text and purpose of the provisions indicate that they also confer functions on (in the case of s 251A) all persons holding native title in relation to the area covered by an ILUA and (in the case of s 251B) all the members of the native title claim group or compensation claim group. Those functions are quite distinct as between s 251A and s 251B, in at least two ways.
4. As the applicants submitted in these proceedings, the function in s 251A is to endorse a *single* event – the making of an ILUA. The function in s 251B is to endorse a series of steps in what might be a long and drawn-out process leading to a contested or consent determination, or an eventual discontinuance or withdrawal of proceedings, and/or, for example, the negotiation of an ILUA. Related to this is the second distinguishing feature between the two provisions: s 251A confers a function on the persons holding native title in relation to a particular area of authorising an event: the making of an ILUA covering that area. Section 251B confers a function of authorising a person, or persons, rather than an event. That is consistent with the more ambulatory and ongoing nature of what must be done by those individuals who constitute the applicant/registered native title claimant in relation to a native title or compensation application.
5. The respondents accepted, correctly, that “making of the agreement” in s 251A refers to entering into the agreement. That event – the making of an ILUA – is then authorised by the persons holding native in relation to the area by one of the two methods set out in s 251A(a) or (b). In other words, the relevant function is the act of authorisation. The purpose of subss (a) and (b) is to prescribe the two methods by which that function can be performed. Either there exists a traditional decision-making process (subs (a)), or the persons holding native title in relation to the area must themselves determine a decision-making process for the ILUA authorisation (subs (b)).
6. That, in my opinion, is the extent of s 251A. It gives meaning to the verb “authorise” where used elsewhere in the Act in connection with the making of an ILUA (relevantly, s 24CG(3)(b)(ii) or s 203BE(5)(b)), and it prescribes two alternative methods by which that authorisation can be given. By this provision, the NT Act ensures and requires that the “ultimate authority” of the persons holding native in relation to the area is given to an ILUA. It also ensures that those individuals who constitute the applicant/registered native title claimant are held within the representative role given to them so that persons holding native title must endorse what their representatives have negotiated and agreed to on their behalf, in accordance with one of the two methods in s 251A. Section 251A (and, for that matter, s 251B) does not alter the representative function of the individual who constitutes the applicant/registered native title claimant. Rather, it confirms that function. In my opinion, how that representative function is fulfilled, and any limits or qualifications on it, are to be found elsewhere in the Act and not in s 251A.
7. In context, in s 251A ‘authorise’ means endorse, ratify or approve, bearing in mind that in that provision it refers to an event. In s 251B, referring to people as representatives, it means empower. Section 251B does not contemplate overriding or disregarding those representatives, or forcing them to act in a way they do not agree with. It is a positive clause, not a negative one.
8. Section 251A, in contrast, can be seen to have even less connection with overriding or disregarding the position or views of the individuals who constitute the registered native title claimant. It does not engage with that issue at all. It speaks only to the ILUA itself, and to whether or not the persons holding native title in relation to the area endorse, approve or ratify the agreement which is proposed to apply to that area. Section 251A, read with the relevant location of the verb ‘authorise’ in s 24CG(3), must be construed as referring to an ILUA with the features set out in ss 24CB-24CE. Section 251A simply has no role to play in determining whether the agreement the persons holding native title in relation to the area are asked to endorse is, or is not, an ILUA in accordance with those provisions. That is determined by the provisions in Subdiv C of Pt 2 Div 3 themselves. If those provisions, properly construed, require all individuals constituting the registered native title claimant to conclude the ILUA, then it is only the making of an ILUA with that feature which the persons holding native title in relation to the area can lawfully authorise under s 251A.
9. The definitional character of ss 251A and 251B renders it difficult, in my opinion, for these provisions to be construed as conferring extended functions and powers on the native title claim group. The third, fourth and fifth respondents submitted that s 251A extends to empowering the authorising group to “determine how it wishes to indicate its assent to the agreement, including by providing who can sign an agreement on [the group’s] behalf” (namely, only some of the individuals who constitute each applicant/registered native title claimant in relation to the area). They submitted this flowed from the principle that a power or function is generally construed as impliedly also conferring a power to do all things reasonably incidental to the function or power, relying on *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473 at 478; *R v Gough; Ex parte Australasian Meat Industry Employees’ Union* [1965] HCA 52; 114 CLR 394 at 416 (Windeyer J), 422 (Owen J); and *Johns v Australian Securities Commission* [1993] HCA 56; 178 CLR 408 at 428-429 (Brennan J). The State took a similar approach, by its reliance on the concept of ‘flexibility’ in the nature of the authorisation given.
10. I do not consider those principles applicable to ss 251A and 251B in the way the third, fourth and fifth respondents contend, nor that there is the ‘flexibility’ in s 251A authorisations which the State suggests. The reasons can be put in two ways. First, the kind of “additional” function in the present situation was the passing of a resolution authorising and directing the persons comprising a relevant registered native title claimant to sign the proposed ILUA and agreeing and acknowledging that the signatures of such of those persons who have signed by a specified date would be sufficient evidence of authorisation. Equally, on the respondents’ arguments, the resolution could have been to the effect that the ILUA could be made by majority or minority decision of the persons comprising the relevant registered native title claimant. Or, it could have been that only one member of each registered native title claimant need sign. Resolutions of this kind are not, in my opinion, the doing of things which are “incidental” to the function of authorising the making of an ILUA. It is a different function altogether: it is about changing the effective composition of the applicant/registered native title claimant. I say “effective” because a resolution of the kind for which the respondents contend (and which was passed at the s 251A authorisation meetings in the present proceedings) potentially deprives, and in these proceedings has deprived, some individuals of the ability to fulfil their representative role. For individuals who do not sign the proposed ILUA, such an authorisation renders nugatory their presence as named members of the applicant/registered native title claimant. That is not an activity which is “incidental” to authorising the making of an ILUA.
11. Whether or not such a resolution could be said to be incidental to the function in s 251B of authorising an individual who constitutes an applicant/registered native title claimant to deal with matters arising in relation to native title or compensation applications is not a matter that need be conclusively determined in this case. I note, however, that provisions such as s 62(1)(a)(iv) (the requirement that a claimant native title application must be accompanied by an affidavit sworn by “the applicant” stating that “the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it”) tend against construing s 251B as empowering a native title claim group to impose majority decision-making amongst the individuals who constitute an applicant.
12. Nevertheless, the extended operation of s 251B, in authorising people to “deal with” matters arising in relation to a claimant application, and its express relationship to s 62A, means it may be consistent with the purpose of s 251B to construe it as empowering a claim group to set *some* limits and terms on any authorisation, because its subject matter is ongoing conduct of an application on behalf of that group. That proposition is borne out by the terms of s 66B(1)(a)(iv) which, as all parties accepted, expressly contemplates by the use of the phrase “exceeded the authority given to him or her by the claim group” that some terms and conditions can be placed on an authorisation made under s 251B. Several decisions of this Court have recognised an authorisation under s 251B may have this effect: see, eg, *Far West Coast Native Title Claim v South Australia (No 2)* [2012] FCA 733; 204 FCR 542 at [50]-[55] (Mansfield J) and the cases there referred to.
13. Although the respondents embraced reliance on the terms of s 66B(1)(a)(iv), I consider it tends against their arguments because of its location in s 66B itself. Its location in s 66B as one of the bases on which this Court may order a change to the persons constituting an applicant/registered native title claimant suggests Parliament intended s 66B to be the mechanism, and the only mechanism, by which the native title claim group could ensure that those people empowered to represent it were acting in an appropriately representative way.
14. Whether, given its extended operation to authorising ‘dealing with’ a native title application, s 251B should properly be construed as empowering a claim group to authorise its representative individuals who constitute an applicant/registered native title claimant to make decisions by a majority of the individuals who constitute the applicant is a matter I need not determine in these proceedings. There are single judge decisions in this Court which have held s 251B extends that far: see *Anderson v Queensland* [2011] FCA 1158; 197 FCR 404 at [62] (Collier J); *Far West Coast Native Title Claim* at [50]-[54] (Mansfield J). In *KK v Western Australia* [2013] FCA 1234, too, it was held that a claim group could authorise the applicant to act other than unanimously if the claim group directed the applicant to take a particular step and one of the persons constituting the applicant refused to do so: at [87]-[88] (Barker J).
15. There are also decisions in which judges of the Court have expressed a different view, namely that a claim group cannot authorise majority decision-making: see *Tigan v Western Australia* [2010] FCA 993; 188 FCR 533 at [28] (Gilmour J); *Gomeroi People v Attorney-General of New South Wales* [2016] FCAFC 75; 241 FCR 301 at [176]-[177] (Bromberg J). In the latter case, Bromberg J (dissenting in the result) said (at [177]):

The short answer to the applicant’s reliance upon s 251B, is that the applicant has mischaracterised that provision. Section 251B does not deal with the decision-making process of an applicant. It deals only with the process of decision-making to be utilised when a claim group decides to authorise a person or persons to be an applicant.

1. As I have noted, read with s 66B(1)(a)(iv), it is appropriate to construe s 251B as empowering a claim group to place limits or conditions on the authority of the individuals it appoints as its representatives. However, the point Bromberg J makes has, I respectfully consider, some force. Like s 251A, s 251B is primarily a definitional provision and in its terms it does not purport to extend to the way in which those people who are authorised as the applicant make their decisions. In contrast, s 66B deals expressly with this issue.
2. In *Tigan*, Gilmour J described (at [18]) the contention that individuals constituting an applicant could act by majority as “inimical to the object of ss 61 and 62 in the context of the Act as a whole”, finding (at [28]) that members of the applicant cannot act by majority but must act in concert. His Honour added (at [28]):

If dissension arises, as it seems has occurred here, between the named persons who are the applicant, then there are procedures under the Act for the native title claimant group to effect a change in the membership of the applicant. Indeed that has been foreshadowed in this case.

1. It will be apparent from my reasoning that I would be inclined to agree, respectfully, with his Honour.
2. However, as senior counsel for the applicants in these proceedings submitted, it is not necessary to determine this question conclusively. That is because there is no evidence that there was any such resolution under s 251B in relation to the manner in which the members of any of the applicant/registered native title claimant entities could make decisions. This was not an argument available to the respondents and they did not make it.
3. Rather, the only resolutions which purported to authorise and direct individual members of the applicants/registered native title claimants “to be named as Parties to, and to sign” the area ILUAs were resolutions purportedly made under s 251A. As I have already held, it is clear that there is no textual or contextual basis to find that s 251A extends that far, especially given s 251A does not incorporate the language of s 62A, in contrast to s 251B.

## The terms and operation of s 24EA of the NT Act

1. Section 24EA is a critical provision in the operation of the ILUA scheme. Its purpose is twofold. First, notwithstanding any particular arrangements in any particular ILUA, by reason of s 24EA(1)(a), once the details of the ILUA are entered on the Register of ILUAs and for so long as it remains on that Register, an ILUA will take effect as a contract between the parties to the agreement. In some circumstances (the four ILUAs here being examples), the parties may have intended the ILUA to have contractual effect from the time of its conclusion. However, that may not always be the case and s 24EA(1)(a) is designed to regularise all ILUAs which are on the Register and to give them all the same kind of legal effect, and therefore the same kind of legal enforceability.
2. Second, s 24EA(1)(b) extends the binding effect of an ILUA to all persons “holding” native title in the area. I interpolate here that, just as the introductory words to s 251A refer only to people “holding” native title, although further on in s 251A reference is made also to people who “may hold” native title, I would construe the reference in s 24EA(1)(b) to “holding” as including those who *claim* to hold native title in the area. Otherwise, the effect of registration of an ILUA in respect of an area where there has been a determination of native title would be different from an area where an ILUA is concluded prior to any determination. That is not the intention of the scheme, as the definition of “native title group” in s 24CD demonstrates. The scheme intends ILUAs concluded either by registered native title claimants or holders of native title to have the same force and effect. Indeed, in my opinion, taking into account the terms of s 24CD(3), the scheme also intends that ILUAs have the same force and effect where negotiated and concluded by persons *claiming* to hold native title who have not had any native title claim accepted for registration under s 190A.
3. The extension of the binding effect of the ILUA to “all persons” holding native title in relation to any land or waters covered by the ILUA reflects the representative nature of the registered native title claimant, of the registered native title body corporate, and of the representative Aboriginal/Torres Strait Island body. Ultimately, each of those entities has performed its functions in relation to an ILUA in order that the persons holding native title in relation to the area receive the benefits of that agreement. Receipt of the benefits of the agreement means acceptance of the responsibilities and liabilities of the agreement as well, although in this context “acceptance” means acceptance by the *group* of persons holding native title by authorising the agreement in accordance with s 251A, not necessarily individual acceptance or consent by each person in that group. That is what s 24EA(1)(b) is designed to achieve.
4. Section 24EA(1)(b) has another purpose, also important to the scheme. Extending the binding effect of an ILUA to all persons holding or claiming to hold native title brings the certainty and finality to the effect of future acts on native title interests which Pt 2 Div 3 is intended to achieve.
5. There is a further feature of s 24EA(1) which should be noted, as it supports the approach I have taken to the question of who must ‘make’ the area ILUA. In its express terms, the extension effected by s 24EA(1)(b) is to all those persons holding native title “who are not already parties to the agreement.” Those people assumed by Parliament to be within the terms of s 24EA(1)(a) are those who, as individuals, constitute the registered native title claimant which is a party to the ILUA and contractually bound. The assumption is that all such individuals are within para (a) because they have, in their capacity as representatives but bearing in mind they also in effect represent themselves, already voluntarily agreed to assume the obligations in the ILUA. To give an example from these proceedings: Ms McGlade is assumed by the legislative scheme to be contractually bound under s 24EA(1)(a) because she, as one of the people constituting the Wagyl Kaip registered native title claimant, is assumed to have participated in concluding the ILUA.

## Section 62A of the NT Act

1. It is obvious from the nature of the legislative scheme in the NT Act that those persons constituting an applicant, and subsequently a registered native title claimant, are required to perform a number of functions under the Act, and make a number of decisions.
2. Section 62A recognises that role, and empowers the individuals who constitute the applicant to perform such functions and make such decisions, because they are authorised by the claim group members under s 251B. The authorisation renders the individuals representatives of the group, and s 62A then empowers them to deal with “all matters arising under” the NT Act in relation to the claimant application (or the compensation application, as the case may be).
3. The note to s 62A suggests the provision should be read down as having no application to ILUAs. The respondents embraced this position. The applicants contended s 62A had a role to play in the making of an ILUA, because Pt 2 Div 3 itself contemplates that matters covered by an ILUA will include the extinguishment of native title rights by surrender and withdrawing, varying, amending or doing “any other thing” in relation to a claimant application. To agree to those matters requires a registered native title claimant to “deal with” matters arising under the Act in relation to the claimant application; that is, to exercise powers conferred by s 62A. For example, as in these four ILUAs, to consent to orders disposing of the claimant application in this Court.
4. I agree with the applicants’ submission. Despite the note, there is no basis on which to read s 62A down so as to not empower the individuals who constitute the applicant/registered native title claimant to deal with an ILUA, especially given the statute (in Pt 2 Div 3) contemplates an ILUA can affect, and bring to an end, a claimant application. While it might be the case that, once an ILUA is concluded, the individuals who constitute an applicant are contractually bound to do certain things (such as sign consent orders in their capacity as the persons who constitute an applicant), their power to do so can only arise from s 62A. The contract is not the source of any power to perform a function which is governed by the NT Act, as they are contracting in a capacity entirely created by the Act. Of course, all the individuals constituting the applicant/registered native title claimant must, as I have found, act collectively.
5. Nor, contrary to the respondents’ submission, is s 251A the source of any such power. As I have set out, s 251A has a critical but limited role. In its role as a definition, it describes how the members of a claim group endorse or ratify the making of an ILUA as a necessary precondition to registration. There is no basis to construe s 251A, related as it is to a single event, as a source of power for those individuals who constitute an applicant/registered native title claimant to make decisions or perform functions which arise under the NT Act because of that status, rather than because of their status as parties to an ILUA.

## The role of s 66B of the NT Act

1. The applicants submit, and I agree, that the scheme of the NT Act identifies the process set out in s 66B as the appropriate, and necessary, process to resolve disagreements between persons constituting an applicant/registered native title claimant, or between some or all of those persons and members of the native title claim group, as well as providing the means to make changes to the constitution of these entities consequent upon illness, incapacity or death.
2. I do not accept the respondents’ approach, which renders s 66B an optional process, and capable of circumvention by the passing of particularly framed resolutions purportedly pursuant to s 251A (in the case of persons holding native title in relation to land or waters in the area covered by the agreement) or s 251B (in the case of the claim group in a claimant application).
3. Section 66B appears in Pt 3 Div 1 of the NT Act, a Division which sets the basic parameters for the making of an application for a determination of native title or a compensation application. The “Overview” to Pt 3 in s 60A describes the provisions in this way:

Basically, the provisions set out who may make the different kinds of application, what they must contain and what is to be done when they are made.

1. Division 1 is the foundation for the way in which claimant and compensation applications are made. It is wrong to see these provisions as conceptually or practically divorced from the ILUA provisions in Pt 2 Div 3. While it is true that the ILUA provisions can operate in circumstances where there is no claimant or compensation application, and can operate in circumstances which postdate a determination of native title, where the ILUA provisions expressly identify a link to an existing application (as s 24CD does), then they must be construed in a way which is consistent with the other parts of the Act that affect, and constrain, the way such applications are dealt with. It cannot be the case that Parliament intended those persons who jointly constitute a registered native title claimant could or should perform their representative role more, or less, jointly in different parts of the legislative scheme.
2. I give a further example. Subdivision P of Pt 2 Div 3 deals with the right to negotiate in relation to certain future acts. Once the terms of Subdiv P are triggered under s 26, s 29 requires that notification be given to affected parties, including any registered native title claimant: s 29(2)(b)(i). Registered native title claimants in relation to land or waters affected by the future act are also deemed to be a “native title party” for the purposes of the right to negotiate: see s 30(1)(a). A native title party then becomes a “negotiation party”: see s 30A(b). Under the normal negotiation procedure in Subdiv P, the negotiation parties negotiate in good faith with a view to obtaining agreement to the doing of the future act, whether subject to conditions or not. Once such an agreement is reached, s 41 relevantly provides:

**41 Effect of determination or agreement**

(1) Subject to this section:

(a) a determination by the arbitral body; or

(b) an agreement of the kind mentioned in paragraph 31(1)(b);

that the act may be done subject to conditions being complied with by the parties has effect, if the act is done, as if the conditions were terms of a contract among the negotiation parties. The effect is in addition to any other effect that the agreement or determination may have apart from this subsection.

*Other negotiation parties*

(2) If a native title party is a registered native title claimant, any other person included in the native title claim group concerned is taken to be a negotiation party for the purposes only of subsection (1).

…

1. The similarity with s 24EA(1) is plain. All claim group members are ultimately bound, “as if” by contract, by the decisions of the individuals constituting the registered native title claimant about the doing of a future act, and any conditions on which it must be done. Yet there are no additional authorisation provisions in Subdiv P. That is because the individuals who constitute the registered native title claimant are assumed by the scheme to be acting in the ongoing representative capacity conferred on them by s 62A, read with s 61 and s 251B. The terms of s 66B would apply to those individuals if they purported to agree to a future act in circumstances where the claim group members did not agree, or at least, did not acquiesce. Other negotiating parties under Subdiv P are entitled to assume, and the scheme is built on the assumption, that the individuals constituting the registered native title claimant will negotiate under Subdiv P in their representative capacity for the claim group. There is no suggestion in Subdiv P they can perform that function by majority decision-making. If they do not share a joint view, the remedy lies in the hands of the claim group in s 66B. The scheme places ultimate authority with the claim group, through ss 61, 251B and 66B, but only through those processes.
2. The text of s 66B(1)(a) indicates it is directed at individuals who constitute the applicant, and the circumstances set out in subparas (i)-(iv) confirm this. Although the chapeau to para (a) is sufficiently widely expressed to allow for the replacement of all individuals who constitute the current applicant, the text of subparas (i)-(iv) indicates that the criteria must be applied to each individual, separately. Although that is the case, consistently with the text and purpose of s 61(1)-(4), s 66B uses a collective noun, or rather two collective nouns: the “current applicant” (s 66B(1)) and the “new applicant” (s 66B(3)). The term “the new applicant” demonstrates that Parliament’s intention is that, by changing the individuals who jointly constitute an applicant, a new statutory entity is created. That in turn reveals an intention that the statutory applicant is, and only is, the collection of individuals who constitute it, not only some of those individuals. Since a registered native title claimant is treated by the NT Act as the same entity (simply at a different stage of the determination process) the same reasoning applies.
3. This is an appropriate occasion on which to apply the approach to construction set out in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* [1932] HCA 9; 47 CLR 1 at 7 (Gavan Duffy CJ and Dixon J):

When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

1. Dixon J repeated the approach in *R v Wallis* [1949] HCA 30; 78 CLR 529 at 550 in the following terms:

But upon some matters the Act does speak with more particularity. If it confers a specific power with respect to a limited subject or specifies a manner of dealing with it or otherwise provides what the duty or authority of the arbitrator shall be, then upon ordinary principles of interpretation the provision in which that is done should be treated as the source of his authority over the matter, notwithstanding that otherwise the same or a wider power over the same matter might have been implied in or covered by the general authority given by s. 38. This accords with the general principles of interpretation embodied in the maxim *expressum facit cessare tacitum* and in the proposition that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.

1. More recently, Gummow and Hayne JJ emphasised in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; 228 CLR 566 at [54], in relation to this approach, that “whilst ‘rules’ or principles of construction may offer reassurance, they are no substitutes for consideration of the whole of the particular text, the construction of which is disputed, and of its subject, scope and purpose.”
2. In my opinion, there are no competing considerations arising from the text, context or purpose of the NT Act which would suggest that Parliament intended the authority of the individuals chosen by their fellow native title claim group members to be their representatives could be ignored, altered or undermined by subsequent resolutions of the claim group under the ILUA authorisation provisions in s 251A nor under the generalised authorisation provision in s 251B (whether by majority or otherwise), without an application under s 66B. The respondents’ arguments are capable of circumventing entirely the process set out by Parliament in s 66B, including the role it gives to this Court.
3. The Court’s discretion in s 84D of the NT Act (to hear and determine a claim for native title despite a defect in authorisation under s 251B) is not inconsistent with the approach I take. The first purpose of s 84D is to enable production of proof by individuals who claim to have been authorised under s 251B, in circumstances where there is a basis to consider they may not have been. That is, the statute enables the Court to interrogate the existence of an authorisation compliant with the NT Act. The second purpose of s 84D is to empower the Court to make orders depending on the outcome of its inquiry. The Court has a discretion, not unconfined, to permit the claim to proceed, notwithstanding a defect in authorisation: see s 84D(4). In the case of the adversarial aspect of the determination of a native title claim, such a power is necessary and appropriate to avoid injustice. Section 84D, enacted after s 66B, is not a substitute for it, but operates in a way that is complementary to it.
4. I consider my approach to be consistent with the earlier authorities on the operation of s 66B, of which *Daniel v Western Australia* [2002] FCA 1147; 194 ALR 278 is a good example, in part because its facts are similar to those in the present proceeding.
5. During the course of proceedings in this Court on three native title applications, and prior to their finalisation, the State of Western Australia sought to acquire land within the relevant claim areas for the purpose of industrial development. There were a large number of community meetings, described by one witness in the evidence as “very hard for the community” and one of the native title claim groups, the Ngarluma Yindjibarndi, resolved to enter into an agreement with the State. Broadly, the terms of that agreement involved the receipt of benefits in exchange for the acquisition by the State of the claimants’ native title rights and interests. One of the individuals who constituted the applicant refused to sign the agreement. He described himself as an elder, law man and custodian of traditional and customary sites of the Ngarluma People, who was appointed as an applicant on behalf of the Ngarluma to the Ngarluma and Yindjibarndi native title claim. He said the Burrup (one of the areas to be covered by the agreement) contains the most important sites in Ngarluma culture, tradition and custom. He was dissatisfied with the agreement because he saw it as having been negotiated between the Yamatji Land and Sea Council and the State. He claimed Yamatji lawyers would not listen to or talk to Ngarluma in a proper way about their native title in the Burrup. It was common ground before French J (as his Honour then was) that this refusal was not only holding up the conclusion of the agreement, but jeopardising it altogether.
6. I set out these facts in some detail to demonstrate that, contrary to some of the implications in the respondents’ submissions, the representative role played by an individual who constitutes an applicant may explain why an individual holds what those seeking the conclusion of an area ILUA may see as a ‘dissenting’, ‘unreasonable’ or ‘obstructionist’ voice. None of those descriptions may be accurate. Mr Walker could have been described as ‘obstructing’ the agreement in *Daniel*, which is no doubt why the s 66B application was brought. However, there is no sense in the judgment of French J that Mr Walker was doing anything other than acting conscientiously according to what he saw as in the best interests of the people he considered he had been authorised to represent, and indeed had been authorised to represent. There is no evidence before the Court about the motivations of the people such as Ms McGlade, who has not signed the Wagyl Kaip and Southern Noongar ILUA, but it would not be appropriate to infer that people such as Ms McGlade are ‘obstructing’ the settlement for capricious or arbitrary reasons unrelated to their representative function. The appropriate forum for a debate about the reasons for any opposition would be in a s 66B application, where these issues could be contested and evaluated.
7. After considering the evidence, French J made an order removing Mr Walker and two others (who had died) as members of the applicant, and declaring that the remaining six Ngarluma people and nine Yindjibarndi people replace the then current applicant. His Honour concluded (at [52]) that Mr Walker was, as a result of decisions taken at a community meeting in August 2002, no longer authorised by the claim group to make the application or to deal with matters arising in relation to it. At [54], French J expressed his conclusion on the discretionary aspect of the Court’s power in the following way:

The conditions for the exercise of the power under s 66B having been satisfied, the question that then arises is whether, in its discretion, the court should make the orders which are sought. In my opinion it should. This is a case in which one of a large number of registered applicants is holding up the execution of an agreement which has been authorised by the native title claim group and which is of substantial importance to its members. To decline to make the order in these circumstances would be to undermine the authority of the claim group and to frustrate its legitimate decisions.

1. Earlier in his judgment (at [11]-[12]), French J had described the importance of s 66B to the scheme of the NT Act, in the sense of being the mechanism through which the authority of the native title claim group is preserved:

It is of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration, that those who purport to bring such applications and to exercise such rights on behalf of a group of asserted native title holders have the authority of that group to do so. Prior to the 1998 amendments there was no requirement under the Native Title Act that an applicant have such authority. The absence of that requirement led, in some cases, to conflicting and overlapping claims all carrying with them the statutory right to negotiate in respect of the grant of mineral tenements and the compulsory acquisition by Commonwealth or state governments of native title rights and interests. Although many aspects of the 1998 amendments were the subject of controversy in the public and parliamentary debates that preceded their enactment, the need for communal authorisation of claims was largely a matter of common ground.

In *Western Australia v Strickland* (2000) 99 FCR 33 at 52, the Full Court approved a passage from the judgment in *Strickland v Native Title Registrar* (1999) 168 ALR 242 at 259–60, including the observation that:

The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications.

1. If the respondents’ contentions are correct, the persons holding native title in relation to the area covered by the proposed ILUA could simply have passed a resolution under s 251A authorising all the individuals, except Mr Walker, to sign the agreement, and avoided the obviously considerable time and resources employed to persuade the Court to make an order under s 66B. It was not suggested, by the parties in *Daniel* nor by French J, that there was such a simple alternative solution. That is because there is no support in the text, context or purpose of the NT Act for any such alternative process to s 66B.
2. As the applicants submitted, other decisions of single judges in this Court have affirmed the necessity for applications under s 66B in order to change an applicant, at least insofar as there is dispute or disagreement between the individuals who constitute the applicant: see *Holborow v State of Western Australia* [2002] FCA 1428 at [51]-[52] (French J); *Far West Coast Native Title Claim* at [54] (Mansfield J); *Gomeroi* at [83]-[92], [112] (Barker J); *KK* at [48], [66], [96]-[101] (Barker J) .
3. *Butchulla* concerned an application under s 66B(1)(a)(i) (which at that time applied where the current applicant was “no longer authorised by the claim group”) to remove certain people from the applicant, which was opposed. The grounds for opposition related to the effectiveness of the resolution said to have been passed pursuant to s 251B to revoke the authorisation of the original individuals. Since the meeting deciding to revoke the original individuals’ authority, two people who constituted the applicant had indicated they did not wish to continue in that capacity. The respondents to the s 66B application (the original individuals constituting the applicant who were at risk of being removed) submitted that without these two individuals, there was no capacity, or standing, to bring the proceeding to remove them because all individuals constituting the applicant need to act collectively. Kiefel J decided that was not the case and that appointment under s 61 is personal. Her Honour decided that once an individual was authorised pursuant to s 251B, her or his authorisation continues until such time as it is revoked or the person is no longer willing and able to act in a representative capacity, whichever is the earlier. Accordingly, the inability of one person to continue in a representative capacity did not affect the standing of any other authorised person, for example, to bring a s 66B application: at [42]-[45]. To the extent *Butchulla* concerns a construction of s 66B and the finding that a fresh authorisation may be needed for remaining members of an applicant to make a s 66B application, my approach is consistent with that taken by Kiefel J. However, it may be that the way in which her Honour described the appointment under s 61 as “personal” (see especially at [40]-[45]) indicates a different view from the one I take, and if that be the case, I respectfully disagree with her Honour. However, Kiefel J was considering these issues in a different context, and certainly not in the contractual context of Pt 2 Div 3 of the NT Act.

## The effect of my approach for circumstances where an individual has died or is incapacitated

1. Section 66B expressly covers circumstances where individuals constituting an applicant have died. The third, fourth and fifth respondents appeared to contend that authority suggests an application under s 66B is not always required in such a case. They referred to statements of Mansfield J in *Lennon v South Australia*[2010] FCA 743; 217 FCR 438 (Mansfield J), and also to some of the authorities to which his Honour referred in *Lennon*. For the reasons I set out, I do not consider the approach taken by Mansfield J in *Lennon* is inconsistent with the approach I take in respect of ascertaining who is a party to an ILUA for the purposes of s 24CD of the NT Act.
2. In *Lennon*, six people were authorised to be the applicant in a native title claim and two of those six had died. A motion was filed seeking the removal of those two people. The death of a person is, as I have noted, a ground for removal under s 66B(1)(a)(ii) of the NT Act. In *Lennon*, reliance was also placed on O 6 r 9 of the *Federal Court Rules 1979* (Cth) which empowered the Court to make an order that a person cease to be a party if she or he were no longer a proper party. The perceived difficulty with s 66B appeared to be the question whether an entirely new authorisation process would be required if that provision were used.
3. At [1], Mansfield J held:

… where one or more of a number of persons authorised under s 251B of the *Native Title Act 1993* (Cth) (the NT Act) to make a claim for the determination of native title has died, generally the remaining persons so authorised may continue to deal with all matters arising under the NT Act in relation to the application. The remaining persons so authorised will continue to be “the applicant” for that purpose. Consequently, on their application the Court may remove the name of the deceased person as a party.

1. His Honour noted decisions to the same effect by single judges in *Butchulla*, *Chapman v Queensland* [2007] FCA 597; 159 FCR 507and *Doolan v Native Title Registrar* [2007] FCA 192; 158 FCR 56.
2. At [6] his Honour said:

For the purposes of the NT Act, the applicant is defined as constituting the authorised person or persons jointly, as distinct from the native title claim group itself. But the NT Act does not thereby constitute the applicant as having an independent legal existence. It is a definitional term, referring to the persons authorised under s 251B. An application for determination of native title must be instituted in the names of the authorised persons as the parties, and the affidavit required by s 62(1) must be provided by each of those persons. The same applies to a compensation application under s 61(1) and the affidavit required by s 62(3). As a matter of convenience, the practice has arisen of designating the application by a geographical name or a name related to the claim group, such designation also does not alter the fact that the parties making the application are the authorised persons.

1. I do not disagree with these passages. His Honour was, with respect, correct to emphasise that the NT Act creates no new legal entity but designates an individual or individuals as an applicant, which his Honour describes as a “definitional term”. These passages do not suggest that each of the six individuals could make different decisions, or give different instructions to the legal representatives for the applicant. They must act “jointly”, as s 61(2) implies. His Honour did not suggest, for example, that only two of the remaining four persons could have given instructions for the amended application to be filed, if two opposed the amendments.
2. In *Lennon*, the death of two individuals had triggered the application. Neither the State nor the representative body opposed orders being made to remove the two individuals, but the Commonwealth did oppose the proposed orders. It submitted the Court has no power to remove the individuals under s 66B of the NT Act without the native title claim group having another meeting under s 251B of the NT Act to authorise either the remaining four individuals, or them and others, or entirely new people, to be replaced as the applicant. Mansfield J noted at [11] that if the Commonwealth was correct, the position would be productive of “significant consequences to the progress of the matter, as well as causing significant expense, inconvenience to the native title claim group, and delay”. His Honour continued:

If the Commonwealth contention is correct, at present there is no “applicant” capable of giving instructions and the application itself must therefore rest in a nether world: neither truly alive as there is no applicant (see eg per Kiefel J in *Chapman* at [12]), nor truly dead as it may be revived assuming the native title claim group authorises the remaining four persons constituting the applicant or others to maintain the claim and to make decisions with respect to it, and one or more of those authorised persons on their behalf then applies under s 66B to be substituted as the applicant. In addition, and significantly, the hopes and expectations of the native title claim group to reaching a satisfactory resolution of their claim by a consent determination will have been put on hold, and will have been delayed, for some further months.

1. Referring (at [18]-[20]) to the decision of *Sambo v Western Australia* [2008] FCA 1575; 172 FCR 271 (in which Siopis J had held an application under s 66B and authorisation under s 251B was required for one subset of individuals constituting the applicant to seek to remove another subset), Mansfield J acknowledged that in a situation such as *Sambo*, where there was a “genuine issue … as to the best way forward”, the only option may well be s 66B. Where a person had died, Mansfield J’s view (at [22]) was that s 66B did not “cover the field”, especially given the consequences to which he had referred were “antithetical” to the NT Act. His Honour’s view was that there was a construction available which reflected the approach in the Preamble to the NT Act and did not involve the potential frustration of the application for a lengthy period.
2. Mansfield J’s view (at [26]) was that, in the circumstances of death or incapacity of an individual, s 62A of the NT Act or O 6 r 9 of the *Federal Court Rules* provided “a ready and economical means” of changing the individuals who constitute the applicant. I infer his Honour saw s 62A as the source of authority for the existing individual constituting the applicant to approach the Court and I agree with that view. He did not consider s 66B obliged a claim group to use that process in circumstances of death or incapacity where (I infer) the claim group were otherwise content with the remaining individuals as their representatives. My inference is supported by what Mansfield J said at [29]:

The Commonwealth has pointed out that there will be cases in which it is important not only that persons are individually authorised as part of the applicant, but also that the particular group of persons is collectively authorised to act on behalf of the claim group. There may be sectional interests within the claim group whose interests are balanced by the particular combination of authorised persons. It is clear that such circumstances may arise. That is why s 66B empowers the claim group in its terms and in the circumstances it specifies. *Que Noy v Northern Territory* [2007] FCA 1888 provides an example of a claim group doing so. It would not be consistent with the clear objectives of the NT Act, on the other hand, to impose the s 66B procedure on the claim group where there were no such considerations.

1. Whether or not the current equivalent of O 6 r 9 (r 9.08 of the *Federal Court Rules 2011* (Cth)) could be used to remove an individual’s name from an applicant is not a matter I consider is necessary to determine. I note that one of the consequences of orders made by the Court under s 66B is the alteration of the Register of Native Title Claims (see s 66B(4)). While it is conceivable another source of power in the *Federal Court of Australia Act 1976* (Cth) could be used to order the Registrar to amend the Register, in my opinion it is clear s 66B(4) is intended to achieve that purpose. The real issue of concern to Mansfield J (and legitimately so, with respect) was that, where there is no disagreement within the claim group and the remaining applicants clearly continue to enjoy the confidence of the claim group, a further authorisation meeting (with all its attendant delay, cost and resources) would be unnecessary.
2. That is, it is not the fact of an application to this Court, of itself, which was seen by Mansfield J as productive of delay and frustration of the broader objectives of the NT Act. To make the orders he did, his Honour required an application, with supporting material. Rather, it was the Commonwealth’s suggestion that an entirely new authorisation process under s 251B was required, especially in the context of a remote and widespread community, as was the case with *Lennon* (see [11]).
3. I do not consider that in the case of death or incapacity of an individual who, jointly with others, constitutes the applicant/registered native title claimant, s 66B requires an entirely new authorisation process for orders under s 66B(1)(a)(i) and (ii), at the least. The original authorisation given by the claim group under s 251B remains operative and the “members” of the native title claim group who are the remaining members of the applicant are authorised to deal with matters arising in relation to the native title application (s 62A). That plainly includes making an application of this kind under s 66B(1)(a)(i) and (ii). No separate or new authorisation meeting would ordinarily be required. The source of power however, remains s 66B.
4. The situation is likely, but not necessarily, to be different for an application seeking orders under s 66B(1)(a)(iii). That is because in its terms subpara (iii) contemplates a change in the nature of the authorisation originally given under s 251B. In relation to both subparas (iii) and (iv), the original authorisation may be sufficient if the persons making the s 66B application are the remaining individuals who constitute the applicant. In that case, their original authorisation may be sufficient for the purpose of s 66B(1)(b) and the preconditions to making the order would need to be addressed by evidence. If, however, other members of the claim group sought to bring an application for orders under s 66B(1)(a)(iii) or (iv), then there would need to be a new authorisation meeting for the purposes of s 66B(1)(b), and indeed to provide evidence that the members of the claim group moving for the change were themselves authorised to constitute the applicant.
5. If an applicant/registered native title claimant is constituted by a single individual, and that individual is incapacitated or dies, the respondents did not suggest that some alternative arrangement could simply be put in place, without resort to s 66B. Plainly, it could not. No matter how inconvenient it might be, a new authorisation process and an application under s 66B would be required.
6. I consider this approach applies to the making of an ILUA in the following way. Where an ILUA is to be made and one or more of the individuals who constitute the applicant/registered native title claimant has died or is incapacitated, an application should be made under s 66B to remove that individual prior to the making of the ILUA. Such an application would be straightforward if made by the remaining individuals who constitute the applicant, and would be authorised by s 62A. There would be no need for any further authorisation meetings. The Court could likely deal with the matter on the papers, if the evidence was clear. If it was not clear, then there is nothing in the scheme of the NT Act to suggest that any less formal ways should be permitted to alter the constitution of an applicant. Then the remaining individuals could sign the ILUA and their signatures would bind the registered native title claimant and, on registration, the claim group.
7. Any other approach produces substantial disconformities with the operation of Pt 2 Div 3 and its contractual approach. A person who has died obviously cannot assume, voluntarily or otherwise, any legal rights and responsibilities. If, by “incapacitated” (being the term used by the parties in the special cases before the Court), what is meant is having sufficiently serious disabilities as to be incapable of understanding the nature of the rights and obligations to be assumed by the agreement, then such a person has no capacity to enter a contract in any event. In *Gibbons v Wright* [1954] HCA 17; 91 CLR 423 at 438, Dixon CJ, Kitto and Taylor JJ said:

[T]he mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.

1. *Gibbons* was applied by the New South Wales Court of Appeal in *Ford v Perpetual Trustees Victoria Ltd* [2009] NSWCA 186; 75 NSWLR 42 at [83]-[90] (Allsop P and Young JA, Sackville AJA agreeing at [134]). I take it the parties had these principles in mind when they described some of the individuals as “incapacitated”.
2. It should not be assumed any different approach was intended by Parliament in relation to the making of an ILUA, to which the statute gives contractual effect, than that taken under the general law. It was intended by Parliament that the individuals chosen as representatives of the claim group be able to fulfil those responsibilities. Section 66B makes that clear. They are serious and weighty responsibilities, as the nature and content of the terms in the ILUAs in these four proceedings demonstrate. Much is at stake. In my opinion, Parliament intended that all individuals constituting the registered native title claimant be able and willing to perform their representative responsibilities, and if they were not, then the process in s 66B was to be used. As I have explained, that process need not be cumbersome, or expensive, or cause delay. If there is a real difference of opinion about, to use Mansfield J’s phrase in *Lennon*, “the best way forward”, then as his Honour accepted, the structure and purpose of the NT Act is that there be a full application under s 66B and, if necessary, new authorisation meetings. Then, Parliament has reposed the ultimate decision about a change in the composition of the applicant/registered native title claimant in circumstances of a real dispute in the Court, not in the claim group. There is no ‘short cut’ around this.

## The decision in *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019; 189 FCR 412

1. It will be apparent that I do not agree with the approach taken by Reeves J in *Bygrave*, although I do agree with his Honour’s construction (at [79]) of the word “all” in s 24CD(1) and (2)(a).
2. However, I do not agree with his Honour’s findings at [83]-[85] that a registered native title claimant may be made a party to an ILUA by naming only one or more (but not all) of the persons named in the entry of the Register of Native Title Claims. It will also be apparent that, for the reasons I have given, I do not agree with his Honour’s findings (see generally at [101]-[109]) that there is no requirement of consent by the individuals constituting the registered native title claimant, and I do not agree that there is no requirement that a party to an ILUA must sign it. I consider a requirement for signature to be implicit in the legislative scheme.
3. Nor do I agree with his Honour’s finding (at [87]-[88]) that there is no requirement that persons who comprise a registered native title claimant named as a representative party to an ILUA act jointly or collectively, at least not in the sense I understand his Honour to have stated that proposition. As I have pointed out, s 61(2) does not say the individuals must *act* “jointly”. It says that they are, jointly, the applicant. In practical effect this may mean, absent orders under s 66B, they must agree on how to perform their functions and what decisions to make, but that would be to focus on the outcome rather than the process. In the process of performing functions and making decisions, each individual constituting the applicant has a representative role and is entitled to her or his own voice. That may mean much negotiation and debate, but I think that is precisely what Parliament contemplated may occur in the course of matters arising under the NT Act. It is only if, at the end of the day, no agreed position can be reached that resort must be had to s 66B.
4. Reeves J saw (at [117]-[118]) a brighter line between a s 251B authorisation and the making of an ILUA than I have identified. I have explained my reasons for considering that much of what occurs in the negotiation of an ILUA, and specific agreement to specific terms related to a claimant application, is the performance by the named individual of their functions under s 62A, as authorised by the native title claim group. If in negotiating an ILUA those individuals exceed their authority, they could also be removed under s 66B, subject to the Court considering it appropriate.
5. I note Reeves J’s observation at [90] that s 24CD should not be construed so as to allow an individual member of a registered native title claimant to “frustrate or veto” a native title contracting group entering into an ILUA. With respect to his Honour, just as I prefer not to embrace the terms “dissident” and “dissenting” as they were used in argument before the Court, so I prefer not to characterise the refusal of a person in Ms McGlade’s position as a ‘veto’ or as ‘frustrating’ an ILUA. As I have noted, and as the example of *Daniel’s* case shows, an individual who holds views different from those of the majority of the individuals constituting the registered native title claimant may nevertheless be conscientiously performing her or his representative role. If she or he is not, then she or he should be removed under s 66B, if the Court is satisfied on evidence that is appropriate. If she or he *is* performing such a role, then expressing a contrary view may lead to a change of mind, or at least a modification of views, in the remainder of the individuals constituting the registered native title claimant. One cannot assume the motives for entering into an ILUA are any more objectively appropriate and reasonable than the motives for not doing so. There are simply different perspectives, and it is for the claim group as a whole, and the claim group only, to decide which perspective should prevail. Ultimately, if the native title claim group desire the same outcome as the majority of individuals constituting the registered native title claimant, then the NT Act provides the solution in s 66B, read with s 251B, conditional upon the Court’s satisfaction.
6. I note the use in his Honour’s reasons of the term “representative party”, which is also the term used in the impugned ILUAs in this proceeding. While I have found that the individuals constituting the registered native title claimant are appointed to that role as authorised representatives of the native title claim group, the NT Act describes all persons as simply a “party” to an ILUA. I prefer the statutory term, in part because it emphasises, for the reasons I have given, that a registered native title claimant is a singular statutory concept, however constituted.

## The Whadjuk ILUA: the *Smith* proceeding

1. The material difference between this and the other ILUAs is the respondents’ reliance on events which occurred after the lodgement of the ILUA for registration.
2. The State lodged the Whadjuk ILUA for registration on 29 June 2015. On that date, two people who were named as the applicant for the Whadjuk Claim had not signed the ILUA: Mr Clive Davis, and Mr Noel Morich. Mr Davis was incapacitated and later died on 8 August 2015. Mr Morich signed the ILUA on 24 February 2016, more than six months after the ILUA was lodged for registration.
3. Of course, none of the impugned ILUAs have been registered, because of these proceedings.
4. The applicants contend that compliance with s 24CD must be assessed at the date of lodgement of the ILUA for registration. The Whadjuk ILUA either met the requirements of s 24CD on that date or it did not. If the applicants are correct, the subsequent signature of Mr Morich could have no effect.
5. The respondents contend that the date of lodgement is not critical, but rather the date of decision by the Registrar. The third, fourth and fifth respondents contend in their written submissions:

Since every living person who comprises the applicant for the Whadjuk People Claim has signed the agreement, it plainly complies [with s 24CD].

1. I have dealt with the issue of incapacity or death of a person who constitutes, jointly, a registered native title claimant at [472]-[489] above.
2. The respondents’ submissions should be accepted. Although s 24CG prescribes the nature and content of an application for registration, there is no debate on the facts of each of the four proceedings that the applications for registration contained what they needed to contain. The debate is whether, as a matter of law, the agreements were ILUAs so that the obligation imposed on the Registrar by s 24CK(1) was required to be performed.
3. That is a matter which arose for determination at the time the Registrar’s obligation under s 24CK(1) crystallised. Due to these proceedings, that time has not yet been reached. If and when that time is reached, the Registrar would have before her or him a certification from SWALSC in relation to an agreement that complies with the requirements of ss 24CB-24CE and so is an ILUA in accordance with s 24CA of the NT Act. There will be no impediment to registration, subject to Mr Davis’s name having been removed under s 66B from the Register of Native Title Claims.

## Conclusions on the applicants’ arguments

1. For the reasons I have set out, on a proper construction of ss 24CB-24CE, an agreement will only be an ILUA for the purposes of s 24CA if all of the individuals whose names appear on an entry on the Register of Native Title Claims as the applicant sign the ILUA. Whether they can authorise another to sign as agent or proxy can be left for a case which raises that issue directly. Subject to what I consider should be straightforward alterations under s 66B in circumstances where a person has died, or is incapable in the *Gibbons v Wright* sense, all the individuals who constitute the registered native title claimant must agree that the entity should voluntarily assume the rights and obligations involved in the ILUA. The agreement then meets the statutory criteria of an ILUA set out in ss 24CA-24CE and is capable of being registered, subject to authorisation in accordance with s 251A. It is the s 251A authorisation which is necessary to produce the statutory effect in s 24EA(1)(b) of binding all members of the native title claim group as if the ILUA were a contract to which they were parties.
2. Where there is disagreement amongst the individuals who constitute the registered native title claimant, then if this disagreement cannot be resolved by negotiation amongst the named individuals, or negotiation with the claim group members, an application under s 66B would need to be made to the Court to change the composition of the applicant. This preserves the representative character of the individuals who constitute the applicant, which is a core feature of the legislative scheme.
3. I do not consider this approach departs from the proposition that, in the making of an ILUA, the members of the native title claim group have “ultimate authority”: see *Far West Coast Native Title Claim* at [59] (Mansfield J); *Daniel* at [16] (French J). They have that authority in two ways. First, by their decision whether to retain or remove the representatives they have earlier chosen, and to use s 66B if they choose to remove them. Second, by their participation in the area ILUA authorisation for which s 251A provides, and the methods they, together with any other participating native title claim group, subscribe to for the purposes of s 251A(b), assuming there is no traditional decision-making process common to all the claim groups which must be followed.
4. The consequences of my conclusions for each impugned ILUA are as follows.
5. In the *McGlade* proceeding, each of the five persons who comprise the Southern Noongar registered native title claimant has executed the agreement, and Ms McGlade is the only one of the three persons who jointly comprise the Wagyl Kaip registered native title claimant who has not signed that agreement or agreed to become a party to it. That means the Wagyl Kaip and Southern Noongar ILUA is not an ILUA within the meaning of s 24CA of the NT Act.
6. In the *Eades* proceeding, although Mr Eades is a member of the native title claim group rather than a person who, jointly, constitutes the Ballardong registered native title claimant, there was no challenge to his standing to bring this proceeding. The *Eades* special case notes that he voted against the resolutions at the s 251A authorisation meeting. Of the 11 people who constitute, jointly, the Ballardong registered native title claimant, eight have executed that agreement, one died before the Ballardong ILUA was agreed (Mr Doug Nelson), and two (Mr Allan Jones and Mr Reg Hayden) have not signed the agreement or agreed to become parties to it. That means theBallardong ILUA is not an ILUA within the meaning of s 24CA of the NT Act.
7. In the *Smith* proceeding, Ms Smith is a member of the Whadjuk native title claim group rather than a person who, jointly, constitutes the Whadjuk registered native title claimant, however there was no challenge to her standing to bring this proceeding. Of the five people who jointly constitute the Whadjuk registered native title claimant, four have signed the agreement and the fifth, Mr Davis, died after the agreement was made and therefore neither signed nor gave his consent to that agreement. The fact that one person (Mr Moric) signed the ILUA after it was lodged is of no consequence to the Registrar’s ability to register it, if the ILUA otherwise meets all the requirements of the NT Act.
8. For the reasons I have given, the death of Mr Davis and the impossibility of him voluntarily assuming responsibilities as a representative of the Whadjuk claim group does not preclude the Whadjuk Agreement satisfying the requirements of s 24CB-24CE of the NT Act, in the sense that there can be a straightforward application under s 66B to remove him.
9. The *Culbong* proceeding, as I have noted, involves two registered native title determination applications which are both proposed to be within the South West Boojarah #2 ILUA Agreement Area. Seven people, jointly, constitute the South West Boojarah #2 registered native title claimant. Of those, five have executed the agreement and two (Ms Culbong, the applicant and Mr William Webb) have not signed and have not agreed that the South West Boojarah #2 registered native title claimant should become a party to the South West Boojarah #2 ILUA.
10. One person constitutes the registered native title claimant in the Harris Family claim. Ms Van Leeuwen has executed the South West Boojarah #2 ILUA.
11. The absence of agreement by Ms Culbong and Mr Webb means the South West Boojarah #2 ILUA is not an ILUA within the meaning of s 24CA of the NT Act.
12. The answers to the case stated in the each proceeding appear below. In my opinion declaratory relief should be sufficient to give effect to the Court’s decision. The Registrar will abide the decision of the Court and accordingly, given its decision, the four impugned ILUAs will not be registered in their current state. In the case of the Whadjuk ILUA a straightforward procedural application is all that is needed before the registration of that ILUA can occur. What further steps may or may not be taken in relation to the other three ILUAs will be a matter for the parties.

# ANSWERS TO CASE STATED IN EACH PROCEEDING

1. The questions stated by the parties in each proceeding, and the answers I consider should be given to them, are as follows.
2. In the *McGlade* proceeding:
3. Does the fact that the applicant has not signed or agreed to become a party to the Wagyl Kaip and Southern Noongar ILUA have the consequence that the Wagyl Kaip and Southern Noongar ILUA is not an agreement that complies with the requirements in ss 24CD(1) and (2)(a) of the NTA?

**Answer:** Yes.

1. If the answer to question 1 is yes, what relief should be granted to the applicant?

**Answer:** The applicant is entitled to declaratory relief.

1. If the answer to question 1 is no, what relief should be granted to the respondents?

**Answer:** Unnecessary to answer.

1. Who should pay the costs of the special case?

**Answer:** Unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

1. In the *Eades* proceeding:
2. Does the fact that (because he passed away before the Ballardong ILUA was agreed) Doug Nelson was not named as a Party to, and could not sign, the Ballardong ILUA have the consequence that the Ballardong ILUA is not an agreement that complies with the requirements in ss 24CD(1) and (2)(a) of the NTA?

**Answer:** Yes.

1. Does the fact that Allan Jones and Reg Hayden have not signed, or agreed to become Parties to, the Ballardong ILUA have the consequence that the Ballardong ILUA is not an agreement that complies with the requirements in ss 24CD(1) and (2)(a) of the NTA?

**Answer:** Yes.

1. If the answer to either question 1 or question 2 is yes, what relief should be granted to the applicant?

**Answer:** The applicant is entitled to declaratory relief.

1. If the answer to either question 1 or question 2 is no, what relief should be granted to the respondents?

**Answer:** Unnecessary to answer.

1. Who should pay the costs of the special case?

**Answer:** Unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

1. In the *Smith* proceeding:
2. Does the fact that Mr Davis did not sign the Whadjuk ILUA prior to the making of the registration application on 29 June 2015, and now cannot sign the Whadjuk ILUA (because he passed away after the registration application was made), have the consequence that the Whadjuk ILUA is not an agreement that complies with the requirements in ss 24CD(1) and (2)(a) of the NTA?

**Answer:** Yes.

1. Does the fact that Mr Morich had not signed the Whadjuk ILUA when the registration application was made on 29 June 2015 have the consequence that the Whadjuk ILUA is not an agreement that complies with the requirements in ss 24CD(1) and (2)(a) of the NTA, notwithstanding that Mr Morich subsequently signed the Whadjuk ILUA, on 24 February 2016?

**Answer:** Yes.

1. If the answer to either question 1 or question 2 is yes, what relief should be granted to the applicant?

**Answer:** The applicant is entitled to declaratory relief.

1. If the answer to either question 1 or question 2 is no, what relief should be granted to the respondents?

**Answer:** Unnecessary to answer.

1. Who should pay the costs of the special case?

**Answer:** Unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

1. In the *Culbong* proceeding:
2. Does the fact that the applicant and William Webb have not signed, or agreed to become Parties to, the South West Boojarah #2 ILUA have the consequence that the South West Boojarah #2 ILUA is not an agreement that complies with the requirements in ss 24CD(1) and (2)(a) of the NTA?

**Answer:** Yes.

1. If the answer to question 1 is yes, what relief should be granted to the applicant?

**Answer:** The applicant is entitled to declaratory relief.

1. If the answer to question 1 is no, what relief should be granted to the respondents?

**Answer:** Unnecessary to answer.

1. Who should pay the costs of the special case?

**Answer:** Unless the parties agree as to the costs order within 14 days, the question of costs should be determined following further submissions from the parties.

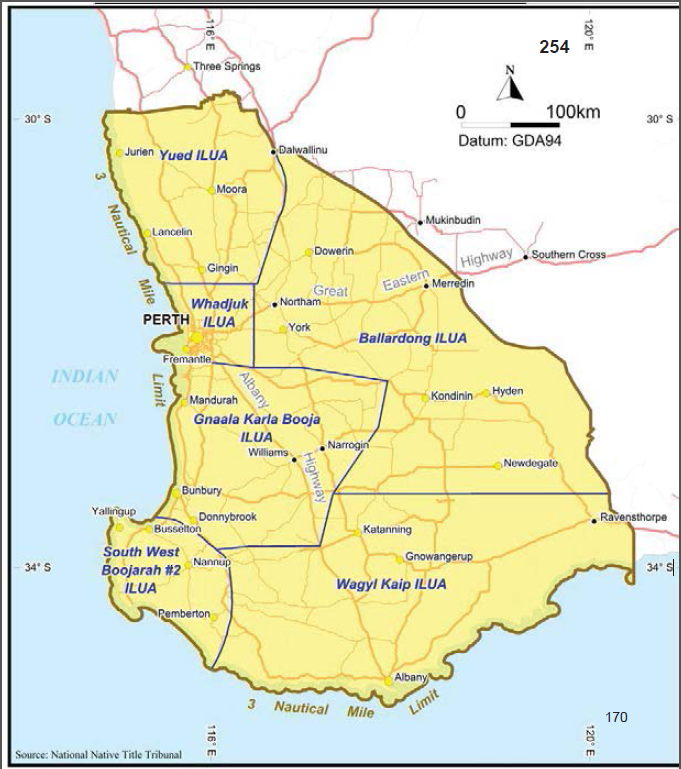
1. The wording of those answers is slightly different to the answers given in the joint judgment, but not substantively so. In those circumstances, I join in the Orders and Declarations of the Court.

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| I certify that the preceding two hundred and forty-four (244) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. |

Associate:

Dated: 2 February 2017

# ANNEXURE A – MAP SHOWING THE AREA COVERED BY THE SIX ILUAS



SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | WAD 137 of 2016 |
| Respondents |  |
| Fourth Respondent: | GLEN COLBUNG (SUED ON HIS OWN BEHALF AND AS REPRESENTING THE INDIVIDUALS NAMED AS ‘REPRESENTATIVE PARTIES’ IN, AND WHO HAVE SIGNED, THE WAGYL KAIP & SOUTHERN NOONGAR INDIGENOUS LAND USE AGREEMENT) |
| Fifth Respondent: | HAZEL BROWN |
|  | WAD 138 of 2016 |
| Respondents |  |
| Fourth Respondent: | REG YARRAN (JNR) (SUED ON HIS BEHALF AND AS REPRESENTING THE INDIVIDUALS NAMED AS ‘REPRESENTATIVE PARTIES’ IN, AND WHO HAVE SIGNED, THE BALLARDONG PEOPLE INDIGENOUS LAND USE AGREEMENT) |
|  | WAD 139 of 2016 |
| **Respondents** |  |
| Fourth Respondent: | NIGEL WILKES (SUED ON HIS OWN BEHALF AND AS REPRESENTING THE INDIVIDUALS NAMED AS ‘REPRESENTATIVE PARTIES’ IN, AND WHO HAVE SIGNED, THE WHADJUK PEOPLE INDIGENOUS LAND USE AGREEMENT) |
|  | WAD 140 of 2016 |
| **Respondents** |  |
| Fourth Respondent: | DONALD HAYWARD (SUED ON HIS OWN BEHALF AND AS REPRESENTING THE INDIVIDUALS NAMED AS ‘REPRESENTATIVE PARTIES’ IN, AND WHO HAVE SIGNED, THE SOUTH WEST BOORJARAH #2 INDIGENOUS LAND USE AGREEMENT) |